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HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 1

TUESDAY, JULY 12, 1960

THURSDAY, JULY 14, 1960

FRIDAY, JULY 15, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

WITNESSES:

Professor Frank R. Scott, McGill University, Montreal; Professor C. P. Wright, Ottawa; Professor C. R. Dehler, St. Eustache-sur-le-lac, Quebec; Mr. Darren L. Michael, Executive Secretary, Dept. of Public Affairs, Canadian Union Conference, The Seventh Day Adventist Church in Canada; Mr. Saul Hayes, Executive Secretary, Canadian Jewish Congress; and Mr. Donald McInnes, Dominion Vice-President, Canadian Bar Association.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23534-1—1

STANDING COMMITTEE
ON
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

and Messrs.

Argue,	Korchinski,	Rapp,
Batten,	Martin (*Essex East*),	[2] Roberge,
Deschatelets,	Martini,	[3] Stefanson.
Jorgenson,	Nasserden,	
Jung,	[1] Nielsen,	

J. E. O'Connor,
Clerk of the Committee.

[1] Replaced by Mr. Stewart on Monday, July 11, 1960.
[2] Replaced by Mr. Badanai on Monday, July 11, 1960.
[3] Replaced by Mr. Mandziuk on Thursday, July 14, 1960.

ORDERS OF REFERENCE

THURSDAY, July 7, 1960.

Resolved,—That a Special Committee be appointed to consider Bill C-79, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, with power to send for persons, papers and records and to report from time to time;

That such Committee have power to print such papers and evidence from day to day as may be deemed advisable or necessary;

That the Committee be empowered to sit during the sittings of the House; and

That Standing Order 66 be suspended in relation thereto.

Ordered,—That Bill C-79, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, be referred to the said Committee.

Ordered,—That the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms be composed of Messrs. Argue, Batten Deschatelets, Dorion, Jorgenson, Jung, Korchinski, Martin (*Essex East*), Martini, Nasserden, Nielsen, Rapp, Roberge, Spencer, and Stefanson.

MONDAY, July 11, 1960.

Ordered,—That the name of Mr. Stewart be substituted for that of Mr. Nielsen on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

MONDAY, July 11, 1960.

Ordered,—That the name of Mr. Badanai be substituted for that of Mr. Roberge on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

THURSDAY, July 14, 1960.

Ordered,—That the name of Mr. Mandziuk be substituted for that of Mr. Stefanson on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

ATTEST

L. J. RAYMOND,
Clerk of the House.

23534-1—1½

MINUTES OF PROCEEDINGS

TUESDAY, July 12, 1960.
(1)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.33 a.m. this day for Organization purposes.

Members present: Messrs. Argue, Badanai, Batten, Dorion, Jung, Korchinski, Martin (*Essex East*), Martini, Nasserden, Rapp, Spencer, Stefanson and Stewart—13.

On motion of Mr. Stefanson, seconded by Mr. Martin (*Essex East*), Mr. Spencer was elected Chairman of the Committee.

Mr. Spencer assumed the chair and thanked members for the honour given him.

Following the reading of the Order of Reference the Chairman asked for nominations for the post of Vice-Chairman.

On motion of Mr. Martini, seconded by Mr. Jung, Mr. Dorion was elected Vice-Chairman.

On motion of Mr. Stewart, seconded by Mr. Dorion,

Resolved,—That pursuant to its Order of Reference of Thursday, July 7, 1960, the Committee print, from day to day, 750 copies in English and 250 copies in French, of its Minutes of Proceedings and Evidence.

On motion of Mr. Martin (*Essex East*), seconded by Mr. Stewart,

Resolved,—That a Subcommittee on Agenda and Procedure comprising the Chairman and 4 members to be named by him, be appointed.

Following the discussion concerning the future activities of the Committee and the announcement by the Chairman of a meeting of the Subcommittee later this day, the Committee adjourned at 10.12 a.m. to the call of the Chair.

THURSDAY, July 14, 1960.
(2)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.34 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Argue, Badanai, Batten, Deschatelets, Dorion, Korchinski, Martin (*Essex East*), Martini, Nasserden, Rapp, Spencer, Stefanson and Stewart—13.

In attendance: Professor Frank R. Scott of McGill University, Montreal.

Following the reading of the report of the Subcommittee on Agenda and Procedure relating to its meeting held Tuesday, July 12, it was moved by Mr. Stefanson, seconded by Mr. Rapp, that the report be adopted. The motion was carried on the following division: Yeas: 7; Nays: 3.

The Chairman read to the Committee opinions he had obtained from the Clerk of the House regarding the extent of the Committee's Orders of Reference.

Agreed,—That broad latitude be allowed witnesses appearing before the Committee.

Mr. Scott was introduced, and after dealing generally with the question of a Bill of Rights made certain observations on various clauses contained in the Bill.

At 11.00 a.m. the Committee adjourned to meet again at 2.00 p.m. this day.

AFTERNOON SITTING

(3)

The Committee reconvened at 2.04 p.m. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Badanai, Batten, Deschatelets, Dorion, Korchinski, Martini, Nasserden, Rapp, Spencer, Stefanson and Stewart—11.

In attendance: Professor Frank R. Scott, of McGill University, Montreal.

Mr. Scott resumed his presentation to the Committee, and at 2.20 p.m., the Members having been called to the Chamber the Committee recessed until 3.10 p.m.

Following the conclusion of Mr. Scott's presentation he was questioned and then thanked by the Chairman.

Mr. Dorion brought to the Committee's attention an apparent discrepancy between the English and French versions of the Bill relating to Clause 2 (b).

At 5.00 p.m. the Committee adjourned to meet again at 8.00 p.m.

EVENING SITTING

(4)

At 8.05 p.m. the Committee reconvened. The Chairman, Mr. Spencer, again presided.

Members present: Messrs. Argue, Badanai, Deschatelets, Dorion, Korchinski, Martini, Nasserden, Rapp, Spencer, Stefanson and Stewart.—11

In attendance: Professor C. P. Wright of Ottawa and Professor C. R. Dehler, of St. Eustache-sur-le-lac, P.Q.

The Chairman introduced Professor Wright who set forth his views with respect to the Bill.

Following questioning, Professor Wright was thanked for the interest which prompted him to appear before the Committee, and was retired.

Professor Dehler was introduced, and following his presentation and questioning was thanked, and retired.

At 9.25 p.m. the Committee adjourned to meet again at 9.30 a.m. on Friday, July 15, 1960.

J. E. O'Connor,
Clerk of the Committee.

FRIDAY, July 15, 1960.
(5)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.35 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Argue, Badanai, Batten, Deschatelets, Korchinski, Mandziuk, Martin (*Essex East*), Martini, Nasserden, Rapp, Spencer and Stewart.—12

In attendance: Mr. Darren L. Michael, Executive Secretary, Department of Public Affairs, Canadian Union Conference, The Seventh-day Adventist Church in Canada; and Mr. Ainsley Blair, Counsel; Mr. Saul Hayes, Executive Secretary, *Canadian Jewish Congress*; Mr. Michael Garber, Q.C., Immediate Past President, National Executive Committee; and Dr. Manfred Saalheimer, Chief, Legal Research.

The Chairman introduced Messrs. Michael and Blair, and Mr. Michael read a brief on behalf of the Seventh-day Adventist Church in Canada, copies of which were distributed to Members.

Following Mr. Michael's questioning he was thanked by the Chairman, and retired.

At 11.00 a.m. Members were called to the Chamber to attend the opening of this day's sitting of the House.

At 11.40 a.m. the Committee reconvened and Messrs. Hayes, Garber and Saalheimer were introduced.

Mr. Hayes set forth the position on human rights and freedoms of the Canadian Jewish Congress and was questioned concerning a brief, copies of which were distributed to Members of the Committee.

Agreed,—That the brief be printed as an appendix to the record of this day's procedings. (*See Appendix 1*)

The questioning of Messrs. Hayes, Saalheimer and Garber concluded, they were thanked and at 12.50 p.m. the Committee adjourned to meet again at 2.00 p.m. this day.

AFTERNOON SITTING

(6)

At 2.05 p.m. the Committee reconvened. The Chairman, Mr. Spencer, presided.

Members present: Messrs. Badanai, Batten, Deschatelets, Dorion, Korchinski, Mandziuk, Martin (*Essex East*), Martini, Nasserden, Rapp, Spencer and Stewart.—12

In attendance: Mr. Donald McInnes, Q.C., Dominion Vice-President, Canadian Bar Association; Ronald C. Merriam, Q.C. Secretary-Treasurer; and Mr. McKay.

Future business of the Committee was discussed and it was agreed that the Subcommittee on Agenda and Procedure would meet later this day in order to consider the invitation of further witnesses.

Messrs. McInnes, Merriam and McKay were introduced and Mr. McInnes read a brief on behalf of the Canadian Bar Association.

He was questioned, thanked and retired.

Messrs. Martini and Dorion submitted separate drafts containing suggested wording for a Preamble to the Bill.

A brief from the Canadian Chamber of Commerce was tabled and copies distributed to Members.

At 3.45 p.m. the Committee adjourned to the call of the Chair.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

THURSDAY, July 14, 1960,
9.30 a.m.

The CHAIRMAN: Gentlemen, we will come to order. I was delaying slightly in the hope that Mr. Argue might arrive.

First of all I think I should report that I appointed to the steering committee Messrs. Argue, Badanai, Dorion and Stewart.

The steering committee met on Tuesday and I have the report from the committee. After I read the report it would then be in order to receive a motion for its acceptance.

> The preparation of a telegram to be sent to persons interested in making representations to the committee was considered and it was agreed that in so far as possible interested individuals and organizations be made aware of the committee's deliberations. It was agreed that the committee would tentatively schedule hearings for Thursday, Friday and Saturday of this week and that the meetings would be held at 9.30 a.m., 2 p.m. and 8 p.m. if necessary.

I draw particular attention to the individuals and organizations, would point we were not aware of who, of the individuals and organizations, would wish to appear before this committee and be heard. So at the moment it is not certain that meetings on those three days at those times will be necessary.

With that explanation I would be pleased to receive a motion for the acceptance of that report.

Mr. BATTEN: Mr. Chairman, would you entertain any comment on this before you have a motion?

The CHAIRMAN: I think it would be in order if we have the motion first.

Moved by Mr. Stefanson and seconded by Mr. Rapp.

The CHAIRMAN: It is now open for discussion.

Mr. BATTEN: Regarding the hours of meeting, 9:30 to 11, I think, is a very convenient time; but 2 o'clock is a most inconvenient time today. Today is a very important day in the house. There is the debate on external affairs in which most of us are interested and in which many of us will take part. I do not know how those who are going to take part in this debate can be there and also attend a meeting here at 2 o'clock.

The CHAIRMAN: Is it because of a particular matter of business today? Would we not be in the same situation even if there was some other matter before the house?

Mr. BATTEN: I do not think so. If it were purely a matter of estimates, for example, if someone wished to speak he could be called when the items in which he is interested appear; but in my view this is a very important day in the house.

The CHAIRMAN: We do have witnesses to appear before this committee and I think it is desirable to accommodate them as much as possible.

Mr. MARTINI: I think you said we would meet at these hours if necessary. If we have witnesses we cannot have them sitting around. We may not even sit at 2 o'clock. I think we can adopt the report.

Mr. MARTIN (*Essex East*): I would like to say a word in support of the point of view Mr. Batten brought up. I am grateful to you, Mr. Chairman, first of all for submitting the report of the steering committee for approval or rejection by this committee. I was afraid the steering committee had gone ahead on its own and decided our course of business when I learned this morning that one very important and valuable witness had been asked to come, but your first remarks this morning clearly indicate your appreciation that these matters must be decided by the committee as a whole. For that I am very grateful. Before we decide who should be called, however, as a committee we have to decide that and consider the recommendation of the steering committee, which I think generally would be acceptable.

I must say at once that the suggestion we should meet as a whole at 9.30, 2 p.m. and 8 p.m. at a time when other committees of the house are meeting and when important legislation is before the house, is a schedule which simply cannot be met by those who are sitting in the opposition groups. We simply cannot discharge our functions. Today is a good example. Mr. Batten has mentioned that the foreign affairs debate is on. It is true that debate will ensue based upon the items of the estimates of the Department of External Affairs, but there will not be a discussion today of the estimates; the estimates simply are a basis for a second discussion this session on foreign affairs. As Mr. Batten said some of us will participate in that debate. It is not possible for us to be here this afternoon or tonight while that debate is going on.

I think if we are going to meet a heavy schedule in this committee, and do it in a constructive way, which I am sure is the desire of all of us, we will not want to settle things by way of motion but rather by way of accommodation.

First of all, I doubt if we have authority to sit on Saturday. The house is not sitting, itself. I can understand why this was done—because you want to traverse as much of our agenda as possible; but I doubt if we have authority. In the second place I know that some of us have made engagements to be in our own constituencies on that day. Never for a moment did I think we would meet on Saturday.

I just bring forward these views to you. I think we ought to have a pretty clear idea, at the earliest opportunity, what is going to be our agenda, and whom we will ask to come. I understand it was decided that telegrams should be sent to particular individuals and, as a result of this, we have Professor Frank Scott here this morning whom I regard as perhaps almost the leading authority on this subject. I would like to know what other witnesses have been asked to come. I myself would like to suggest groups and persons who should come. I do not know how fair we are being to some of these people. Professor Scott will have to speak for himself as to whether or not he had an opportunity to examine this bill and whether he is prepared at this stage to give us his final views in regard to it. I do not see how it is possible for us to meet today beyond 11 o'clock.

Mr. ARGUE: Mr. Chairman, I think it would be a mistake for this committee to endeavour to meet this afternoon, because of the foreign affairs debate in the house. The member for Essex East will, undoubtedly, be involved in that debate. I expect to be involved in that debate at some stage today.

I thing it is an imposition on parliament itself to have two discussions going on at the same time in which members who have strong views on both subjects are involved. I would hope, at least for today, that we would not be called upon to meet other than this morning. I do not make that as a permanent objection, in respect of meeting in the afternoon, but I think, as has been said that there should be some attempt made to accommodate members. I think we are placed in an absolutely impossible position by having a meeting of this committee this afternoon. I raised the strongest objection—if I am allowed to

say that—in the steering committee to a meeting on Saturday. I think it is questionable whether or not committees should meet on a week-end when parliament itself is not meeting. It seems to me to be rather a backdoor method of trying to increase the sittings and the work of the members of parliament. I believe that, if and when the house decides to sit on Saturday, then and then only do meetings of committees become proper on Saturday.

I have a second objection. I had a long standing engagement for a number of months to be in Truro, Nova Scotia, on Saturday, and that is where I will be. Members are put in a most difficult situation when they have sprung on them by two or three days notice that a committee is going to meet. I believe if you had made a poll of the members of this committee a week or ten days ago they would have said there is no chance of the committee meeting on Saturday unless and until the house is in session. I think we will have to have an attempt to regularize our meetings, and know who is going to appear before us.

I am delighted to see Professor Scott here. I feel he will make a valuable contribution to the committee. I hope we will give the widest possible latitude for witnesses and organizations to appear. I repeat my request of the last day that representatives, or officials of the provincial governments who have given a good deal of thought to this subject should have the right to appear before this committee if they wish to do so.

The CHAIRMAN: Mr. Argue, I think it is not normally in order to discuss, before the committee, statements that are made at the steering committee; but I am inclined to allow a reasonable amount of latitude in that respect. Having allowed you to make the statement as to your position at the steering committee I should also bring to the attention of the committee that no mention was made by you on Tuesday of the fact that you had this engagement on Saturday.

Mr. ARGUE: No; but I raised the strongest objection to sitting on Saturday.

The CHAIRMAN: Yes. At the same time you indicated you would have less objection if the house were sitting on Saturday.

Mr. ARGUE: I do not think I have any legal objection to Saturday if the house is sitting; but I very much resent being placed in this difficult position by such a decision of the committee. I think there is a difference.

The CHAIRMAN: Is there any further discussion on this matter?

Mr. DORION: Mr. Chairman, perhaps we should have a legal opinion on this. However, I do not believe it is necessary that parliament be sitting on Saturday, because this is during a session. I do not understand the legal opposition. From a legal standpoint I do not think there is an objection. I believe it is our right to sit even on Saturday if we have a motion before us.

The CHAIRMAN: I might say that as a result of the tentative ruling that I made at our organization meeting on Tuesday I felt it desirable to discuss the matter with the Clerk of the House of Commons for the purpose of obtaining advice from him as to whether or not I was correct in my ruling. That matter I intend to deal with a little later. At the same time, I also raised with him the question of the regularity of committees meeting on Saturday. In that respect I had previously read a citation in Beauchesne which indicated that it was quite regular for committees to meet on Saturday. I think that I should place before the committee the exact report which was given to me by the Clerk of the House of Commons. He states this:

> The other remaining question raised by you was whether or not a committee may sit on a Saturday. In this regard, Bourinot, at page 467

in his 4th edition, states: "In the Canadian commons, committees frequently sit on Saturday." The same statement is to be found in citation 300 of Beauchesne's 4th edition.

The records show that the special committee on defence of Canada regulations sat on Saturday, July 27, 1940, when the house had adjourned on Friday, July 26, until Monday, July 29, 1940. No special authority was asked for or granted on that occasion.

So I think these references, Bourinot and Beauchesne, effectively dispose of the question as to whether or not it is regular to meet.

Mr. ARGUE: Mr. Chairman—

The CHAIRMAN: Just one moment.

Of course, it is still open to the committee to decide not to meet on Saturday if it is so disposed.

Mr. ARGUE: Mr. Chairman, I would like to comment on the citation that you advanced. Bourinot says that it is customary for the committees of the Canadian House of Commons to meet on Saturday. Some of us have been around here in many more recent years than Bourinot and know the practice of the committees of this House of Commons, so we do not have to go to an ancient authority to find what our practice has been.

The CHAIRMAN: We may have a recent authority after this meeting.

Mr. ARGUE: I think the references that you have given, or the reference that has been read from the statement of the Clerk of the House of Commons, is probably the most recent reference. I would take it he would give you the most recent reference, but this suggests to me an excellent argument why we should not be asked to sit on Saturday. This was a war emergency. It was July 27, 1940, many many years ago. This was a time when a defence committee met on a Saturday. I take it in the last 20 years we have not been meeting on Saturday. By no stretch of the imagination would we expect that we would be asked to sit on a Saturday when the House of Commons itself was not sitting. I want to object in the strongest possible terms to a majority of this committee deciding to hold a gun to the members of the opposition to force meetings, which are not the custom in this House of Commons, on a Saturday in order to railroad a bill, through the House of Commons, which was purported to be a bill to protect human rights and fundamental freedom. I think it is an impertinence to parliament that we should be made to meet on Saturday.

Mr. MARTINI: Mr. Chairman, it has been suggested that we should not meet this afternoon because the House of Commons is sitting. The steering committee suggested we should meet on Saturday when the House of Commons is not sitting. Let us hear from those members who object, as to when they wish to meet so that we can get on with the business of considering this bill. There has been one half hour wasted now. We could have heard some witnesses who are here. If we are going to start to argue about rules and regulations there is no sense sitting here. We are wasting time.

Mr. ARGUE: I would like to answer that.

Mr. BATTEN: I want to answer that too, Mr. Argue, because I started this discussion.

I made no such suggestion, Mr. Chairman. My objection to meeting today was because there was a very important debate taking place in the House of Commons today. I did not object to a sitting of this committee while the House of Commons was sitting.

The CHAIRMAN: Perhaps I might make an observation. We do not propose to sit this morning while the House of Commons is in session. There is a

period from 11 o'clock until 2 p.m. when the House of Commons will be sitting. It may be convenient for those members, who are going to take part in the debate on the estimates of that department, to deal with the matter in the House of Commons during that interval.

Mr. MARTIN (*Essex East*): Mr. Chairman, I want to say to Mr. Martini that I can understand his frustration in this matter, but I am sure he will understand ours. This whole problem arises because of the fact that we are now in the last portion of the session dealing with important government business. These matters could be disposed of easily while the House of Commons is sitting, but if the well known usages of parliament are going to be observed, and if opposition members are going to be given the opportunity of participation, it is not possible for us to do anything other than to try to meet the situation that has provoked this discussion. It is not possible for us physically, or in terms of efficiency, to be here for an hour while the House of Commons is sitting, and go back into the House of Commons, and that sort of thing. This is a foreign affairs debate which some members of this committee will have to take part in, and this means that we will have to be there from 11 o'clock this morning right throught until 11 o'clock tonight. Now, it is not possible to discharge that primary function of parliament as well as being in attendance at this committee's meetings.

With regard to the question of sitting on Saturday, I would want to examine the precedent which the chairman has referred to, but at first glance it looks to me like a strong precedent. I am sure that we are not going to discharge this matter on the basis of precedent. Mr. Argue is the leader of a party. I do not support his party; but if he has an outside engagement it seems to me it is an engagement that ought to be respected. I think we will make more progress by trying to accommodate one another, rather than forcing the situation. We ought to agree not to meet today, that is clear. We ought to decide that we cannot, because of the unusual character of the situation, meet on Saturday. It seems to me that we ought to have a full meeting of the committee—I would be willing to have it during the dinner hour tonight —when we could discuss the future business of this committee to determine just exactly which witnesses are going to be called and what our plan is, and in that way I think we would have a more orderly arrangement.

Mr. MARTINI: Mr. Chairman, all I can say is, let us get down to business. I do not care when we meet. You may suggest the proper hours to meet so that we can get on with our business. I do not care whether we meet on Saturday or Sunday. I suggest rules are only to be used as guides, and we have to use a little common sense. I suggest that we get on with our business instead of arguing about rules and regulations.

The CHAIRMAN: Gentlemen, I think we have had enough discussion in regard to this motion. It is nearly half an hour now since we started. Arrangements have been made for Professor Dehler, a former professor of philosophy and theology of the university of Ottawa, to appear before the committee this afternoon. I presume that it might be possible to make some change in that regard to accommodate those members who have objected, but I think if this committee is to complete its work with reasonable dispatch, that we should meet, and we should accommodate those persons who wish to appear before this committee. After the steering committee, whose function it is to determine the days and times of sitting, decided that the committee would sit, if necessary, on Thursday, Friday and Saturday, these witnesses were invited accordingly, and one at least has expressed the desire to appear before this committee this afternoon. We should take into account the inconvenience

that would be caused to that witness. The matter is in the hands of this committee. I think there has been ample discussion about it and I will now put it to a vote. Those in favour will signify in the usual way.

Mr. ARGUE: Is this a motion in respect of an afternoon meeting today?

The CHAIRMAN: The motion is for the acceptance of the recommendation of the steering committee.

Mr. BADANAI: We will be meeting on Thursday, Friday and Saturday?

The CHAIRMAN: If necessary.

Mr. BADANAI: I voted for it at the meeting of the steering committee because I felt that most of us will be here in any event, and, therefore, I will vote for the motion now.

Mr. ARGUE: I voted against it.

The CHAIRMAN: All those in favour? Contrary?

I declare the motion carried.

Now, I am sorry that I find it necessary to bring up this further matter before we proceed with the hearing of our first witness, but you will recall that on Tuesday I indicated tentatively what I considered would be in order, before the committee. I carefully refrained from getting into any debate with any member of the committee on that ruling because of the fact that I stated at the time that it was based upon my view then of the rules of procedure, and what I considered to be relevant to the bill which has been referred to this committee. I presume the individuals are reported accurately in the newspaper. Mr. Martin is reported to have stated that this committee has been brought together under false colours. Mr. Argue is reported as having said that as a result of this ruling, tentative though it was, the work of the committee would be a complete farce.

I do hope that we are not going to engage, in this committee, in provocative statements such as that.

Mr. ARGUE: What are you reading from, sir?

The CHAIRMAN: I am just telling you what my views are. I am not reading from anything.

Mr. ARGUE: Were you not quoting from something?

The CHAIRMAN: I was quoting from the Ottawa *Journal*.

Mr. ARGUE: I made no private statement to the Ottawa *Journal* or any other statement.

The CHAIRMAN: This is a report of the statement that was made at the Tuesday organizational meeting of the committee, and it is my recollection that those statements were made.

Mr. ARGUE: What is the point of order; that the *Journal* misquoted the committee meeting?

The CHAIRMAN: No.

Mr. ARGUE: Or are you reading a newspaper report at a later meeting to reflect something that a member said at a prior meeting? I think this is most unusual and most out of order.

The CHAIRMAN: If you will listen, Mr. Argue, I will explain again what I am doing.

Mr. ARGUE: I stopped you on a point of order, and on a point of order I have the right to speak. I do not have to take—

The CHAIRMAN: You have the right to speak when I get through speaking, and not before.

Mr. ARGUE: I do not have to take those kinds of statements. I was speaking on a point of order and you will allow me to proceed.

The CHAIRMAN: You were not speaking on a point of order. I was speaking and you interrupted.

What I am saying is this; at the first meeting of this committee, statements were made by Mr. Argue and by Mr. Martin that reflected upon the committee and reflected upon the chairman. Now, I did not enter into a debate with you on that occasion, as it arose only out of the tentative ruling that I had made as to what I considered to be the terms of reference to this committee, and what I considered would be relevant and in order before this committee. As a result of that you, Mr. Argue, and you, Mr. Martin, took exception, and this is the report of what was said at that organizational meeting. One of the reasons why I did not enter into debate at that time was because what was said would not appear verbatim in the proceedings of this committee and, having made only a tentative ruling, I preferred not to debate the question. However, the report of what was said at that meeting, as it appears in the Ottawa *Journal*, was that Mr. Martin said: "we are here under false colours" Mr. Argue said that the work of the committee would be a "complete farce". Again I say that I hope in the deliberations of this committee we can get on with the work that we are to do, without the making of remarks such as that, which I consider to be out of order and unjustified.

Mr. MARTIN (*Essex East*): Mr. Chairman—

Mr. ARGUE: Mr. Chairman, I want to reply to this.

The CHAIRMAN: Just a moment, please. I think we should clear up again, before the committee, what is in order before the committee. Again, in this instance I consulted the Clerk of the House, and I have received from him an indication, according to his knowledge and experience, of what is proper to come before this committee.

So that there will be no misunderstanding, I quote from his report to me:

> In the first instance, I should state that the scope of the deliberations or inquiry of a special committee is defined and limited by its order of reference. In this regard, at pages 469-70 of Bourinot's 4th edition, it is stated:
>
> > It is a clear principle of parliamentary law that a committee is bound by, and is not at liberty to depart from, the order of reference. This principle is essential to the regular despatch of business; for, if it were admitted that what the house entertained, in one instance, and referred to a committee, was so far controllable by that committee, that it was at liberty to disobey the order of reference, all business would be at an end; and, as often as circumstances would afford a pretence, the proceedings of the house would be involved in confusion. Consequently, if a bill be referred to a select committee it will not be competent for that committee to go beyond the subject-matter of its provisions."
>
> In the same regard, citation 304 of Beauchesne's 4th edition, in part, states as follows:
>
> > "(1) A committee can only consider those matters which have been committed to it by the house.
> >
> > (2) A committee is bound by, and is not at liberty to depart from, the order of reference. In the case of a select committee upon a bill, the bill committed to it is itself the order of reference to the committee, who must report it with or without amendment to the house."

In our committees, it has been the practice to permit a reasonable latitude when applying the rule of relevancy in debate, but the rule itself is stated at page 421 of May's 16th edition in these words:

> "Stated generally, no matter ought to be raised in debate on a question which would be irrelevant, if moved as an amendment, and an amendment cannot be used for importing arguments which would be irrelevant to the main question."

As you know, on Tuesday, July 5th last, the house negatived an amendment to the motion for the second reading of the bill which forms the order of reference to your committee. That amendment was as follows:

> "That this bill be not now read a second time, but be it resolved that this house is of the opinion that the provinces should be consulted in order to ascertain whether agreement can be reached on the terms of a constitutional amendment to guarantee human rights and fundamental freedoms."

That may be found in votes and proceedings of July 5, 1960, at page 727:

Apart from the other limitations placed on the scope of your committee's proceedings, it is my submission that the question of consultation with the provinces in order to obtain agreement to widen the terms or provisions of bill C-79 having been considered and rejected by the house, it cannot be again raised in the special committee.

To summarize briefly, I would say:

(1) The function of a committee on a bill is to go through the text of the bill clause by clause, and word by word, if necessary, with a view to making such amendments in it as may seem likely to render it more generally acceptable.

(2) The committee is bound by the decision of the house, given on second reading, in favour of the principle of the bill.

(3) The chair should not admit amendments nor permit debate on matters which are irrelevant to the terms or provisions of the bill. In this regard, it should be noted that an amendment could relate in a general way to the subject-matter covered by the bill and yet be irrelevant to the terms or provisions of the said bill.

(4) "When a question has once been negatived, it is not allowable to propose it again, even if the form and words of the motion are different from those of the previous motion."—Bourinot's 4th edition, page 329.

(5) It also should be noted that to a motion for the second reading of a bill, when the principle thereof is being considered, it is permissible to move an amendment adverse to or differing from the principle of the bill. However, such an amendment is never admissible in the committee stage of proceedings on a bill.

The other point that was raised in the letter is the one to which I referred previously, which was the question of the committee sitting on Saturday. That, in my opinion, does confirm the tentative ruling that I made on Tuesday as to the scope of the hearings before the committee and what I would consider to be in order and what I would consider to be not in order.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I—

Mr. ARGUE: Mr. Chairman, I would like to have an opportunity to speak on that.

The CHAIRMAN: May I just say one thing—

Mr. MARTIN (*Essex East*): On a point of order, Mr. Chairman; may I suggest that you should not go on to discuss the ruling unless the matter is before the chair.

The CHAIRMAN: I am going to make a ruling now, Mr. Martin. I recognize that we will have witnesses appearing before the committee who perhaps are not aware of our rules of procedure and our rules of debate. They may have prepared briefs which in a measure go beyond the scope of this bill that is before the committee. I think it would not be courteous to them if we were to restrict them to the rules of procedure to the same extent that we, as members, are restricted.

However, I do not want that to become a precedent to be taken advantage of by the members, and I should suggest that leave of the committee be given to the witnesses to present their views upon the whole question of the bill of rights as they see it, and not restrict them to the bill and matters relevant to the bill.

If that is the wish of the committee—and I suggest that we might do that —then I think we would have orderly discussion, we would be able to hear all these witnesses who want to appear before the committee, hear all that they want to say on the question of the bill of rights, and then when we get into our deliberations we can proceed orderly and strictly within the rules that are laid down for the guidance of committees and for the orderly despatch of the business of the house as well as of committees.

Mr. ARGUE: Mr. Chairman, on the point of order that you raised initially when you began this discussion; you had quoted from a newspaper clipping taken from the Ottawa *Journal*, which contained a report of the words that I have used in this committee. You went on to say that in your opinion this had reflected on the chairman.

I want to say that if there was any feeling on your part at that time that those words that I had used were out of order, or constituted a reflection on yourself, it was your right, your duty, to raise this question at that time, and not to bring in a newspaper clipping at a later meeting of the committee, to in fact try to raise a point of order after many days had gone by.

It is a well known rule in the Canadian House of Commons that if a member makes a statement that is out of order, it is the duty of members of the house, or the Speaker at the time, to raise this question. I had said, if I remember correctly—and since there was not a verbatim report, one has to depend on his recollection of the events at the time—that if it was the ruling of the chairman that we could not have the widest possible discussion on the whole principle of the bill of rights and the best method of bringing about the provisions of the bill, this would make a complete farce of this committee.

There is a question—and this question has been raised and dealt with—as to whether or not this committee could now consider the proposition that there should be consultation with the provinces to try to get agreement on a constitutional amendment. Well, it is true that in the House of Commons our group moved an amendment on second reading, "that the bill be not now read a second time; but that consultation should be undertaken with the provinces to try to get an agreement on a constitutional amendment. That motion was put to the house, and was defeated. I do not think it is possible to say that that motion removes any right of this committee to talk about a constitutional amendment.

This motion had to do with consultation with the provinces, in the hope that agreement might be obtained on a constitutional amendment. This does not in any way preclude the federal government itself bringing about a constitutional amendment; and, as a matter of fact, no reference whatsoever was made to whether or not this would be a desirable procedure for the Canadian government to follow.

You went on, Mr. Chairman, to say that you would not restrict witnesses from making a wide presentation—

The CHAIRMAN: No, I did not say that, Mr. Argue.

Mr. ARGUE: Or that you would not limit them to—

The CHAIRMAN: I suggested that the committee might, in its wisdom, see fit to grant that leave.

Mr. ARGUE: The chairman said that the committee, in its wisdom, might see fit to grant leave to the witnesses to make a broad presentation. Well, I do not think the committee, in all justice and in all sincerity, can do anything else—and I am certain that is what will be done. I think it follows, that after this kind of presentation has been made, the members of the committee must have the right to question witnesses on the statements contained in the brief—or what is the point of raising the question in the committee at all?

I am not going to challenge the proposition that we cannot discuss in this committee the question as to whether or not the government should undertake consultation with the provinces to obtain agreement on a constitutional amendment; but I do put forward, and put forward very strongly, that this committee by the house having decided on this motion is in no way restricted, except in this detail, to the discussion of a proposition that a bill of rights would be stronger and more effective if it were imbedded in the Canadian constitution.

Mr. MARTIN (*Essex East*): Mr. Chairman, I regret that it is necessary for us to disappoint Mr. Martini, but he will appreciate, I am sure, that the review given us by the chairman makes it inevitable that there should be some further clarification.

I regret that the chairman thinks anything I said and supported could be construed as a reflection on him. I have known him too long, it seems, for him to place an interpretation of that kind on the words I am correctly reported as having used. What I said was this: if we were going to be denied the opportunity of considering all forms of suggested proposals for bringing forward a real bill of rights, then we were in this committee under false colours. I must repeat that statement. If we are to be denied the opportunity of examining all the proposals which have been made by various people, most with great authority, then I say we are in this committee at this time under false colours. My ground for making that statement, and my authority, is the Prime Minister himself. We had a full discussion over three days in the House of Commons on the bill of rights. During that discussion we urged that a joint committee of both houses of parliament should be established to enable the fullest discussion of this problem from every angle. The Prime Minister did not accede to a joint committee but was insistent, as his words in *Hansard* will show, that the committee of the House of Commons should be afforded the widest opportunity of going into this whole matter.

Now you have obtained from the clerk, in an ex parte way, his ruling as to whether or not we are able to depart from the order of reference in a manner that would permit the kind of discussion that Mr. Argue has now requested and with which of course I fully concur. It seems to me—and I am not taking issue with you because it seems you were trying to avoid delay; I am simply raising a technical objection—that before the chair should give an indication of its thinking, or of a tentative ruling, there should be before the committee a definite proposal.

I may say now that I do propose, during the course of our deliberations, to ask this committee to ask the provincial governments to attend at this

committee so that we can ascertain a number of things. One is: whether or not they have been asked to collaborate in the formation of a bill of rights.

Mr. MARTINI: Mr. Chairman, on a point of order, I think we should go on and listen to the witnesses and then if any point of order arises we could discuss it then. I think all Mr. Martin is trying to do is make his points now before we start to discuss the bill. He could make his suggestions when we come to that.

Mr. MARTIN (*Essex East*): The Chairman gave us an indication and read out the clerk's opinion. Surely we are entitled to comment at that stage.

Mr. MARTINI: I am saying let us get on with the meeting and when we reach this point we can bring up the matters he has. Let us hear the witness now. We have wasted half an hour.

Mr. ARGUE: Let us have the point made clear about wasting time. Let us make clear who brought this up.

The CHAIRMAN: I believe, in the long run that if we take a little time now at the beginning of our sittings, and get clear in our minds the function of this committee, it will shorten considerably the subsequent meetings of the committee. With that in mind, although we are taking considerable time, I brought the matter up because I wanted everyone to know what would be the likely ruling in respect of the proceedings before this committee.

I would suggest, Mr. Martin, that you make your remarks as brief as possible, but I do think it would be desirable to get this finalized. I believe that will tend to expedite future sittings of this committee.

Mr. MARTIN (*Essex East*): As I indicated I propose at some stage in our proceedings to move that the provincial governments be called to this committee for the purposes I have indicated. When that is done then we will have to have a ruling from the chair and then if the ruling from the chair is as the chair has indicated, then those of us who take issue with it will simply have to seek the other procedural devices which are open for determination of this in the house.

The CHAIRMAN: Exactly.

Mr. MARTIN (*Essex East*): This we will do in an orderly and I hope in a friendly but firm manner. I disagree with Mr. Argue when he suggest that the amendment which was not supported by the Liberal opposition in the House of Commons is one which precludes our doing the very thing which he suggests. The basis of this amendment—and I offer this for your consideration in the meantime Mr. Chairman—was that the effect was not so much to give authority to or ask the government to call the provinces, but to preclude consideration of the bill itself. That is the procedural consequence of that amendment. That is why we were opposed to it. It was not that we did not want the provinces called, but rather because, I think, of the interpretation of standing order 128 which says that a motion of this kind has the effect of killing a bill.

Mr. ARGUE: Which is not true. You are just as wrong now as you were then.

Mr. MARTIN (*Essex East*): That was not the understanding of Mr. Argue, but that is what we understood was the effect.

Mr. ARGUE: Do not tell me we were trying to kill the bill when we were not.

Mr. MARTIN (*Essex East*): No. I said that was our interpretation of the effect.

Mr. ARGUE: It was not our interpretation nor do the rules support what you say.

Mr. MARTIN (*Essex East*): What I do think, Mr. Chairman, is this: for instance, I will be surprised when Professor Scott speaks, knowing his writings over the years—and few in this country have contributed as much to the subject as he has—I do not see how it will be possible for us to make the slightest progress with a witness like Professor Scott unless the question which Mr. Argue raised is mentioned by him, and if it is mentioned by him that we be afforded an opportunity of interrogating him on that point. Suppose you are right, that the conclusion of the Clerk is right and your ruling is right, we can go to the House of Commons and ask if there is any doubt, because the governing factor in this whole picture must be the assurance given by the Prime Minister that this committee would be set up and that there would be the fullest opportunity of examining every aspect of this matter. I am sure the Prime Minister will be the first to accede to that. If he does not, then he is, I think, to be adjusted as a very serious violator himself of the very bill he has introduced. Now, we do not want that to happen.

The CHAIRMAN: Before I recognize Mr. Dorion, if that is your view why did you not move in the house that the bill be not read a second time, but that the subject matter of the bill be referred to a select committee of the house; in which event it would be perfectly in order, if that motion were carried, for the committee to do exactly all the things you have outlined.

Mr. MARTIN (*Essex East*): You have asked a question. I cannot make a specific answer to this specific question, but I can say we felt, from the assurances given by the Prime Minister, that there would be no doubt that there would be opportunity for the fullest discussion in this committee of all aspects of the matter. We were perhaps naive in doing so. I hope we are not proven to be, but if that is the case it will be most unfortunate for the formulation of this bill of rights.

Mr. DORION: Mr. Chairman, I believe the statements made the other day by Mr. Martin and Mr. Argue raised the following question: what should be the boundaries of the field of discussion in this committee. May I express my own opinion on this, even if it is not an authority.

Our committee, in my opinion, is limited in its investigation by the order of reference and the nature of the bill that we have to examine. The bill is drafted in the form of a federal law. This is the procedure adopted by parliament.

The C.C.F. party had moved that a different procedure should be adopted. That procedure suggested was a constitutional amendment and the motion was defeated. As our committee exercises powers delegated by our parliament, it would be beyond our own powers to act in opposition to parliament itself. More than that, it would be contrary to democratic principles.

For both these reasons, and speaking for myself, I do not believe that any of the witnesses could approach that aspect of the problems.

May we get the opinion of any of the provinces? This is a different question. It is possible that one or some of them fear that any of the clauses of this bill may be an encroachment on provincial rights; but it is for the provinces to express their desire to be heard. This question surely is one which may be open to discussion, and I believe that on such a point we have the duty to hear witnesses in order to determine whether we will have to suggest amendments to the bill. But I have noticed that no province has made representation —not before this committee, because the committee was not in being. Some of us have received some letters with objections to the bill, but I do not believe the Prime Minister or any of us—we discussed this point in the steering committee—have received objections which have come from any of the provinces. Consequently we have here witnesses who asked to appear before us, and asked

to make representations in order to bring up some possible amendments to our own bill which we have under discussion. It is my humble opinion that any question in regard to the form of the bill would be out of order.

Mr. ARGUE: I wonder if I might ask Mr. Dorion a question. Are you aware, Mr. Dorion, that in January 1959 the premier of Saskatchewan wrote to the Prime Minister setting forth his case in support of a constitutional amendment?

Mr. DORION: Yes, but I believe that that point is out of order because parliament decided—

Mr. ARGUE: I thought you were saying that no province had requested this and I just wanted to tell you that Saskatchewan have made a request.

Mr. MARTIN (*Essex East*): I would like to ask Mr. Dorion a question as well.

The CHAIRMAN: Mr. Argue, I think the point that Mr. Dorion was making was that no province indicated that the bill, as drafted, encroached upon provincial jurisdiction.

Mr. DORION: Yes.

Mr. MARTIN (*Essex East*): Mr. Dorion, I would like to ask you a question. Is it not a fact that Mr. Rivard, the former solicitor general in the former government of Quebec, took exception to the bill on the ground that it was a violation of the powers given to the provinces under section 92 of the British North America Act?

Mr. DESCHATELETS: The opposition did as well.

Mr. MARTIN (*Essex East*): And as Mr. Deschatelets points out, that point of view was supported by the opposition, and there was a unanimous vote in the legislature of Quebec. That had reference essentially to what is now in clause 2 (a) of this bill. In any event, the bill likely has not been carefully considered in its present form by all provincial governments. I assure you, I will bow to your high constitutional authority, but you must have some great doubt yourself about clause 2 (a) in so far as the word "Canada", and the word "property" in that section.

Mr. DORION: Mr. Martin, I would like to answer your question. I know that Mr. Rivard made two statements, one which was in the meaning you indicated and another one which was not so precise.

Mr. MARTIN (*Essex East*): One was before and one was after.

Mr. DORION: Now, Mr. Martin, I am clear about this. I do not suggest that no witnesses can be heard on this aspect of that question. It is a very important one and I believe it would be a good thing to discuss the point. I am in agreement with your opinion on that point. What I said was that for myself and for some other members of the committee, we did not receive any objections or any letters objecting to the form of the present bill. However, I repeat that if we have witnesses who would like to be heard on that point, perhaps even on the instructions of the provincial governments; I have no objection at all. On the contrary, I believe that it would be a very good thing to discuss this aspect of the question.

The CHAIRMAN: Gentlemen, I surmise that we are in agreement then so far as the witnesses are concerned, and that you would not wish to hold them strictly to our rules of procedure, but allow them to present their opinions without restriction. Is that correct?

Mr. MARTIN (*Essex East*): Reserving the right, of course, to deal with the issue per se when it arises in that specific form. You have given your indication as to what you will do.

The CHAIRMAN: I will rule on that.

Mr. MARTIN (*Essex East*): Yes, you have given that indication.

I have one more point I would like to make.—(Mr. Martin continued in French)

I was just saying that we might possibly want to have a translator here for those members who wish to speak in French. They ought to be able to do so. That certainly would be in conformity with the principles of the bill of rights.

Mr. DORION: (French.)

Mr. MARTIN (*Essex East*): (French.)

The CHAIRMAN: Is it agreeable to the members of the committee that we allow the witnesses that latitude?

Some hon. MEMBERS: Agreed.

The CHAIRMAN: We have with us gentlemen, Professor Frank Scott of McGill university. Unfortunately I am not as familiar with the talents of Mr. Scott as are undoubtedly many members of this committee. I think I should mention that he is also an author of an article which has appeared in the Canadian Bar Review on the broad subject of a bill of rights. I would like to welcome Mr. Scott to the committee. I must apologize to Mr. Scott for the length of time which we have taken. I indicated to him that we did have a preliminary question to dispose of, but I did not think it would take quite so long. However, I trust that, having followed the discussion, Mr. Scott will probably realize that it may shorten time later on in the meetings of this committee.

You are aware, Mr. Scott, of the latitude that will be extended to you in appearing before this committee. We are happy to have you volunteer to come before us, and we would be pleased to receive from you your views on this matter of the bill of rights.

Mr. MARTIN (*Essex East*): Mr. Chairman, just one word before Professor Scott begins. I think it would be unfair just to have the slight reference to him of having written an article. Professor Scott did write an article appearing in the Canadian Bar Review dealing with the effect of this particular bill on the law in the province of Quebec. In addition to that, Professor Scott has written a book in respect of the whole question of civil liberties in Canada. He has given a number of lectures. He gave a noted series of three lectures for the Canadian Broadcasting Corporation. He is a professor of law at McGill university and in my judgment he his the outstanding constitutional authority in Canada.

I thought I would add those word of introduction so that when the record is prepared he will be introduced as one who has done more than write one article.

Mr. MARTINI: Let us hear Mr. Scott.

The CHAIRMAN: Thank you Mr. Martin.
Mr. Scott, would you address the committee.

Mr. DORION: (French).

Professor F. R. SCOTT (*Professor of Constitutional Law, McGill University*): Perhaps it would be better if I stood. The members of the committee might hear me more easily.

The CHAIRMAN: You are at liberty to sit if you wish.

Mr. SCOTT: I take it that I may speak in a more or less uninhibited way. If you feel that what I am saying is going beyond what you think the committee should spend its time on, Mr. Chairman, I will rely on you to bring me to order.

Mr. Chairman, I received the invitation to come before this committee only about 24 hours ago; consequently I have not had any time to prepare a very formal presentation. What I thought I would do first would be to make some general observations on the bill as it appears to me, and then perhaps to look, in more detail, at some of the specific clauses that occur in the different parts.

I cannot help observing that the bill as a whole is surely about the least and smallest bill of rights we could imagine ourselves to be adopting, because it seems to fall between two stools in a sense that it is not as large and comprehensive as a declaration of human rights would be; for instance, as the universal declaration of human rights of the United Nations, or as the very interesting declaration of human rights which fourteen European nations have now agreed upon among themselves, which contain many more provisions than we find in our bill of rights. These declarations of rights, Mr. Chairman, are able to extend themselves further than a statute which is intended to have immediate legal effect. This bill seems to me to be declaratory in clause 2, and seems not to be as comprehensive as a declaration would normally be. On the other hand when it comes to the statutory enactment portion, which is clause 3, it does not really achieve very much, other than to advise the judges in Canada in future that they are to interpret Canadian federal statutes in a way to protect these rights. There are no teeth in this bill. There is no restriction on federal legislators' capacity in parliament to change their minds on the subject of human rights, should they desire to do so.

So, it is rather a small bill. I know, Mr. Chairman, it has been described as a first step. I do not quite know why, when we are approaching the 100th anniversary of confederation, we are only taking a first step in regard to a bill of rights. I personally see no necessity to be so tentative about this matter. I think it is historically true that bills of rights in the development of national constitutions, such as the United States, are not often changed. When you have made an effort at one time to adopt a certain bill, then that is the way it is going to be probably for a long time. I would be afraid that our next step in Canada, if we look at this only as a beginning, may be further away than I would like to contemplate, because it is a little difficult to start over again with something which you have just completed. Therefore, I think if we can make this bill better and more comprehensive, and like a real bill to begin with, we should have achieved more of the purpose I am sure, we all have in mind.

This bill is purely a Canadian federal statute. I notice there was some discussion in the House of Commons, Mr. Chairman, about this being a good thing, and that the notion of going to the United Kingdom parliament seemed almost to be suggested as an un-Canadian thing. Now, in my opinion, Mr. Chairman, it is normal still in Canada to use the legislative capacity of the United Kingdom parliament to effect our constitutional changes. We all suppose that at some future stage in the development of Canada we are going to, what I call, nationalize our constitution. We made an attempt to do this in 1950 at the conventions between the dominion and the provinces, but it failed. Some day we are going to have to do this. We are going to have to bring to Canada the power to amend every portion of the British North America Act by some agreed procedure, a procedure which will undoubtedly involve some degree of provincial participation. However, until we do that I do not think there is anything un-Canadian, or unpatriotic, or unnationalistic for us to utilize the machinery we have, and the United Kingdom parliament is still part of our constitutional machinery. We turn it on when we want to, and turn it off again. It is an odd situation only explainable in historical terms. For that reason I do not think we should hesitate to employ this procedure where it is appropriate.

I know, Mr. Chairman, that here I am going beyond perhaps what you think is the proper terms of reference to this committee, but this a question of constitutional amendment. Of course, I have always stood for a constitutional amendment for a bill of rights because I cannot see this bill of rights restricting the federal parliament's capacity in making laws contrary to basic human rights. This bill does not do that.

I have made a suggestion myself, Mr. Chairman; with your permission I will state it briefly here.

A method by which an amendment could be obtained without necessarily having prior consultations with the provinces is; if the parliament of Canada wished, it could secure a constitutional amendment which would take away from itself in the future the power to make Canadian statutes contrary to certain basic human rights. It could do that—and since the amendment would in no way affect the present rights of the provinces, the prior agreement of the provinces to that constitutional change would, in my opinion, not be necessary—no consultation would be necessary. If the parliament of Canada wishes to have less legislative authority than it now possesses, there is nothing to prevent it, as it were, giving that authority back to the United Kingdom parliament and leaving it there for the time being.

I know it has been stated that this is not a very helpful proposal because—at some future time, again—another joint address could issue from the parliament of Canada requesting that the previous amendment be altered. But I think, Mr. Chairman, there is a great difference between the protecting of human rights in a constitutional amendment and protecting them merely in this federal statute. This federal statute, in my opinion, will have to give way before any future Canadian federal statute conflicts with it, because the later voice of parliament always, in law, predominates over an earlier voice. In other words, the courts must always interpret the latest opinion of parliament, and not an earlier opinion; whereas, if there were a constitutional amendment taking away power from the parliament of Canada to legislate contrary to human rights, no future federal statute conflicting with that amendment would be valid—it would be *ultra vires*.

I think, therefore, Mr. Chairman, I have suggested—just to conclude this thought—that if the Canadian parliament did restrict its own future legislative capacity in the area of human rights, there could be in that constitutional amendment a provision that the same restriction on legislative capacity would apply to any province that chose to adopt it, and you could, as it were, offer to the provinces the opportunity of bringing themselves, by their own vote, under the same restriction as the parliament of Canada had imposed upon itself. Then, as each province came in under that restriction, so would the protection of human rights extend over the Canadian legistlative authorities; and I would anticipate that we might expect a number of provinces to agree very quickly to that constitutional limitation, and that gradually public opinion in the other provinces would bring them in also. And by that process, without any violation of provincial freedom, without the necessity of any prior consultation with the provinces, we would have achieved a basic constitutional protection of human rights which is lacking in this bill.

Mr. Chairman, perhaps now, with those general observations, I might speak to the text of the bill—unless you wish questions, perhaps, to be put to me on some of these introductory remarks.

The CHAIRMAN: I think I would prefer to have you deal with the whole matter before any questions are asked.

Mr. SCOTT: Mr. Chairman, if I may turn to clause 2 of the bill: a number of points can be raised with respect to the wording in that section. I would start with the statement in the text:

> It is hereby recognized and declared that in Canada there have always existed—

and it lists in the following paragraphs a certain number of freedoms.

I do not know what the purpose of making this legislative lie is; but it is a complete untruth. These freedoms have not always existed in Canada. We de not need to be ashamed of the fact: the evolution of human freedom has been a gradual process. One does not have to go very far back in our history to find times when the freedoms mentioned here did not exist. As a matter of fact, this was so in the federal statutes themselves. In the federal Elections Act, right down to after World War II, there were many racial discriminations.

These freedoms have not always existed; and I do not like the idea—as I heard someone suggest—that they would like to hang this up in the school room so that our Canadian children could read it and be proud of their rights.

This is not true: these freedoms have not always existed—and I would suggest, Mr. Chairman, that you might consider rephrasing clause 2 to make it a little more consonant with the facts of our history.

In clause 2, paragraph (a), there is a phrase used that is very familiar in American constitutional law, but which is quite new in ours. That is:

> —due process of law;

Paragraph (a) says:

> The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

I do not know what the intention of the draftsman is here. It is a phrase capable of at least two meanings: it could either mean just "according to law"—in other words, you cannot have your property taken away, or your liberty, or life, except according to the law which says they may be taken away; because there is always some possibility of taking away a person's liberty—for instance, if he is put in prison—by a properly constituted court, et cetera. It may mean that; or it may mean that you cannot be deprived of these rights unless by a legal process which recognizes certain basic principles of justice—which is a little narrower than the other.

If you leave the words as they are, "due process of law", why, you are thrusting upon the courts on some future occasion the necessity of telling us what in fact they do mean. Does this import into Canadian constitutional law a great deal of the American law on the point, or are we to have a law of our own?

I may say, Mr. Chairman, that I have not had any time whatever to suggest amendments in wording, and I am not so sure that you want a witness such as myself to do that. Amendments can be worked out, I presume, by the draftsmen of the Department of Justice.

The CHAIRMAN: Professor Scott, perhaps this might be an appropriate point to break in. The house will be meeting in just a few minutes. Gentlemen, Professor Scott wants to return as soon as possible, and he does not want to remain over until this afternoon. I wonder if it would be possible for us to adjourn now, and reconvene after the orders of the day have been reached, solely for the purpose of concluding Professor Scott's evidence—and then we will adjourn. Would that be acceptable, in view of the fact that Professor Scott wants to return as soon as possible?

Mr. ARGUE: Mr. Chairman, because of a contemplated procedure undertaken some time ago by my party, it will be impossible for me to come to this

meeting, because I expect to be speaking in the house at that time. I am very sorry that I will not have the opportunity of hearing Professor Scott. I would like to see the committee meet at a time when all of us could be here—but I cannot be here.

Mr. MARTIN (*Essex East*): I cannot be here either, because I will be speaking right after Mr. Green. I would certainly like to hear this witness, and I would also like to ask him questions.

The CHAIRMAN: Could we advance the afternoon meeting to 1:00 o'clock?

Mr. MARTIN (*Essex East*): Mr. Green will be speaking after the orders of the day—I do not know how long he will be—and then I will be speaking. I am sory, but I cannot be here. I would like to be here.

The CHAIRMAN: Of course, Professor Scott's remarks, views, and so on, will appear in the proceedings.

Mr. MARTIN (*Essex East*): I know; but there is no opportunity given to comment on them or ask him questions. I would like to ask him a series of questions on what he has said already.

I would suggest, in his case—he has obviously been taken unawares, without too much notice; and I am not criticizing anybody for that—that he ought to be given a chance to deal with this matter. He said that the draftsmen, the officers of the crown, ultimately will have to draft any amendments; but I would like to see, in writing, some of the amendments which he himself would propose, for the consideration of this committee. I think they would be very helpful to all of us.

But he would have to have time for that, and I would think that sometime next week—if that is convenient to him—he could come back and we could deal with his evidence.

The CHAIRMAN: Well, the committee stands adjourned until 2:00 o'clock.

AFTERNOON SESSION

The CHAIRMAN: Order, gentlemen.

If any member of the committee has not a copy of the bill, we have a few extra ones here for distribution, to anyone who would like to have one in order to follow the evidence.

Mr. Scott, would you continue.

Mr. SCOTT: Mr. Chairman, this morning I just had time to open with some few general observations about the bill, and I stated, in my opinion, it was about the most modest kind of bill of rights we could possibly imagine.

Then, I was going on to look at some of the wording in clause 2, and to ask the question whether, perhaps, it might not be profitably amended to bring out certain new ideas or make certain things clear that are not clear there now.

I thing the last thing I referred to was the phrase "due process of law" in clause 2, paragraph (a), and I pointed out it would have more than one meaning. Since the protection of the declaration of property is a matter mostly decided, although not exclusively, by provincial law, and since we know, under the Canadian constitution, that a person can be deprived by a province of his property in any manner the province decides to adopt, including outright confiscation, it would seems to me that the phrase "due process of law" there can only mean "according to law"; in other words, according to whatever law is applicable. It does not import, therefore, the necessity of payment of expropriation in every case which, I would submit, as a matter of constitutional jurisdiction, is not something that the federal parliament is capable of making applicable within the provincial sphere.

There are, of course, certain powers in the federal government to expropriate in certain things and, under the War Measures Act, can expropriate there for the purposes of conduct of a war, and provide for compensation—and that would be "due process of law". However, this is not to be taken as in any way affecting the province; it must leave their jurisdiction untouched.

On the point, also, that the wording of clause 2 is a little unusual in a statute, it says:

It is hereby recognized and declared . . .

that these rights, and so on, existed. Those words, "recognized and declared" do not, in my view, attempt to enact something. This is not, I think, from the legal point of view, an enacting clause, but a declaratory clause and, therefore, in my view, it does not change any existing law. It says that, in the hands of parliament, these rights are recognized and declared to exist. I have pointed out already that "declared to have existed" is not quite true. For that reason, I do not share the view of some people who think this could be an invasion of provincial rights. If it was enacted that these rights existed, and parliament was saying that a person in Canada cannot be deprived of property, except due process of law, then I think that enactment might be held to be invading, to some degree, this sphere of property and civil rights. But, I do not so read the section. Some people have read it that way. There is a little ambiguity in the section that might deserve, perhaps, consideration by those who might be contemplating some amendment.

If we go on to clause 2, paragraph (b), it expresses the right of the individual to protection of the law, without discrimination. I think I know what the purpose of that section is. But, I am not sure it is really very correctly phrased. Does it not mean we want to declare in Canada that every individual can pursue all his activities—his employment, and so on,—without fear that anyone else is going to discriminate against him, because of these, by reason of race, national origin, colour, and so on.

We had a case in Quebec in 1940-41, where a negro went into a tavern—and that was the Christie case; Christie versus the York Corporation—during an intermission in one of the hockey games at the Forum. The tavern was located in the Forum. This man ordered a glass of beer, and the tavern keeper refused to sell him a glass of beer. He sued the tavern keeper for personal harm, discrimination and moral injury. The Quebec courts, upheld by the Supreme Court of Canada, held that he had not suffered any legal wrong, because of the right of the owner, the proprietor of the tavern, to run his business as he liked—what you might call the freedom of commerce—and that was a more important right than any right of the individual citizen not to be discriminated against. In consequence, as I say, this Mr. Christie lost his case.

He had the protection of the law, in one sense.

Mr. DORION: Could we have the name of the case again?

The CHAIRMAN: What was the name of the case?

Mr. SCOTT: Christie versus the York Corporation, and it is reported in the 1941 Supreme Court reports. Now, there was not any law dealing with discrimination, particularly in Quebec. You had a conflict between two kinds of right—the right of the businessman to run his business as he likes, and sell to whom he will and, on the other hand, the right of a citizen who comes into a place which is selling liquor under a liquor licence—however, in this case it was beer; it was a tavern and not a restaurant—the right of a person who is, generally speaking, invited into such a place where the proprietor holds a licence from the state to sell beer, not to be discriminated against. There are two rights. However, the legal analysis, at that time, was that it was the right of the proprietor to do business as he liked—maître chez lui; master in his own house, prevailed.

So, I do not know how this thing would apply to a situation of that sort. I doubt if it could. The proprietor said: I want the protection of the law, and I want to sell to whomsoever I choose to select. You have difficulties there that I think this particular phrasing really would not meet. However, it may well be that that is the situation where one runs up against a human right that comes within the purview of the provincial law and, if that situation is to be changed in the province of Quebec, it is going to require legislation, on their part, to bring the tavern into the same right as applies in hotels and restaurants, where such a discrimination would be illegal.

I do not want to suggest this is a general rule of law in Quebec; it is a rule that applies in this particular instance.

Mr. BATTEN: There is a vote, Mr. Chairman.

Mr. SCOTT: That is a higher law.

The CHAIRMAN: This is most unfortunate. However, I think you have finished your discussion on due process of law.

Mr. SCOTT: On that point.

The CHAIRMAN: Then we will adjourn, to reconvene here immediately after the vote.

—The committee recessed because of a division in the house.

The CHAIRMAN: Order, gentlemen. I hope we can go through now without interruption for the rest of the afternoon.

Professor Scott, would you care to resume your presentation.

Mr. SCOTT: Yes, Mr. Chairman.

Mr. DORION: Excuse me, Mr. Chairman and Professor Scott. Do you not believe that it would be better to ask questions now on the points which have been raised by Professor Scott. Otherwise we will have to come back afterward to every point and ask the opinion of the professor.

Mr. DESCHATELETS: I do not believe we should do this. I think that Professor Scott should be allowed to go on with what he has to say. We might also provide a period of a few hours or a day before we ask questions. Personally, I would like to go over my notes. I would like to have a delay of at least one day and then have an opportunity to request information from Professor Scott.

Mr. STEWART: What would the professor prefer?

The CHAIRMAN: I feel that our witness already has expressed a desire to return to Montreal as soon as he gets through with his presentation to the committee.

Mr. DESCHATELET: Would there be anything to prevent Professor Scott coming back on another day.

Mr. SCOTT: I could come back if you wish it. Also I would be happy to take up any points which arise out of the portion I have covered, if that is your wish.

Mr. STEWART: I am afraid you might not get your full submission in if we do that. Would it not be better to go on and finish the presentation first, and then ask questions.

Mr. DORION: All right.

Mr. SCOTT: Mr. Chairman, so far we have discussed the wording and effect of clause 2 of the bill. I think I have covered all the points I wanted to raise about that section.

We come then to clause 3 which is the enacting portion of the bill, in my opinion. As you know, its purpose is to create a kind of new rule or interpretation—but it is not so very new. The present rules or statutory interpretation under any charges, certainly when any penal statute is being interpreted, are interpreted in a restrictive sense so as to leave a wider area of freedom rather than a narrow one. Not only that, but under section 3 there is an instruction to the judges in Canadian courts in the future when interpreting any federal statute or regulation under a statute to interpret it in such a manner as not to infringe the rights or freedoms that are there set out and, indeed, it attempts to prevent what might be called an inadvertent invasion of those freedoms by a future act of parliament by saying that such future act must be taken as not having intended any invasion of these freedoms, unless the act itself expressly states that it is the intention of parliament so to do.

There could be argument as to whether the judges will feel bound by this rule or interpretation, if in fact they are confronted with a future federal statute which, while not saying in express terms that it intends to amend the bill of rights, nevertheless does so by its necessary meaning. But I do not know; there is never any use in attempting to predict what the judges will do. This is a statement in the bill that they are supposed to act in a certain way and we may hope that perhaps they will do so.

The actual wording of the subsections of section 3 raises some points that some people have raised in the debates in the house. I note particularly subsection (*b*) about the cruel, inhuman or degrading treatment or punishment. The question has been raised as to whether that, for instance, means that the provision in the Criminal Code for the imposition of the sentence of flogging—whipping—in certain cases must now be read out of the Criminal Code. Frankly, I doubt whether any future judge is going to read this out when it is expressly in the Criminal Code, especially when we remember that there was a similar provision about cruel and inhuman punishment in the English bill of rights of 1689, which has not prevented the imposition of the sentence of flogging in England since that date. However, one has to ask these questions. I honestly do not know what the answer is going to be.

I doubt very much whether the particular provision here would be taken by judges in the future as having repealed a certain scope of the Criminal Code. If I am asked whether hanging itself is not an inhuman punishment, then are we to say that we have by this bill of rights, if it is adopted, abolished the death penalty, by hanging at any rate. I can only ask these questions. Frankly, as I said before, I do not think so great a change in the present criminal procedure will be effected by this bill.

I will then come to section 4. This is a quite innocent looking section which says it is the duty of the Minister of Justice, in accordance with the regulations, to examine every proposed regulation in the future in order to ascertain whether it is consistent with the provisions of this act. I should like to suggest that this idea might be expanded. I would like to see, in the Department of Justice, a special division on human rights, or a special section in the department itself; that is to say, personnel employed by the department for the specific purpose of keeping an observant eye on not only the legislation coming through parliament and the regulations issued under that legislation, but indeed on the future goings-on in the country to see whether they could not initiate procedures that might improve the general observance of human rights in Canada.

I think there was a time when we felt that the way to make people observe principles of human rights was to punish them if they did not observe those principles; and I think some punishment still is necessary in the law; but I think the experience in the application of things like the Fair Employment

Practices Act, where discrimination in employment, for instance, has been excluded by statute, has taught us that you can make greater progress by investigating complaints, talking to employers, and finding out why there is discrimination, and see what is the reason, let us say, why an employer does not wish to employ a certain type or class of person, whether there is any justification for it, and so on. In other words it is more or less a social work approach to the essential problem, rather than a criminal law enforcement approach.

If we had a division in the Department of Justice such as they have in the United States department of justice with people paying special attention to these problems, I would think we could make a more rapid advance in developing a better climate of opinion in Canada, which would be more favourable to human rights than merely asking the Department of Justice to look at the text of regulations. I should like to think that the Department of Justice might initiate research projects in Canada in areas which need investigation. It might publish educational material to educate the public generally about the rights to which they are entitled. These people in the Department of Justice could become specialists in this field, and add something a little more up to date and continuous in the way of ideas and suggestions both to parliament and to administrative bodies generally. This is a rapidly developing field, the question as to what are the rights of administrative bodies and tribunals. It is an area of the law which has been developing rapidly in the past 25 years; all democratic countries are concerned about it. I think a lot more systematic approach to the study of these problems as part of the function of the Department of Justice would be a very appropriate thing.

I go next to this question of the effect of the proclamation of the War Measures Act upon our human rights and fundamental freedoms. This bill has drawn—and I am now referring to clause 6, apart from amendments to the War Measures Act itself which really do not influence us greatly with respect to the matter with which I am now dealing—this clause 6 says in subclause (5):

> 6 (5) Any Act or thing done or authorized or any order or regulation made under the authority of this act, shall be deemed not to be an abrogation, abridgement or infringement of any right of freedom recognized by the Canadian bill of rights.

Now, as I understand that, it means in effect that once the War Measures Act is proclaimed, parliament, and particularly the governor general in council, is free to make any kind of regulation under that act, regardless of how far it might be considered to infringe the protections otherwise accorded under this bill of rights.

I am particularly concerned about this, because of our experience under the War Measures Act just after World War II, when it was held that the Privy Council, by order-in-council under the War Measures Act, could authorize the deportation of Canadian citizens—not only those who had certificates of naturalization, but also native-born citizens who might have their citizenship cancelled.

But even in wartime it is not necessary, I submit, for the government of Canada to have the power to deport a native-born citizen.

I think the Minister of Justice in talking about this pointed out that the Citizenship Act had been amended in recent times, and that there was only one ground for the cancellation of citizenship.

But I would remind you, Mr. Chairman, that once the War Measures Act is proclaimed, it is possible by order-in-council to amend statutes. The power of the Governor General in council is so great under the War Measures Act

that he can amend statutes which parliament previously adopted. In other words, by order in council all the former restrictions in the Citizenship Act can be re-inserted, and Canadian citizens can be deported.

I do not think that power is necessary. It seems to me that the relationship between the War Measures Act and this bill has not been adequately thought through, and that if we are in this act to say that in time of war a Canadian citizen cannot expect all the protections that this act gives him in time of peace—which is a sustainable proposition in general terms, I suppose—we, nevertheless, do not need to go so far as this present draft bill in saying that they can expect an end to the fundamental freedom and human right as this bill proclaims, to survive as against some regulations under the War Measures Act.

I think subsection (5) of section 6 has to be looked at or the War Measures Act itself should be looked at from the point of view of the degree to which it permits the executive branch of government to invade the fundamental liberties of the Canadian citizen. I would respectfully urge that some attention be paid to that aspect of the problem.

I do not like to see a Canadian bill of rights which says that you have all these great rights, but once war comes, you have none of them at all—because that is what, in effect, it says. They all disappear in the face of the War Measures Act. But I think that some things should survive, even during a war emergency.

It is set out in the present War Measures Act that you can disregard all these human rights which are herein stated, but you cannot take away property without compensation. Property seems to be the only human right—if it is a human right—which receives real protection even in war time, because confiscation of property is not permissible under the War Measures Act. Nevertheless deportation of a Canadian citizen is permissible, and imprisonment without trial is permissible.

Why should the right of a citizen to live in his own country be less deserving of consideration than the right of a citizen to have property taken away without compensation?

It seems to me to be a wrong order of values, but that happens to be the way the law is now, and I do not think it should survive or be encouraged in a bill of rights.

That concludes all I have to say about this particular bill in its present wording. As I have said, I am not particularly happy about this kind of bill. It is about the smallest kind of bill of rights that we could have had. I personally would have much preferred to have a real bill of rights which would give us real protection. But this does not give us protection against a change of heart in the future by a future Canadian parliament.

And I would like to have seen—as I agree with all those who have so frequently said that ultimately your human rights depend at least as much, if not more, upon the tradition of the observance of rights in the people, and the acceptance of the principles of freedom, than they depend upon the text of a law.

So the more your committee is able to invite representations from people across Canada, and the more organizations are able to come here and make their observations, the more the process of the enacting of this bill becomes the process of informing all sections of the Canadian people of the nature of the problem of protecting rights in modern society.

I think therefore that the widest possible opportunity of this kind should be given. And I would like to thank you now for allowing me, at any rate, the opportunity to make these remarks to your committee.

The CHAIRMAN: Thank you very much, Mr. Scott. I am sure that the committee has listened with great interest and appreciation to the presentation you have made. I think, as has been indicated, that some of the members of the committee may wish to ask you a few questions on some of the matters which you have brought out before the committee. First, Mr. Dorion.

Mr. DORION: Mr. Scott, I understood that you told us that the first part of clause 2 is not exact in its meaning, and that we should recognize in Canada that there has always existed, and shall continue to exist, human rights; that it is not an exact proposition.

I believe you are correct in that point; but has there not been an interpretation formula which has been often used? An example is probably to be found in preamble to the Religious Worship Act of 1852, where I believe we have the same wording at the beginning of that statute. Do you remember that?

Mr. SCOTT: That was an act of the Province of Canada?

Mr. DORION: Exactly.

Mr. SCOTT: To preserve the freedom of worship in Quebec?

Mr. DORION: Yes; and it was modelled upon an Ontario statute, and this was abondoned in 1915. But we still have our act in the Quebec statutes, where it is I think, chapter 307. Do you believe that this is merely a common interpretation of the former statute which has been used in many statutes?

Mr. SCOTT: I must confess that I cannot remember the preamble of that statute offhand.

Mr. DORION: I believe it was in exactly the same wording.

Mr. SCOTT: There may be some legislative intention which escapes me, in the choosing of this wording. But I do not like to see a statement of that character if it only has some rather technical legal meaning, because it will not have the same meaning to the citizens who are going to read it. I think the bill of rights should be, as far as possible, in the simplest form of language. This is not a document primarily for lawyers, it is a document for citizens. They should be able to read this and agree with it all the way through. I think anybody reading it will say that obviously is not so. Indeed, I have had a class of students analyzing this statute, and one said to me: well, if the rights have always existed, then they do not need to exist any more in the future than they have in the past, and if they did not exist in the past, they do not have to exist in the future. This might be the implication you could draw from the existence of this phrase. I am suggesting that whatever legislative authorities there have been could be expressed in words that do not seem so clearly to run contrary to our historical record.

Mr. DORION: I am right in saying in respect of this formula that it is retroactive legislation?

Mr. SCOTT: I would rather you used the words: this interpretation would be applied retroactively. I am suggesting the same legislative purpose could be obtained, surely, by words that will cause less raising of eyebrows among the students who read it.

Mr. DORION: The second question Mr. Scott I would like to ask is; I would like to have your interpretation of the words at the beginning of clause 2: "in Canada". Do you believe that we have to take the geographical meaning of that or the legal meaning of those words "in Canada"? I suppose you read the article written by Mr. Pigeon.

Mr. SCOTT: Yes, I have.

Mr. DORION: I would like to have your opinion of his objection.

Mr. SCOTT: I was not convinced by his concern over that phrase "in Canada" because, as I read clause 2, it is merely declaring a belief in certain principles, but is not attempting to enact any new law. If the parliament of Canada wishes to say, as I think it has the right to say, that there shall exist these rights in Canada, it means the entire country. The enacting clause, clause 3, confines the effect of the bill to federal statutes so that the provinces are left without any diminution of their former authority. I quite frankly do not think there is anything improper in the words "in Canada". We obviously want the bill of rights to have effect throughout Canada. All federal statutes run all through Canada, and therefore, since this is a federal statute, it must apply in Canada as a whole.

Mr. DORION: In other words we have to read that phrase within the context of the bill itself?

Mr. SCOTT: Oh, yes, quite. This is subordinate to clause 3.

Mr. DORION: Consequently you do not see any encroachment?

Mr. SCOTT: No, I do not see any. As I say, I was not convinced by the argument that Mr. Pigeon made in that article.

Mr. DORION: I read with great interest your article which appeared in the bar review. I saw at the beginning of your article these words: "Mr. Diefenbaker's proposed bill of rights as drafted confines itself to matters within federal jurisdiction". I would like to know, Mr. Scott, if you see anything in the wording of clause 2 which may be interpreted contrarily to your proposal which appears in your article.

Mr. SCOTT: Well, I can only repeat that I do not see anything contrary to that proposition, because of the words "recognize and declare". This is a recognition that the rights exist, and a declaration that they exist. This is not an attempt to make any new rights. It is not an enactment of new legislation. To me it is an expression of opinion on the part of parliament, not an enactment of new law.

Mr. DORION: Thank you.

Mr. DESCHATELETS: On this point, Mr. Chairman, would you permit me to ask a question.

Mr. Scott, we say that this bill will apply within federal jurisdiction. Now, as you probably noted, most of the rights mentioned here relate to civil rights and property which are, as you know, exclusively under powers of the provinces under our constitution. I cannot understand and cannot see where this bill could apply if the civil rights and property are under provincial jurisdiction exclusively. I wonder if you could give us an example of where, with this bill applied to a case relating to property and civil rights, freedom under these two items would be infringed.

Mr. SCOTT: May I first express my disagreement with your opening remark, that most of the rights in clause 2 fall within provincial jurisdiction in respect of property and civil rights. My personal opinion is that such rights as freedom of religion, of speech, of assembly, of association and of the press are not within the jurisdiction of provinces in general. I am not saying that there are not some aspects of these matters that are; but in general, the basic rights themselves are within an area that, in my opinion, can only be infringed on by the application of criminal law. I think the Birks case, in regard to freedom of religion, and the Switzman case, in regard to both freedom of speech and of the press, have made that reasonably clear. Similarly the right to life is one which can only be taken away by the criminal law with respect to the death penalty. The provinces have the powers of imprisonment and fines, to enforce their provincial law, but they certainly have no power to put to death. The provinces can, of course, take away

liberty of an individual, because they can put the individual in prison for an infringement of valid provincial laws. I come back to the part I have been repeating, that this is not a clause, in my view, which changes any existing law. It is a statement of a belief by the parliament of Canada that these rights exist in Canada, and are important rights, because they are being put into this special bill. It is a list and orderly presentation of basic notions of freedom. It is the later intention of this statute to secure these rights for all time, in present and future federal legislation. I do not think there is an invasion of provincial authority. If the parliament of Canada, has an active law which says that it believes education is very well provided throughout Canada, such a law using the word "education" would not be a change in the provincial law. It would not be a legal invasion of provincial jurisdiction. It is a statement of objectives and values, and does not run up against the problem of the distribution of legislative authority under sections 91 and 92.

Mr. DESCHATELETS: Professor Scott, will you agree that the enjoyment of property is an exclusively provincial right under our constitution?

Mr. SCOTT: Oh, no.

Mr. DESCHATELETS: You do not agree with that?

Mr. SCOTT: No, not exclusively. The basic rights with regard to a man's property are provincial, but if I come and take your property away from you without your permission then I break the federal law of theft. Many aspects dealing with property are federal. This word "exclusive" is rather difficult to use in respect to indeed almost anything in section 92. You have no right to buy and sell narcotic drugs where there could be an element of profit, because the federal criminal law has come in and prohibits that.

Enjoyment, I would say, generally is a provincial matter, but there are federal succession duties. If you think about the question of property, it is such a complex part of the law, with so many aspects, that while it may be basically a provincial matter there are areas in which the federal law must necessarily operate. I do not only mean this in respect to those portions of geographic Canada like the Northwest Territories, where the federal law, of course, is the exclusive law.

Mr. DESCHATELETS: Mr. Chairman, would you permit me another question? In relation to clause 2(b), are you aware, Professor Scott, that under the civil code of the province of Quebec, what we call *le chef de la communauté* has more rights in the province of Quebec than under the common law which applies in other provinces? This has a different meaning. You said this morning, there was some mention about certain provinces—there are two provinces, I think, which already have a bill of rights, and that other provinces might have their own bill of rights. You have also said this morning that in case there should be two bills of rights, a provincial statute and a federal statute, that the federal statute would have precedence over the provincial statute.

Mr. SCOTT: No, I do not think, as a matter of fact, I made any reference to provincial bills of rights this morning. Only one province has a bill of rights, and that is Saskatchewan, because Alberta's bill of rights was held unconstitutional. You could not lay it down as a principle of federal law that if there was ever conflict between the federal and a provincial bill of rights, that the federal would necessarily prevail. That would depend on whether the section of the federal bill considered in conflict with the provincial bill was not enacted validly by the federal parliament. It might be that the provincial bill of rights would be an invasion of the federal area; and in that case it would

give way before the federal bill. However, you could not make a single pronouncement that the federal bill would always prevail. It might in some instances; it might not in other instances.

Mr. DESCHATELETS: In relation to colour with the example you have given this morning, of a coloured man being refused a glass of beer in a tavern in Montreal, does this bill of rights, as it exists now, contain provisions that would prevent this thing happening again?

Mr. SCOTT: In my view, this bill would have no effect whatsoever on the decision of the courts in the Christie case. It leaves that case, in my view, as a rather startling rule of Quebec law, that it is possible so to injure the feelings of a Canadian citizen in a tavern so as to refuse him a glass of beer in a tavern. I cannot see that this bill changes that ruling in the least degree.

Mr. DESCHATELETS: Do you suggest that in this bill we should have a special clause relating to the prevention of discrimination as to race, national origin, colour, religion or sex, without any other implication, as we have here, as to protection of the law, and so forth? Would you suggest we would have a clear clause preventing any discrimination in relation to colour, national origin, religion, sex, and so forth?

Mr. SCOTT: I am glad I am asked that question, because I realize I had omitted to make a suggestion in my initial presentation, which I would like to make now.

The federal parliament has exclusive jurisdiction in the field of criminal law. If the federal parliament wished to make, let us say, certain forms of racial discrimination a crime, I am sure it has jurisdiction so to do. I am not suggesting the drafting of such a prohibition. Indeed, if the federal parliament wished to make it a crime to interfere with the exercise of these fundamental freedoms, I am sure it has power to do so. As a matter of fact, there is in the present Criminal Code a provision making it a crime to interfere with the practice of religion and the conduct of a service. This came up in the *Chaput* case, where Jehovah's Witnesses were privately meeting in a private house, and the police entered and disturbed the meeting. The police, in that instance, were committing a crime. The criminal law protected the freedom of religious worship by making it a crime to interfere with its practice.

I am suggesting—and if I might make the suggestion in all seriousness to this committee—that they might consider whether the criminal law might not be strengthened with respect, perhaps, to the practice of some of these other fundamental freedoms. For instance, should it not be a crime to interfere with the conduct of a public meeting? There might be some forms of interference with a public meeting that might be some kind of an offence at the moment; but it would seem to me we could define new crimes, the definition of which would be designed to protect these basic rights that are here outlined.

If you had a section in the Criminal Code making certain forms of racial discrimination or discrimination on the grounds of colour or religion a crime, then that might lead into the Christie situation; and after the amendment of the Criminal Code, in that sense, any future tavern keeper anywhere in Canada refusing to serve a glass of beer because the customer was coloured or was of the wrong religion or had the wrong political views, would be committing a crime. That is a possible exercise of federal jurisdiction, but it is not exercised in this bill.

Mr. DESCHATELETS: This is my last question: Do you not think that we should have a clear provision right here, in this bill of rights, about racial discrimination?

Mr. SCOTT: If I hesitate to say "yes" to that, it is not because I do not think it is a good idea for the law to be more precise in defending against discrimination. But I should imagine it would not be a very easy provision to include in this bill unless you had carefully thought of its application in various situations. There is now a federal fair unemployment practices act, which does make it an offence to discriminate, in certain classes of case, and with regard to certain classes of persons in employment. It is not the general law. It does not apply to serving people in a shop or restaurant, for instance. I am not sure I can think through all the aspects of that question, Mr. Chairman.

I have a notion we ought to be more precise in making racial discrimination a crime in this country. We should prohibit it. This bill does not do it.

Mr. RAPP: Mr. Chairman, I would like to ask Professor Scott to give us an explanation. In clause 2, under paragraph (a), some of the rights and freedoms are listed—

> —and the right not to be deprived thereof except by due process of law;

Under the War Measures Act, ase you explained, Mr. Scott, the governor in council would have been the power to infringe on some of these rights, is that not right? By deleting in paragraph (a) the words "except by due process of law", would that strengthen this section?

Mr. SCOTT: Do you mean if those words were added to the War Measures Act?

Mr. RAPP: No, deleted. If we strike off the words in paragraph (a) under clause 2, "except by due process of law," it would read then:

> ... and the right not to be deprived thereof.

Mr. SCOTT: Yes; but you surely do not wish to deprive parliament of its power, in certain appropriate situations, to deprive a person of his liberty and of his property? The right of the state to take property from an individual is one that must always be maintained. It is not to be used—

Mr. RAPP: I know; but under the War Measures Act the governor in council can deprive an individual of his right, as stated here under (a); is that not right?

Mr. SCOTT: No. As I understand the War Measures Act, while the power to take property for war purposes is given in the act, there must always be compensation paid—and therefore that is due process of law, I would think. That is in the present War Measures Act. I understood there was a provision, not that there must be a prior payment of compensation; but as I remember the War Measures Act—I confess that I have not looked at it lately, Mr. Chairman—there is a provision for payment of compensation.

Mr. RAPP: In other words, your view is that these words, "except by due process of law" should be left the way they are?

Mr. SCOTT: Yes—although I did raise the question this morning as to what exactly they meant. I am not sure that I know exactly what they do mean: it is not a familiar term in our legal system. I think they just mean "except by law"; that you have these rights except in so far as they are taken away by law—and that means you have them as long as you have them, and you have not got them when you have not got them.

The CHAIRMAN: Professor Scott, do you have any other words to suggest that might be more expressive than "due process of law"?

Mr. SCOTT: Personally, I would prefer a simpler form, of saying "except in accordance with law", and leaving it up to the federal parliament to decide what is the legal process by which in any case, if at all, these rights are to be interfered with.

Mr. RAPP: "Except" what?

Mr. SCOTT: "Except in accordance with law". I think that is what those words probably do mean; although it has been suggested that they might mean "except in accordance with laws which observe certain principles of natural justice"; e.g., property is not confiscated, but it is paid for when taken; or that the deprivation of liberty is only valid when there has been a fair trial, and it is not an arbitrary deprivation. It might mean that.

Mr. MARTINI: Mr. Chairman, I would like to ask Professor Scott this question: do you feel there is a definite need for this bill?

Mr. SCOTT: For this bill, no.

Mr. MARTINI: For a bill of rights, then—let me put it that way?

Mr. SCOTT: I would like to see what I would call a proper bill of rights, an amendment to the fundamental law of the Canadian constitution, taking away from the federal parliament the legislative capacity to invade these rights in certain respects; and I would like to see that form of restriction on the sovereignty of parliament extended over provincial legislatures in accordance with their consent.

But, quite frankly, this bill—which is a solid amendment to the Interpretation Act—I hardly think is worth having. As I said this morning, I am frightened that, if this is the first step, by the time we have taken this we will give up all thoughts of a bill of rights for another generation, and it will end up by being almost our last step. If we took our time with it, we might get ourselves to the point of agreeing to a real constitutional amendment.

Mr. MARTINI: This morning you said that this bill is too small; in other words, are you trying to say that the bill does not go far enough? That is the way I interpret it.

This bill, as it is—will it have much effect on the laws in the statute books today?

Mr. SCOTT: Personally, I do not think so.

Mr. MARTINI: It would not have any effect at all?

Mr. SCOTT: I would not say it would not have any effect; I would not be sure about that. I do not think it will have very much effect, because I think all judges, in interpreting laws which they find coming from the federal parliament, would try to interpret them so as not to invade a right, if they could possibly do so. If the law does invade a right, I think they are still going to apply that law in the future, unless they feel themselves able, by virtue of that little phrase over in clause 3, where it says, "unless it is otherwise expressly stated in any act of the parliament"—unless they feel themselves able to, by virtue of that, to say of a future Canadian statute, "It invades a human right, but it does not also say it intends to amend the bill of rights; and therefore, since it has left out that little phrase of intention, we shall not apply the law so as to take away the human right.

It could have some effect. But when I said it was the least bill of rights that we might have in Canada—I said it falls between the two poles; it is not a fine declaration of rights which ought to be larger than you have in clause 2, and it is not a restriction on the legislative capacity of legislatures, which a true bill of rights would have. It is somewhere in between, and has this rather middling Canadian characteristic, Mr. Chairman, which we so often seem to find in this country.

Mr. MARTINI: Would you not think it is better to start small than to start with a perfect bill, and perhaps take out some of the clauses and perhaps add on as we go along?

Mr. SCOTT: If I could be sure we would take our second step soon after this first step, I might be persuaded by that argument; but I am frightened that we may think we have got ourselves a pretty good bill of rights and rest

content with it, when in fact it is not a very effective bill. Frankly, I think if you were to compare the human rights sections of modern constitutions in federal statutes—and there have been a great many new constitutions in the world since 1945: I think, no less than 50—you would find that this has an old-fashioned look to it, by comparison with the modern statements on human rights. These are mostly the old, traditional, basic rights.

I do not mean by that that they are not extremely important; but a more modern way of treating this would express ideas about man in society, and his life—and not only life, liberty and security of the person or property; but of health, education and participation in the processes of his government, enjoyment of the arts, a variety of things which you do not enact as positive legislation but are aspirations which your state puts before itself in these constitutions. They are targets; they are goals, legislative goals—and this bill lacks that touch of dynamism which I would have hoped a good bill of rights would give. It does not do that, on the one hand; and on the other hand it does not really restrict a future parliament. So, frankly, as a Canadian citizen, I will not give an enormous cheer when this bill passes.

Mr. MARTINI: You said, Professor, that in war time all these rights are lost to Canadian citizens, and also to Canadian-born citizens; they could be deported. Deported to where? If you were a Canadian, where would they deport you to?

Mr. SCOTT: If you have not a country to which you can deport them, I understand that under international law you cannot deport them; but in the case of the Japanese, we had a Japan that could not say "no".

I do not want to suggest that no future government is going to pay no attention to human rights in war time. I would certainly think, and hope, that a future government would pay reasonable attention to human rights in war time; but I am saying that this bill lays it down in black and white that if the War Measures Act is proclaimed, these rights no longer stand in the way of the enactment of the War Measures Act; and we have not got that statement in the law at the moment. This might, in fact, weaken our position under the War Measures Act. Maybe the War Measures Act is at the moment more restricted by the principles of human rights than it will be if paragraph (5) of clause 6 is made law. Frankly, I am frightened of that.

Mr. MARTINI: Do you not think that that clause that says they must call parliament, instead of an order in council, as it was before, improves it a bit?

Mr. SCOTT: Yes, I think it improves it a bit; but I think if a crisis of the magnitude justifying a War Measures Act proclamation existed, parliament would in fact be called. I think these things would happen automatically anyway. But it certainly would make it a little better.

Mr. MARTINI: If we were to make that clause with teeth in it, to protect you during wartime, do you not think we would have to change the War Measures Act first before we made an amendment to this?

Mr. SCOTT: I do think the War Measures Act should be looked at in the light of our current notions of human life, because it was first drafted in 1914 and, if my memory serves me right, has been extremely little amended. We have had the experience now of two world wars, particularly the second one, when problems of how you deal with subversion, and so forth, were very acute. In the light of that experience, I would think that would be enough, and that study and care would have prompted some minimum and basic human rights, even in the emergency of war whereas this bill, as drafted now, says—and would you please look at subsection 5:

> Any act or thing done or authorized or any order or regulation made under the authority of this act, shall be deemed not to be an abrogation, abridgment or infringement of any right or freedom recognized by the Canadian bill of rights.

So, the courts cannot ever say, in respect of any regulation or order in council under the War Measures Act, that it is *ultra vires* because of the degree to which it infringes human rights—and that is a very big statement.

Mr. MARTINI: I do not know whether this question is in order, but I would like to ask it.

Would you rather not have any bill of rights at all than to have this one passed?

Mr. SCOTT: Yes, I would rather have none than this.

Mr. MARTINI: Than to have this?

Mr. SCOTT: Yes.

The CHAIRMAN: Professor, may I suggest to you that the reason you hold that view is because you fear that, with this bill of rights enacted something better may be deferred longer than it would otherwise be.

Mr. SCOTT: I think, certainly, that is part of my thinking, yes.

The CHAIRMAN: Now, may I ask this question. You rather indicated—and, perhaps, I misunderstood you—that this bill had little effect.

I believe that clause 3 is the substantive portion of the act, and may I refer specifically to paragraph (c):

> No such act, order, rule, regulation or law shall be construed or applied so as to deprive a person who has been arrested or detained
>
> (i) of the right to be informed promptly of the reason for his arrest or detention.

Is it not so that at the present time there is no substantive law that requires that a person be informed promptly of the reason for his arrest or retention, and is it not a fact there are frequent cases of people being arrested and held—sometimes, incommunicado—without any charge laid, and in some instances, released without a charge being laid?

Mr. SCOTT: Yes, but if they do that, they break the law.

That came out in the Lamb versus Manuel case in the Supreme Court, in 1959, in connection with another Jehovah Witness case, where the Jehovah Witness had been arrested and held over a week-end with no charge laid. The Jehovah Witness was released then, provided that a promise was given not to sue the police. Of course, this was ineffective, and the police were obliged to pay damages.

I think it is true to say—although I am not familiar with all branches of criminal procedures—that the present criminal procedure requires that the police bring the arrested person to court within a certain limited time.

There is a case I just noticed here. You have a copy of the *Canadian Bar Review*. It sets forth an English case, where a warrant served on a person, on arrest, was held invalid unless, at the time of the serving of the warrant, the nature of the charge was disclosed. Thus, there are protections now for these rights. I doubt if this is going to add anything to this, except to tell the courts, in future, not to allow any future Canadian statute to change the present law unless it is expressly said they want to change the bill of rights.

The CHAIRMAN: Professor, I hardly agree with you that the arrest or detention of a person in all circumstances gives a cause of action.

Mr. SCOTT: No, I am not saying that.

The CHAIRMAN: You have to establish there is bad faith and lack of reasonable and probable cause—for instance, believing an offence has been committed, and that kind of thing, before you can secure any redress. This, on the other hand, is a positive right that is given to persons arrested or detained that they are to be informed promptly of the reason for the arrest or detention.

Mr. SCOTT: But this does not change any present law, does it?

It says the court must not interpret any federal statute as depriving a person of these rights. You see, it is again looking to the interpretation of statutes rather than the changing of any present statute. The present statutes do not deprive a person of these rights.

The CHAIRMAN: But, is it not spelled out, Professor?

You are quite correct when you say they shall not be deprived of these rights, but it goes on and says, specifically:

> And, without limiting the generality of the foregoing, no such act, order, rule, regulation or law shall be construed or applied so as to . . .

have this result.

Now, that, surely, to my mind, is a clear enunciation of a substantive law —that if a person is not informed promptly of the reason for his arrest or detention that a cause of action immediately results.

Mr. SCOTT: Well, you may be right, Mr. Chairman. However, it is not too certain, I think, that it would work out that way.

The CHAIRMAN: Well, I think, perhaps that is the intent.

Mr. SCOTT: Yes.

The CHAIRMAN: If you think there is any doubt, can you suggest what change we should make in this section so that it will be made clear that any offence enumerated here specifically will give an immediate cause of action.

Mr. SCOTT: Well, there are two things. This, in large degree, affects the application of the Criminal Code and the criminal procedure. Now, if there is any imperfection in the present criminal law recording the manner in which an arrest can be effected and the rights of the person arrested, then I would think that the way to remedy that would be to improve the criminal procedure. If what is generally contemplated here is the creation of a right of action for damages against a police officer failing to obey these instructions, as it were, then I wonder whether you want, in another area, the right of action and damages, being a matter of proper and civil rights in each province,—and whether that affects that area at all.

Quite frankly, there are questions here I would need more time to think over before I could be helpful to you—although I think they are proper questions to consider.

The CHAIRMAN: Perhaps just one more question. I am quite sure you can be helpful to the committee.

I refer you to paragraph (e):

> Deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

Now, we have seen, in some bills of right, a declaration that a man is presumed to be innocent until he is proven guilty.

Would you say that that principle is a principle of fundamental justice—that a man is presumed innocent until proven guilty?

Mr. SCOTT: I do not think that the principle of fundamental justice, as the term "fundamental justice" might be used in the courts—the courts have developed what they call principles of natural justice, and I, sometimes, have been surprised that was not the phrase used here.

In the operation of administrative tribunals, suppose you have a licensed commissioner giving a licence for the carrying on of a certain trade or profession, the administrative tribunal ought, in exercising its licensing power, to observe principles of natural justice and, for instance, not cancel the licence arbitrarily without giving the person a right to be heard. The right to be heard is a principle of natural justice. The right not to be judged by someone who

has a bias in this case is a principle of natural justice. There are a few other such principles, but I am not sure that the right to be presumed innocent until proven guilty is such a principle. That depends on the whole operation of the criminal law. It is a very fine principle; but I think there are a few instances where you can find that the principle has been reversed for some specific reason.

Mr. DESCHATELETS: May I ask Professor Scott if in his opinion there is anything in this bill which would give protection to any Canadian citizen who would be caught in the same circumstances as in the Roncarelli case in Montreal.

Mr. SCOTT: You understand that this section 3 only refers to acts of the parliament of Canada. Roncarelli held his legal licence under the alcoholic liquor act in Quebec. There you saw Quebec law interpreted in such a way as to hold that the arbitrary cancellation of that licence for purposes not connected with the purposes of the liquor act, but connected with some other purpose outside of it, was invalid. This is the case then which is meant by the principles of natural justice. Mind you, the principles of natural justice only apply where the administrator is exercising some judicial or quasi judicial authority. If the authority he is exercising is considered to be legislative in its nature he is not obliged to observe these principles. It is a rather technical part of the law where these issues arise. Just in reading this subclause (e) I am not sure that I can see any effect it would have other than to make the court read any federal statute denying these principles with special care and refuse to apply it unless it especially said it wanted to be applied.

Mr. DESCHATELETS: To pursue my predecessor's question in the matter of the proper enjoyment of property, there is no doubt that the Roncarelli case was a case within the provincial jurisdiction, but do you not think that if the Roncarelli case happened after the passing of this bill of rights that he could have been covered by the wording here, "enjoyment of property and the right not to be deprived thereof".

Mr. SCOTT: No; because, as I said before, I do not think that that is an enactment of legislation having effect in the provincial field at all. It is a statement of principles and is not the making of a new law inside a province. Whether the Roncarelli case had been before or after this bill of rights, I would think it would make no difference to the way in which the courts interpreted the Quebec law.

I think someone asked me whether I felt there was much effect which would come from this. The fact that a bill of rights exists makes people more aware, I think, and makes judges more alert to watch out for situations, and clarifies our thinking. To that extent it might influence the law gradually, but will have no immediate effect, as I interpret it, as to the way the provincial law will be interpreted by the courts.

Mr. DORION: It appears that federal legislation may affect a civil right incidentally, but we have to search in order to determine whether or not the federal government is within its own jurisdiction; we have to search the main purpose of the law. For example, as you told us a few moments ago, in a criminal law we have many clauses which affect the liberty of a subject, or the civil rights of a subject; but if we go to the purpose of the clause it is clearly within the federal jurisdiction.

Mr. SCOTT: Yes.

Mr. DORION: Do you not believe that the words "civil liberties", which are translated in French "liberté civile", lead to confusion, because in French we do not speak about civil liberties. We speak about public liberties, relations between a citizen with a state. That probably is the reason why we can have in

a province a charter on civil liberties because it is the relation between the citizen with the provincial state, and here this bill deals with relations of the Canadian citizen with the federal state. Is that right?

Mr. SCOTT: I think so, but the term "civil liberty" is not used in this statute.

Mr. DORION: That is right.

Mr. SCOTT: It is "human rights and fundamental freedoms". It may well be that that phraseology was adopted to avoid the confusion you have drawn attention to. There is a particular confusion in the British North America Act owing to the words "civil rights"—"property and civil rights". That is the American term for civil liberties. It suggests they are inclusive. Personally, I do not think they are. It is private rights essentially which are considered in the section in the British North America Act.

Mr. DORION: In other words, when we are in criminal law very often we are in legislation which affects civil rights in property. I have another observation on which I would like your opinion. Do you not believe that this statute, with this wording, at least would have the effect of an interpretation statute?

Mr. SCOTT: Yes. I think I have said that. I think that is fundamentally what it is. It is rather an extensive special rule of statutory interpretation; that is, a parliamentary instruction to judges in the reading of all Canadian statutes and regulations under the statutes to make sure that in applying this statute they do not allow them to invade these areas of human rights unless, as it says, it has been the express intention of parliament that they wish to do so. That is a rule of interpretation as I see it.

Mr. NASSERDEN: Would you not consider that a real bill then? You said you would like to see a real bill.

Mr. SCOTT: But parliament can amend this by a mere majority vote at any time.

Mr. NASSERDEN: At the time it is in force, it represents something real, does it not?

Mr. SCOTT: Yes, that is quite true; but I think most of these principles are already applied by the courts, but perhaps not precisely.

Mr. NASSERDEN: I was interested in your remark that you would like to see the federal government take some power away from itself. Do you not think that a positive statute, such as this, is better than a negative one which seems to be applying what you have to say in regard to an amendment to the constitution?

Mr. SCOTT: Well, it is quite true that what I would call a true bill of rights, which reflects the application of the sovereignty of parliament, should be in the area of human rights, and that it is a fundamental superior rule of law, saying to parliament "Thou shall not make laws taking away those rights", if you prefer to have a negative law. But it is the protection of those rights against legislative interference that is the point.

Mr. NASSERDEN: But should a declaration of human rights not be positive before we can apply it?

Mr. SCOTT: If this be a declaration of human rights, I would rather like to have it much larger, and just leave it as a solemn affirmation that we believe that these rights are important and are part of the fundamental principles of the Canadian nation. In other words, we would have adopted the universal declaration of human rights of the United Nations, and simply have affirmed our adherence to it in a statute, but not have enacted it as a law. We would merely hold it up as a doctrine.

But as I say, if I were to consider the effect upon school children, let us say, such as something to go on the wall of a schoolroom, I would still rather put up the declaration of human rights of the United Nations than to put up this Canadian bill of rights, because I defy any school child to read clause 3. You have to have good legal training in order to read the first 15 lines of clause 3 and to carry the sense through.

I would rather have that, than a rule of statutory interpretation which has been written for reading by judges. It is true that children can read clause 2 all right. That is fairly neat and clear. But it still leaves out many other rights which the universal declaration of human rights, and the European covenant of human rights include.

Mr. NASSERDEN: In view of the answer you gave to Mr. Dorion a few moments ago, and in view of the fact that judges would be guided by this, do you not think that this is indeed a declaration of certain rights?

Mr. SCOTT: Oh yes, I do not deny that it is a declaration by parliament of its belief in the importance of these rights which are herein named. That is quite true.

Mr. NASSERDEN: That all gets back to my point that it would be a real bill; would you not think so?

Mr. SCOTT: My definition of a real bill is one that stops someone from doing something in the future. But this does not.

Mr. BADANAI: Would Professor Scott indicate if in his opinion a bill could be devised without the consent of the provinces which would protect citizens, notwithstanding provincial jurisdiction, without recourse or change in the British North America Act?

If you follow me, I would like to cite the example of a chap who has a licence, and without cause his licence is cancelled. That is a right which comes under the jurisdiction of a province.

In your opinion then, could a bill be devised to prevent such discrimination being made by a province against a citizen without cause and without obtaining a change in the British North America Act, by the provinces?

Mr. SCOTT: I can think offhand of no way other than perhaps by the creation of a new crime in the criminal Code. I must say it would look a little odd to see in the criminal Code "Thou shall not cancel a licence without a hearing, or something, and if so, you will go to jail".

It is a little unlike normal Criminal Code text; but apart from the criminal law and the power of the federal parliament, I can see no way by which that could be effected by federal legislation other than by an amendment to the British North America Act.

Mr. BADANAI: You are of the opinion that in order to make this bill of rights effective, there should be an amendment to the British North America Act with the consent of the provinces? Is that what you mean?

Mr. SCOTT: That is the kind of bill of rights I would like to see. I think if we worked at it, we could get it. But I would make this final observation: as I have said before, sooner or later we are going to have to give ourselves a Canadian constitution.

We have the British North America Act, but it is not even a Canadian constitution. As a matter of fact, it is one of the oldest constitutions in the world. I think there are only four or five states in the world whose constitutions are as old as the Canadian constitution. We are going to have to have a Canadian constitution, and we are going to have to take away from the United Kingdom parliament the last vestiges of its sovereignty over Canada in legislative terms. It will not affect our relationship with the crown at all, necessarily.

Now, when the time comes—I think perhaps this may be the second step, or this might be the first step—when that revision of our constitution comes, perhaps that is the time when we should put through a true bill of rights, and I think that the constitution, pending federal and provincial legislation, can only be amended by that process.

We may talk of different parts of the constitution in the hope that this will be an entrenched clause in the constitution. But that time is far ahead.

In the meantime we could have gone along—although it is the decision of the house not to do so under the present amendment—but we could get it from the United Kingdom.

Mr. KORCHINSKI: Would you embody many of the laws we have now as set out in this bill in an amendment to the constitution?

Mr. SCOTT: Oh, I would embody most of what is in clause 2, certainly the basic freedoms as set out in paragraphs (*a*) to (*f*) therein, but I do not know if you want to write the protection of property into the fundamental freedoms without due process of law. That might go in.

I think you would draw up a little different list when you are putting it into a fundamental law of the constitution to restrict freedom by legislation than you do when you put it into this kind of bill which is a matter of instruction to judges as to how to interpret statutes.

Mr. KORCHINSKI: Earlier you mentioned sub-clause 3 of clause 3. Do you not think that this act would eliminate or abolish corporate punishment? If you amend the constitution, would you put a section in there which would be something similar to clause 3 (b), and would it not have the same effect? For example, would it not abolish it, or would it abolish it?

If, for example, you should take the positive approach and say that this act does abolish it, that is, corporal punishment, would not the same result come about by an amendment to the constitution if you had that clause?

Mr. SCOTT: I admit that if the present wording of clause 3 (b) were in a constitutional amendment, it would still leave it somewhat uncertain as to its application because, as I have said, the equivalent words are in the English bill of rights of 1689, yet still the death penalty remains; it is not yet abolished in Great Britain, and it has lasted over that time. That is obvious. And the American constitution has something similar as well.

Mr. KORCHINSKI: Certainly you would have to have some provision in there against the imposition of torture and inhuman or degrading treatment or punishment.

Mr. SCOTT: Yes, I would like to put it in there for what it is worth.

Mr. KORCHINSKI: Another question which comes to my mind is this: you thought that perhaps the bill as drafted is somewhat, shall we say, old fashioned and you would prefer to have it a little more modern, something similar to what has been provided in recent years.

My question is this; do you think that perhaps a preamble set out to this particular bill might fill part of that requirement?

Mr. SCOTT: Yes, I do. You could put, what pou might call the aspirational aspects of welfare and developing social institutions, and so forth, into a preamble in a way that does not cause any difficulties in jurisdiction and so forth. It strengthens the non-legal influences of the bill, if you know what I mean. The bill means more to the citizen when it has the type of phrase you find at the opening of the charter of the United Nations, or some of the great phrases in the American constitution and the American declaration of independence, and so forth. These phrases, I think, are appropriate in the preamble to such a bill.

Mr. KORCHINSKI: You mentioned the United Nations bill. Are there any other cases you can site at the moment in respect of a preamble that might meet part of the requirements?

Mr. SCOTT: I do know of actual preambles to constitutions at the moment, but I think, as I said, some of the phrases in the United Nations charter have got the kind of spirit in them which I hoped we could translate into appropriate language for this bill. Some attempts were made, Mr. Chairman, in previous committees on human rights in this parliament, on other drafts of this character. Nobody was wholly convinced by them. It is a problem of phraseology. I do think the weakness in the present bill is its restriction to fairly precise and sometimes rather technical ideas about human rights. These courts, tribunals, commissions and so on are all important, but they have not quite got that political language. This is legal language, none the less important for that reason; but perhaps it would be better to have a little less persuasive and influencial language for the citizen who wants to turn to this and say; here is what I am guaranteed as a Canadian citizen.

Mr. KORCHINSKI: What relationship would an amendment to the constitution have to the War Measures Act, as perhaps a bill of rights has to the War Measures Act? If you have an amendment to the constitution there may be a stronger legal intrepretation there perhaps than you would have in an act, because an act can be overruled by the War Measures Act quite readily. I wonder what relationship you could perhaps draw there. Just how far could you go with the War Measures Act then?

Mr. SCOTT: Constitutions that have restrictions on legislation, like the American bill of rights to the American constitution, have always been interpreted by the courts as not depriving the state of the right to take rather extreme measures in emergency situations consonant with the general purpose of the constitution, which is to preserve the body politic and obviously the liberties of people. I would not anticipate that the writing of fundamental freedom into the text of the B.N.A. act would impair the enforcement of the War Measures Act, properly drawn. This bill of rights, of course, just says that the War Measures Act is untouched by this bill.

Mr. KORCHINSKI: In other words, I fail to see where there is much difference from this, if in the American constitution, for example, you say that the powers which we have.

Mr. SCOTT: I cannot conceive that it contains such extreme measures as that of exiling citizens. The courts would impose some limitation on that. Of course, it imposes some limitation upon emergency measures considered justifiable in the light of that guarantee of freedoms. This essential discretion would be exercised there to allow reasonable tightening up by the state in times of emergency, but not excessive, arbitrary, or utterly uncontrolled ones.

Mr. KORCHINSKI: Your last statement would indicate to me that perhaps there again this is a question of reviewing the War Measures Act rather than this bill. The bill itself is quite allright, if we had perhaps a further study reviewing the War Measures Act, with the idea of amending it to make it properly conform with this act, which we will have if the bill passes.

Mr. SCOTT: I think that is one way of going at the problem. I would like to just re-assert that I do not like the complete dichotomy between human rights defined in the first part of this bill, as normal rights in Canada, and then the statement that when war comes, and the war emergency act is proclaimed, the courts must no longer consider this. It seems to me too sharp a contrast in the light of the interpretation of the laws under the War Emergency Act, particularly in the Japanese-Canadian case. I think this goes too far.

Mr. DORION: Professor Scott, is it your opinion that, even by virtue of the War Measures Act, it is possible to suspend the application of a writ of habeas corpus? I know that during the last war a writ of habeas corpus was not suspended. The only precedent we have, that I know of, was in 1837 when a writ of habeas corpus was suspended, but the judge did not take any account of it. They decided that a habeas corpus writ could not be suspended because it is a part of our constitutional law. I would like to have your opinion on that point.

Mr. SCOTT: It would be my opinion that under the War Measures Act a writ of habeas corpus could be suspended by order in council.

Mr. NASSERDEN: Mr. Chairman and Professor Scott, if we took a look at clause 2, it seems to set out for the individual what freedom in Canada means to him. Clause 3 is directed more or less to the judiciary for their guidance in the future. I notice you said you would like to see a special Department of Justice set up which, I think, is a separate thing altogether from this particular act. Do you not think that clause 4 here pretty well sets the sign posts for legislation in respect of the Criminal Code, or any other laws that may be enacted, or may already be enacted but under revision?

Mr. SCOTT: Yes, I agree that my suggestion that the Department of Justice might have a separate division on human rights, as the United Nations has in its secretariat, is perhaps not appropriate in this Bill. It is a matter of administrative change. I bring the idea before the committee that it is something that strengthens, I think, the fact that protecting human rights is a continuing activity of government. This is not something to write in the law and then wait until something comes up in the courts to decide it. This is something you improve by doing something about it.

Mr. NASSERDEN: Do you not think this is necessary before the other takes place?

Mr. SCOTT: I am not opposed to what clause 4 contains. I think this is a proper function of the Minister of Justice here, but I just wanted it to go a little further.

The CHAIRMAN: Mr. Scott, could I bring you back to subclause (e). Do you think that the substitution of "natural justice" for "fundamental justice" might be preferable?

Mr. SCOTT: I think it is preferable because,—and I am sure your legal advisors will tell you,—the phrase "the principles of natural justice" is well known in English and Canadian administrative law. While the content of these principles is a little vague, they point to certain things, as I have stated such as a fair trial, the right to a hearing by unbiased judges, and if you have an appeal, not to have a man sitting on the appeal who was sitting at the lower court, and so on. Those things have been worked out and developed by judicial decisions and are now a major part of our law. If you take "natural justice" instead of "fundamental justice", you must ask yourself if this is the same or different. I think the one little change makes this statute more harmonious with the case law that now exists in this field.

The CHAIRMAN: May I ask you one further question in that respect? What, if any, effect, would that subclause have upon statutes which: (1) raise a presumption of guilt; or, (2) state that there shall be an irrebuttable presumption? Do you think a statute of that kind will be restricted by this sub-paragraph (e)?

Mr. SCOTT: I could only express an off-the-cuff opinion, but I do not think those statutes would be affected by this. There are some presumptions—for instance, a person in possession of narcotic drugs. I do not think those would be considered as having to be re-interpreted in the light of this section.

The CHAIRMAN: I will take the second one. How about a statute that raises an irrebuttable presumption? Is that not, in effect, a denial of the right to make your defense to a charge and, therefore, is a denial of natural justice?

Mr. SCOTT: Well, I presume the only cases where you would find an irrebuttable presumption are those where some prior evidence has existed which leads to the application of this presumption, and that there would be a trial of the validity of that evidence. In other words, irrebuttable presumption settles a point in a certain way, after certain preliminary proceedings have been gone through; and I would not have thought that would violate this, though I do not want to be pushed into making a firm position on that.

The CHAIRMAN: We may be taking a little unfair advantage of you.

Mr. SCOTT: No, not at all. There are so many of these questions one can ask about, arising out of these provisions, and they would have to be worked out by the courts. But I doubt if the judges would say that such statutes were, in effect, to be amended by the enactment of this statute.

Mr. STEWART: I am sorry, Mr. Scott, but I had to leave the room. You would not say that clause 2 of the bill was exclusive in the sense there would not be any other freedom that might be brought in?

Mr. SCOTT: I might have said that if there were not clause 5 in the bill. That clause 5 makes it quite clear:

> Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

There is always the danger when you lose certain rights, that is your total loss of rights; but I think this bill has taken care of that danger in section 5.

Mr. STEWART: I am a little disturbed about your difficulty in "due process of law". Is that not more or less a well understood term in legal phraseology?

Mr. SCOTT: Giving rise to innumerable cases in the United States.

Mr. STEWART: I know it has in the United States, but has it not a peculiar and particular significance in Canada?

Mr. SCOTT: I would not have thought so, quite frankly.

Mr. STEWART: It is not defined in the code, but "due process of law"—

Mr. SCOTT: Mr. Mundell, who has written a memorandum for the Canadian bar association—

Mr. STEWART: I have read it.

Mr. SCOTT: He calls attention to the two possible meanings of the expression, which I think is fairly taken.

Mr. DESCHATELETS: I have just one question, Mr. Chairman.

I would like to know this, Professor Scott, in your opinion. So far as clause 2 is concerned, let us say the freedom of religion, and let us suppose that in a province such as Quebec, for example, the Jehovah's Witnesses would feel they are prohibited from their freedom of religion in municipalities. Could they use this bill of rights as a legal basis before a court?

Mr. SCOTT: Not in my opinion, if the court were applying some municipal regulation.

Mr. DESCHATELETS: As an individual, as opposed to holding an assembly.

Mr. SCOTT: Even without this bill of rights it is still a question as to what extent a province may regulate the exercise of religion, and to what extent a municipality, exercising delegated powers, may do so. Presumably,

a province may stipulate that a church of a certain size may have only a certain number of people in it. That is looking after the safety of the building and the people inside it.

Mr. DESCHATELETS: Suppose there is no problem of that kind. Has this bill of rights any jurisdiction in a case like that, let us say the Jehovah Witnesses—would they be deprived of their freedom of religion somewhere in Canada? Could they base their claims under this bill, because it says here, in the preamble of clause 2:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist . . . freedom of religion;

Mr. DORION: It all depends on the nature of the proceedings, I believe.

Mr. SCOTT: I would think so. Let us take the example of the child protection act by virtue of which a child is taken away from two Jehovah Witness parents because these Jehovah Witness parents did not want the child to have a blood transfusion. Such cases have arisen. I do not think this bill of rights, when enacted, will affect the way the courts will interpret the actions of that provincial child protection act. Even when it is enacted, there is freedom of religion, and what is its legitimate extent. Our courts would not admit, let us say, that the Mormons have a right to plural marriage as part of their freedom of religion. Even now we must put boundaries around what is the exercise of a religion. The courts will still have to do that after the bill of rights has been enacted, as they did before. But I do not think any provincial regulations or statutes complained of by persons in the province as affecting their religious freedom, will be affected by this. They may be *ultra vires* now as interfering with the criminal law.

Mr. DESCHALELETS: Do you not think that the preamble of clause 2, is pretty wide when it says "in Canada". It seems to me these clauses and paragraphs would apply in all the territories of Canada, without exception.

Mr. NASSERDEN: This is the parliament of Canada.

Mr. STEWART: Does not the Birks case, in effect, decide that religion comes exclusively within the jurisdiction of the federal parliament? Is that not the effect of that case?

Mr. SCOTT: I think that is putting it a little broadly. I think the effect of the Birks case is to say that laws compelling any religious observance, or observance of religious holidays, are laws that belong in the field of criminal law and are therefore beyond the jurisdiction of the province. This, perhaps, may be the same thing as you are saying; but I do not think these words "in Canada" create a difficulty. Clause 2 of this bill, as I see it, is preparatory to the enacting clause which is clause 3, and that is instructions to judges in interpreting federal laws. The federal laws apply all through Canada, and the judges, in interpreting clause 3, must inform themselves of what is in clause 2 in order to know how to read the laws they are going to have to read in clause 3. They are told that all through Canada there are to be these fundamental rights observed, and therefore any federal law which purports to restrain them anywhere in Canada must be read as not restraining. I think that is perfectly proper.

Mr. DESCHATELETS: Mr. Chairman, I have just one last question. Do you not think, Professor Scott, that before this bill of rights is passed it should be referred to the Supreme Court of Canada as a reference, to see if there is anything in this bill which infringes on any provincial jurisdiction, so as to prevent any interpretation of the lower courts?

Mr. SCOTT: I do not really think that is a necessary or a very useful proceeding. If this law does infringe any provincial jurisdiction, the courts are going to say so at some time: the question is going to be answered anyway. Certainly

on my reading of it, I think this was the intention of the persons drafting it, and from the reading of many other people who have written about it, that it does not infringe; and its basic enactment is a matter for the judges, both provincial and federal, in the interpreting of federal laws.

That is a proper function of parliament. If you simply sent this to the Supreme Court and said, "Can you see anything *ultra vires* in it?", it is such a hypothetical question that you would not get a very good answer. I would rather leave that until the question arose, because one thing is certain, that since it is federal legislation, it cannot infringe provincial legislation.

Mr. DESCHATELETS: My question is asked because in the Quebec legislature last February both parties expressed their serious concern as to the constitutionality of this bill.

Mr. SCOTT: I am aware of that, and I think it may have been that the article of Mr. Pigeon had great influence. I think that since the courts, if this is *ultra vires,* will say so anyway; waiting until the case arises in a specific instance is not endangering any provincial right.

The CHAIRMAN: Professor Scott, does it not come down simply to this, that if perchance a federal statute is enacted which does violate provincial jurisdiction, the courts will declare it *ultra vires,* and it has no effect?

Mr. SCOTT: Yes, they will declare it *ultra vires* just as easily after the enactment of the bill of rights as they do now.

Mr. STEWART: Professor Scott, I gather from your remarks that you consider that the category of crimes is not limited at all; that the federal government can declare any act to be a crime, if it so desires, subject to limitation?

Mr. SCOTT: As long as it is not coloured legislation, trying to do something other than make criminal law, yes.

Mr. STEWART: We have the privy council against us on that one. Do you consider the Christie case might have been decided the same way, had it arisen in one of the common law provinces?

Mr. SCOTT: I am not saying that the common law should be framed in the civil law; but I think I am right in saying that there was a majority of common law judges on it at the time, and that did not change the result.

Mind you, there was some dissent in that case at that particular time. I think our feeling about human rights has changed and developed; and so, too, the interpretation might change if that case arose now. Other aspects might be seen, and the case might not go the same way.

The CHAIRMAN: Does that conclude the examination of Mr. Scott? May I say, sir, that—and I am quite sure I am expressing the views of the committee—we appreciate very much your consenting to come before us and to give us your views on this—I think—important bill.

We know that you have done it at some considerable sacrifice. I hope that we have treated you with eminent courtesy. We have probably taken a little advantage of the opportunity of getting some free legal advice.

Mr. SCOTT: You know what lawyers think of that, Mr. Chairman.

The CHAIRMAN: And I am sure that we are all most pleased that you were able to come to the committee, particularly at such short notice.

Mr. SCOTT: Thank you.

Some Hon. MEMBERS: Hear, hear.

Mr. DORION: Mr. Chairman, before the adjournment I would like to make one small observation. I have in my hands the translation of bill C-79, and I believe that the translation of clause 2, paragraph (b) is not correct, because the French meaning of the word "distinction" is not the true translation of "discrimination". "Discrimination" became a French word—I verified

this, and I am sure of it—last year, I believe. "Distinction" has not at all the same meaning as the word "discrimination".

I would suggest that we make a change in the wording of the French version, and the change would be this:

> le droit de l'individu à la protection de la loi quelles que soient la race, l'origine nationale, la couleur, la religion ou le sexe.

Would that be right, professor Scott?

Mr. SCOTT: That sounds very clear to me.

Mr. DORION: It is important.

The CHAIRMAN: I would suggest that you discuss this matter with the law officers, and then perhaps there might be some agreement as to the proper French translation of the English bill.

The CHAIRMAN: Thank you very much, Professor Scott.

Mr. SCOTT: Thank you, Mr. Chairman.

The CHAIRMAN: Gentlemen, we have with us another witness, who is not scheduled for an appearance before the committee; but he has been here all day awaiting an opportunity to appear before the committee. I would suggest that we call him now and give him an opportunity to make his presentation.

We had another witness scheduled for an appearance. He was here, but he has left, and I am not sure whether he will be back today. We may, or may not, be able to dispose of this witness before you wish to adjourn, in which event we would come back later—or would you prefer to adjourn until 8.00 o'clock?

Some Hon. MEMBERS: Yes.

Mr. RAPP: We may still hear this witness.

The CHAIRMAN: Mr. Wright, would that be agreeable to you, to come back at 8.00 o'clock?

Mr. WRIGHT: I would be glad to do that, Mr. Chairman: I should prefer it, if you do not mind.

The CHAIRMAN: It would be better than breaking up your presentation, because we normally would adjourn at 5.00 o'clock. Then, gentlemen, it is agreed that the committee will stand adjourned now until 8.00 o'clock this evening.

EVENING SESSION

THURSDAY, July 14, 1960.
8:08 p.m.

The CHAIRMAN: I will call the meeting to order. There is a possibility we may have a second witness. Our first witness tonight is Mr. C. P. Wright, M.A., Ph.D. I think in this instance it would be well if I were to ask Mr. Wright, before he makes his presentation, to give the committee the biographical background of himself and then proceed with his presentation.

Mr. C. P. WRIGHT (M.A., Ph.D.): First of all, I should say that my present status is simply that of a resident of Ottawa who is a very interested observer of the Canadian political scene. I was born and brought up in England and first went to the United States in 1921. I made my first acquaintance with Canada indirectly. I was a member of the research staff of the Food Research Institute of Stanford University in California. There, I was the principal author of one of its series of Wheat Studies entitled, "Canada As a Producer and Exporter of Wheat". Then I had five years at Harvard university as an instructor and tutor

in economics. I came to live in Canada in 1931, where I had a temporary position as professor of history at Acadia university in Nova Scotia. Then my wife and I settled in Nova Scotia.

It happened that my interest had been aroused in the problem of the St. Lawrence deep waterway in 1932, and so I devoted a considerable amount of time during the next three years to a study of that subject. I wrote a book on the subject entitled "The St. Lawrence Deep Waterway—a Canadian Appraisal". This was published in 1935. It was the writing of that book which gave me my first real interest in Canadian constitutional problems, because one of the problems which had arisen in connection with the various negotiations on the subject of the deep waterway was the extent of the jurisdiction of the dominion on the one hand and the provinces on the other over water power in navigable rivers.

At the same time, 1934-35, members of this house will remember there was considerable discussion in Canada on the subject of what is called "the Bennett New Deal". That, of course, raised a great many questions of jurisdiction and gave me a very special interest in and led me to make a rather special study of the Canadian constitutional law and Canadian constitutional history.

That study was interrupted by the war. I was overseas from 1939 to 1946. I came back to teach at a Canadian university. I spent one year at United College in Winnipeg, and four years at the University of New Brunswick as an associate professor of economics and political science. Then there was a break of two years. There was one winter of teaching at Oxford University in England, and then a good deal of a year spent in a trip around the world. That brought me back to Ottawa; and here I am now.

I have been keenly interested, from 1934 to the present time, in the subject of Canadian constitutional history and law. Today I submitted a letter to the chairman of the committee in which I commented on certain terms in the bill now before you. I should now like to read the paragraphs of that letter to you one by one and to make a few comments upon them as I go on. Perhaps you would like to question me about my views on these separate paragraphs as I complete them. Then, after I have gone through the letter, I should like to make some comments on the general principle of the bill and certain problems of what I would call citizens rights in general in Canada.

I will begin with section 6:

> I would suggest that section 6 should be omitted from the bill and presented to the House of Commons afresh as a bill in its own right, under some such title as the "War Measures (amendment) Act 1960". Since it deals with the forms of procedure to be followed in proclaiming a state of emergency, it seems to be distinctly out of place in a bill that professes to deal in general terms with broad principles of rights and freedoms. I would also observe that the proposed new section 6(1) of the War Measures Act fails to make any provision for the possibility that the circumstances of war may make it impossible for the governor in council to issue any proclamation that will bring sections 3, 4 and 5 of the War Measures Act into force.

Those are my views on section 6.

Section 5:

Mr. DESCHATELETS: Mr. Chairman, may I raise a suggestion similar to that made by Mr. Dorion this afternoon. Would it be better if we deal with the sections as soon as the witness is through with his remarks?

The CHAIRMAN: You would prefer to let him complete this first.

Mr. DESCHATELETS: I have changed my mind. Go ahead.

Mr. DORION: I have changed my mind too. It is better to deal with this and after that discuss it clause by clause.

Mr. WRIGHT: "Section 5."

> If section 6 of bill C-79 is thus deleted—to be brought forward *de novo* in a bill of its own—the justification for the division of the bill into parts I and II would seem to fall to the ground. And in any case, section 5 seems to belong more logically to part I than to part II.
>
> "Section 4. This section defines certain duties imposed upon the Minister of Justice. Actually it deals with two clearly distinguishable subjects—the first being, to take a few words from the bill, 'every proposed regulation', and the second being, likewise, 'every bill introduced in the House of Commons'; and I would submit that each of these subjects deals with matters and raises questions of such importance that each of them should be considered separately, as a subject for legislation in its own right.
>
> "It is, I think, common knowledge that the United Kingdom has been contending for a long time with the problems of justice created by the expedient of 'delegated legislation'. I would not suggest that it is wrong in principle that the Minister of Justice should study every proposed regulation in its draft form in order to appraise its consistency with the principles of the present bill; and indeed I would expect with confidence that he already does so. It rather seems to me that a more elaborate machinery of scrutiny is what is really needed; and accordingly I would suggest that the provision in section 5 which directs the Minister of Justice to apprise proposed regulations should be withdrawn, and that your committee should recommend to the house that a careful study of the problems created by 'delegated legislation' enacted at the instance of Canadian ministers and departments should be undertaken by a royal commission or some other ad hoc body of similar character."

Since I prepared this submission I have looked at the Department of Justice Act. It seems to me, on looking at that act that this power which was apparently conferred upon the Minister of Justice by this bill is already contained there; or that if not already there, it could be added to that act very easily by amendment. Therefore, I do not think it is necessary that this proposal that the Minister of Justice should specially scrutinize delegated legislation—orders, regulations and so on—needs to stand in this particular bill.

Then I go on:

> "The other provision of section 4, that the Minister of Justice shall scrutinize every bill introduced into the House of Commons, is one that I would criticise very strongly. In the first place, every Canadian minister is, by section 9 of the *British North America Act*, 1867, a minister "of the crown"; and it follows from this that the power of scrutiny to be conferred upon the Minister of Justice is essentially a "royal" power. An important question of the privileges of the Commons in relation to the crown thus arises. It is true that, under the *Parliament of Canada Act*, 1875 (United Kingdom, 38 and 39 Victoria, c. 38), the parliament of Canada now possesses virtually complete freedom to legislate upon the privileges, immunities, and powers of each of its Houses; and it follows from this that the provision in the bill on the subject of bills introduced into the House of Commons must certainly be regarded as—in substance—valid and constitutional legislation. Nevertheless, since a question of privilege does, in my view, appear to arise, I would urge that this

proposed diminution of the privileges of members of the House of Commons should be expressly recognized as what it is, and that it should be passed into law—if it is to be passed—in a measure by itself.

"In the second place, I would criticise the proposal on the ground that it deals only with bills introduced into the House of Commons and has nothing to say in relation to bills introduced into the Senate.

"In the third place, I would protest against the establishment of a kind of censorship over bills and over the freedom of speech and action of members of the House of Commons that would thus be entrusted to a minister who occupies an office of a definitely political character. And I would accordingly suggest that your committee should consider the desirability of recommending the establishment in Canada of a "parliamentary counsels' office", such as was first established in the United Kingdom in 1868, and continues to the present day as a most important aid in the drafting of legislation. It would be quite appropriate that a statute creating such an office in Canada should direct it to give consideration in its work to the principles of justice and freedom specified in the Canadian bill of rights.

"In brief, it appears to me that any statutory provision that touches upon the dignity of parliament should itself be given the dignity of a statute of its own.

"*Section 3.* Since this section lays down certain provisions with regard to the interpretation of statutes, it would seem to be appropriate that it should be enacted into law—if such enactment is really necessary—as an amendment to the Interpretation Act.

"By an even more obvious constructional separation than is to be seen in section 4, section 3 also falls into two parts; and here again the two parts are of very different character. The first part deals with the rights and freedoms recognized and declared in section 2; and it concludes (on page 2, line 8) with the words, "recognized by this part". The second part of the section begins (on the same line) with the words, "without limiting the generality of the foregoing", and proceeds to treat of matters relating in some degree to the administration of justice. And this second part of the section is, moreover, itself capable of further division, since its sub-heads (a) and (b) deal with the infliction of pains and penalties, while the further sub-heads (c) to (f) deal with the rights of persons, arrested, detained, and accused. It would thus seem desirable—regardless of whether the subject-matter of section 3 is enacted as part of the present bill or is handled as an amendment to the Interpretation Act—that the present section 3 should be divided into two or even three separate sections.

"Since some of the most significant words and phrases in the second part of the section are capable, as they stand, of more than one interpretation, it would seem to be of great importance that the bill should contain a section of definitions. I would mention, in particular, the words, "other constitutional safe guards", in sub-head (d) (page 2, line 26), and, the principles of "fundamental justice", in sub-head (e) (ibid., line 28). A famous reply of Chief Justice Coke to King James I may be said to have established that there can be no such thing as the principles of fundamental justice apart from the formulated laws and knowledge of those laws".

Professor Scott had something to say on that, and perhaps I should withdraw that particular sentence; but still, it is in the letter.

Subsection 92 (14) of the *British North America Act* confers upon the provincial legislatures an exclusive jurisdiction in relation to "The Administration of Justice in the Province"; and subsection 92 (15) runs as follows:

> The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

It would thus seem highly desirable that recourse should be had to the Supreme Court of Canada for an advisory opinion upon the question of the extent to which the protections recited in section 3 of the bill hold good at the present time in the provincial bodies of law. And it would be of especial importance to establish to what extent—if at all—the constitutional safeguards of Magna Carta can be deemed to hold good in the province of Quebec.

I will make additional comments here, which I did not think of at the time I wrote this letter.

One is, that I presume the provincial attorneys general have rights to initiate prosecutions and also to forbid prosecutions by writs of *nolle prosequi*. So, apparently, provincial attorneys general would have the same right of jurisdiction over this bill, even if it is passed into law as it stands.

Secondly, with regard to that reference to the province of Quebec, I may say I am very, very anxious indeed that the sovereignty of the legislature of the province of Quebec and its laws shall be safeguarded to the fullest possible extent. I do not want to see any national law trespass on what I regard as the real sovereignty of Quebec and its legislature. I think that has been done already to an unwarranted extent.

> *Section 2 and the first part of section 3.* It might be said to be one of the boasts of the English system of law that it does not contain a formulated "bill of rights" because the ordinary body of laws provides effective machinery for the protection of such rights. The division of legislative jurisdiction in Canada has created the possibility that provincial legislation that is professedly enacted in conformity with the powers enumerated in section 92 of the *British North America Act* does in fact, and perhaps even in intention, challenge important civil and political rights within the range of dominion jurisdiction.

Here I am going to make a rather venturesome suggestion:

> In order to give real significance to the declaration of rights contained in section 2 it would seem to be necessary that the first part of section 3 should declare that not merely all acts of the parliament of Canada, but also all acts of all the legislatures, should be construed and applied in conformity with the principles of right and freedom recited in section 2.

That is the end of the letter.

Mr. BADANAI: Mr. Chairman, may I ask Professor Wright if he would consider the appointment of a committee of the House of Commons or of the Senate to which a petitioner may appeal, if for any reason at all his rights were imperilled? He has not mentioned anything about such a committee; but I understand such a committee is functioning now in New Zealand, and the equivalent of a committee also exists in Australia. In that instance, when a citizen is deprived or thinks that he is deprived of some rights he appeals to a commission which functions in the same way as the committee, which would recommend to the government then that his rights be granted or restored, as

the case may be. I would like to have the professor's ideas on the appointing of such a committee.

Mr. WRIGHT: I did not know that there were such commissions in existence in Australia and New Zealand. I have brought along with me some information about an office which has more or less the same functions, which was recently created in Denmark, rather upon the lines of a similar office which has been in existence in Sweden for about 150 years; and I did wish to mention that and describe that office to the committee later. Would that be satisfactory to you?

Mr. BADANAI: Certainly.

Mr. STEWART: Mr. Wright, I did not get the validity or reasons for your suggestion that section 6 be made part of the War Measures Act. Would you mind repeating that?

Mr. WRIGHT: Simply that it did deal with war measures; that is all. I am afraid I did not offer any substantive reasons for saying that. It seemed to me to be part of the War Measures Act. It amends the War Measures Act, and I think it should be in that War Measures Act. That is all.

Mr. STEWART: It has no effect on the validity of this bill as at present drafted?

Mr. WRIGHT: No, is is simply a case of the place at the legislation should be enacted.

Mr. STEWART: This part could have been enacted subject to the provisions of the War Measures Act, without even having clause 6 in it at all?

Mr. WRIGHT: Yes.

The CHAIRMAN: I think his point simply is that inasmuch as section 6 does amend the War Measures Act, it could have been placed in, or could have been brought in as an amendment to the War Measures Act.

Mr. STEWART: I get that point.

Mr. WRIGHT: What I have done in general is to suggest that certain parts of this particular bill should be relocated in other parts of the statute book, where I think they are more properly accommodated. This is one of the parts of the bill which is more properly accommodated in the War Measures Act than in this particular bill.

The CHAIRMAN: Your suggestion was that section 5 might appear in part I instead of part II?

Mr. WRIGHT: Yes. I think that if section 6 is relocated to the War Measures Act the necessity of having the second part disappears, and section 5 simply becomes the last section of the bill.

Mr. STEWART: Section 5 is only to preserve any rights that are not expressly set out in this bill?

Mr. WRIGHT: Yes.

Mr. STEWART: This is a saving clause?

Mr. WRIGHT: Yes.

Mr. STEWART: In other words, this proposed bill is not all exclusive?

Mr. WRIGHT: No.

The CHAIRMAN: I think the point that he makes is that if section 5 is read into part I it would read:

> Nothing in this part shall be construed—

Mr. NASSERDEN: There might be some people in Canada who would like to see it where it is at the present time.

Mr. WRIGHT: Do you mean, that they would like to see section 6 where it is at present?

Mr. NASSERDEN: No, section 5 where it is at present. I do not think it happens to be there by accident.

Mr. STEWART: I was just wondering how far you suggest we go with that definition section. Are you going to try categorically to define all these fundamental rights, due process of law, liberties, fundamental freedoms, and so on; and by doing so are you not curtailing the power of the court that might decide. After all, the common law is still growing, you know.

Mr. WRIGHT: I wanted to leave that suggestion with the committee, and not make any suggestions of my own on that particular point.

The CHAIRMAN: You go no further than to suggest that we might incorporate into the bill, for instance, a definition as to what is meant by "due process of law" or what is meant by—and I think this is another section that bothered us a little before—as to what is meant by "fundamental justice," and that kind of language?

Mr. WRIGHT: Quite so:

The CHAIRMAN: I think it is an idea, but it would be rather difficult, would it not, to attempt to set out in a statute things which are customarily, I would say, expounded by courts rather than in legislation?

Mr. STEWART: I had in mind some of the definitions given in the criminal code which says, "such and such includes, but it does not include something else".

Mr. WRIGHT: In making that suggestion I was not trying to be too helpful to the committee, but was deliberately trying to create some difficulties for it.

Mr. DESCHATELETS: Professor Wright, are you satisfied with this bill of rights, besides your recommendations as to changes of clauses and definitions? Are you satisfied that the purpose of this bill of rights would be obtained by what we have now before us?

Mr. WRIGHT: Actually, in discussing the principles of the bill, I want to criticize those principles very strongly. The chairman said this morning that the house has already committed itself to the principles of the bill, but I am not sure what the principles of the bill really are. Professor Scott criticized the second section, in which the real principles of the bill are recited. I question those principles myself, and have some other reasons for questioning them; and perhaps the real principle of the bill is contained in nothing more than the title of the bill.

I did want to go on to discuss the question of principles by reference to the work of a very great constitutional authority, Professor Dicey.

Mr. DESCHATELETS: Do you feel that with the provisions we have in the bill in its present form the fundamental rights and human rights of Canadian citizens will be protected from now on, if this passes?

Mr. WRIGHT: I should say they are protected already in many respects, sufficiently protected already by the existing law. That is the point on which I do want to offer some opinions later on.

The CHAIRMAN: But you agree, would you not, that while they are protected under existing law they have not been brought together in one statute which a layman could turn up or point to or read as being indicative of the rights which have been established over the years?

Mr. WRIGHT: Yes, that would be the case. They have not been recited in a single place, that is true.

The CHAIRMAN: Would you not agree that is desirable?

Mr. WRIGHT: It might be desirable; but is it desirable in a statute?

Mr. DESCHATELETS: You said in your presentation that you think that the attorneys general of the provinces might have some jurisdiction or pre-eminent jurisdiction over the Minister of Justice in the application of it.

Mr. WRIGHT: I think that is a possibility, is it not?

Mr. DESCHATELETS: Could you elaborate on this a little? Could you show how this can happen? Is it because we are dealing here with civil rights, property or civil rights?

Mr. WRIGHT: No, we are dealing rather with the question of the administration of justice in the province.

Mr. STEWART: This is left to the provinces under the B.N.A. act.

Mr. WRIGHT: If the administration of justice in the province is to be interpreted in that way, then there has been very little court interpretation on that point, I think; but still it has been held that the attorneys general of the provinces have the right of enforcing the laws.

Mr. DESCHATELETS: You said that you are anxious that the sovereignty of the provinces be safeguarded. Is there anything in this bill that could lead you to believe, or to fear, that this sovereignty will be damaged by these provisions?

Mr. WRIGHT: No, I was not particularly concerned with the sovereignty of all the provinces; I was particularly concerned with the sovereignty of the province of Quebec.

Mr. DESCHATELETS: On this particular point: do you think that under the constitution of the British North America Act the province of Quebec has a special status?

Mr. WRIGHT: Oh, yes.

Mr. DESCHATELETS: In what respect?

Mr. WRIGHT: First of all, it has its privileged jurisdiction with respect to property and civil rights in the province. I think that is the most important field in which the province of Quebec has certain rights. But I think perhaps there are other powers in section 92 which might give special privileges.

Mr. DESCHATELETS: Do you think there should be some clauses or provisions here that could be added, in order that these rights of the province of Quebec be protected more than they are here?

Mr. WRIGHT: No, I would not like to suggest that, offhand. What I did suggest was that the Supreme Court of Canada should investigate the present position and return an advisory opinion upon the status of the province of Quebec; and, of course, of the other provinces also, in relation to this bill of rights.

Mr. DESCHATELETS: Do you think, then, that this bill should be examined before it passes, by way of reference to the Supreme Court of Canada?

Mr. WRIGHT: Yes—and particularly the second part of section 3.

Mr. STEWART: Mr. Chairman, there is an academic problem—

The CHAIRMAN: Excuse me. Mr. Dorion has wanted to be recognized for some time.

Mr. DORION: Professor, I would like you to repeat that part in respect to the administration of justice. I did not understand it very well; I did not quite understand your commentary on that point. You recalled that the administration of justice has been the privilege of the attorney general of every province in Canada.

Mr. WRIGHT: Yes.

Mr. DORION: Do I understand that you believe that this bill of rights will have that specific clause in respect to— I do not remember to which part you referred but I would like to know if it would be in accordance with the administration of justice.

Mr. WRIGHT: If it would be, what, with the administration of justice?

Mr. DORION: You spoke about the administration of justice.

Mr. WRIGHT: Yes.

Mr. DORION: Which is a duty within the province of the attorney general. I would like to know to which province you referred when you spoke about it. When you spoke about the administration of justice, I would like to know what was the clause to which you were referring.

Mr. WRIGHT: It would be the second part of clause 3.

Mr. STEWART: (*e*) and (*f*)?

Mr. WRIGHT: Yes.

Mr. DORION: Do you believe that it would be a clause which would be applied to the attorney general in the administration of justice?

Mr. WRIGHT: It might be used. Perhaps in general, I would say that—

Mr. DORION: But do you not consider that it is an encroachment on the provincial rights—because you know that the administration of justice is the duty of the attorney general?

Mr. WRIGHT: Yes.

Mr. DORION: But the administration of justice is guided by the criminal procedure, and the criminal procedure is without the jurisdiction of the federal government.

Mr. WRIGHT: Yes.

Mr. DORION: And this clause is not an encroachment on provincial rights? You did not declare that that clause would be an encroachment on provincial rights?

Mr. WRIGHT: It would be the case, would it not, that the attorney general of a province does have a certain discretion?

Mr. DORION: Yes.

Mr. WRIGHT: He does have a certain discretion in initiating prosecutions?

Mr. DORION: Yes.

Mr. WRIGHT: And he also has a certain right, I think, to enter a writ of *nolle prosequi* if he wishes to stop a prosecution? It is that double power of the provincial attorney general which may override any or all of the provisions in this bill. That is what I suggested. It is a point which occurred to me only this afternoon, and I have not gone into the point at all or asked anybody else's opinion on it. So I simply make that suggestion very tentatively.

The CHAIRMAN: In other words, instead of this being a possible encroachment upon the provincial jurisdiction, you think that possibly provincial jurisdictions may restrict, in a sense, the federal jurisdiction?

Mr. WRIGHT: Yes. Let me say, the administration of provincial jurisdiction might restrict national jurisdiction, the jurisdiction conferred in this bill.

Mr. STEWART: But what freedom would be infringed?

Mr. WRIGHT: The freedom that would be infringed might be the right of a private person to seek a remedy against a certain wrong inflicted upon him.

Mr. STEWART: That would not have anything to do with the criminal law. The right of *nolle prosequi* only applies to criminal law.

The CHAIRMAN: I gather that this is what you mean, that a person injured criminally, who launches a prosecution, might be denied his right, or remedy, shall I say—

Mr. WRIGHT: Yes.

The CHAIRMAN: I guess I am getting into difficulty myself there, because a criminal offence is against the public, or the crown—the people—so there is no private right in respect of a criminal offence.

Mr. STEWART: From a practical standpoint, I was just wondering what was meant.

Mr. WRIGHT: The kind of offence I have in mind is an offence committed by an officer of the government against a private person. Let me suggest that a provincial policeman commits an offence against a private person, that that private person seeks a remedy by a criminal prosecution, and that the attorney general of the province then steps in to protect that provincial policeman and forbids the prosecution.

The CHAIRMAN: You mean, like a prosecution for false arrest?

Mr. WRIGHT: Yes.

The CHAIRMAN: Is there such a thing as a prosecution for that?

Mr. STEWART: There is no prosecution for false arrest; but if a person was illegally arrested and is subsequently acquitted, then he has a civil action for damages for false arrest, malicious prosecution, unjust detention, and so on. But that is civil.

Mr. WRIGHT: Then, instead of false arrest, you might say assault, or undue threat with a weapon.

Mr. STEWART: You still have your highly prerogative rights of mandamus, that you could compel a judge to hear your case, even against a stop order of the attorney general on *nolle prosequi*. I am just trying to figure out how it would apply; that is all.

The CHAIRMAN: I may say, gentlemen, that I hope we can proceed rather quickly with the questioning. Professor Dehler, who had to keep an appointment this afternoon and leave us, is now in the committee room. Therefore, gentlemen, I would ask you to cooperate and expedite your questioning if you can.

Mr. WRIGHT: Mr. Chairman, would you like me to withdraw for the time being, while you hear this other gentleman?

The CHAIRMAN: No, I think we would like to conclude if we can. Is there anything further that you wish to say?

While I have been given considerable latitude by the committee, as you know, I do think that it is outside the functions of this committee to deal with the broad question of the principle of the bill.

Mr. WRIGHT: Yes.

The CHAIRMAN: The bill has received second reading, and it has been referred to us for consideration. So in our study we are pretty much confined to this bill. It may be criticized; it may be amended; it may even be changed; but the general principle of the bill cannot be changed.

Would you not be going beyond the scope of this committee if you were seeking to comment further on the principle of the bill?

Mr. WRIGHT: Possibly I might be doing so. But could I take five or 10 minutes to read a passage from the work of a famous constitutional lawyer, which might throw some light on that question? It will not take very long. Then you could decide whether it is appropriate to discuss that point.

Mr. STEWART: Dicey?

Mr. WRIGHT: Yes. Do you mind?

Mr. STEWART: No, I do not mind.

The CHAIRMAN: We do not want to restrict you.

Mr. STEWART: Dicey is quite an authority.

Mr. WRIGHT: This is Dicey's chapter on the Rule of Law, in his book *Law of the Constitution*, written in 1885. So that he is reviewing bills of rights from the standpoint of 1885, rather than 1960:

> Now, most foreign constitution-makers have begun with declarations of rights. For this they have often been in nowise to blame. Their course of action has more often than not been forced upon them by the stress of circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of legislators. But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. The constitution of 1791 proclaimed liberty of conscience, liberty of the press, the right of public meeting, the responsibility of government officials. But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say so completely non-existent, as at the height of the French revolution. And an observer may well doubt whether a good number of these liberties or rights are even now so well protected under the French republic as under the English monarchy. On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The saw, *ubi jus ibi remedium*,—

where there is a law, there is a remedy:

> —becomes from this point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the rights of man or of Englishmen. The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.

And then, a few more sentences on another page.

The CHAIRMAN: Would you give us the citation from which you are quoting?

Mr. WRIGHT: Yes; this is Dicey, the eighth edition, pages 194 and 195.

Mr. STEWART: Is that Dicey's *Conflicts of Laws*?

Mr. WRIGHT: No; the chapter is entitled Rule of Law.

The CHAIRMAN: And what is the authority?

Mr. WRIGHT: The book is *Law of the Constitution*, and the chapter is entitled The Rule of Law.

There are a few more sentences here:

> The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

That refers to what I call the tradition and character of the people, and it seems to be the ultimate guarantee of personal and political freedom.

There is one more point I should mention. Perhaps I might briefly refer to an article which appeared in "Parliamentary Affairs" in the spring of 1959

written by a Danish official. It describes the activities of the organization to which he had been appointed. I will read a few paragraphs here:

> In 1953 a revised Danish constitutional law came into effect which made provision for a new institution, represented by the office of Folketingets ombudsmand or—as it may be translated—a "State Comptroller" or "Parliamentary Commissioner for Civil and Military Government Administration".
>
> Section 55 of the new constitution of 5th June, 1953, provides:
>
> "By statute shall be provided for the appointment by the Folketing (i.e. parliament) of one or two persons, who shall not be members of the Folketing, to supervise the civil and military administration of the state."

His powers are very very wide.

> In the wording of section 3 of the directives he is to see "whether any person within his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties".
>
> In handling the cases the commissioner has been granted wide powers. He is entitled on receipt of a complaint or on his own initiative to examine any civil or military state activity, and he may inspect any office under the state. Every person in government service is obliged to supply the commissioner with such information and to produce such documents and records which he may require to perform his duties. The right of inspection and access to documents is only subject to a limitation regarding state and certain other secrets, but so far this limitation has been of no importance.
>
> If the commissioner finds that a cabinet minister or former minister should be called on to account for his conduct of office, he submits a recommendation to that effect to parliament. Where the commissioner considers that other persons within his jurisdiction have committed criminal offences in the course of their public service he may instruct the prosecuting authorities to initiate proceedings in the ordinary courts of law. In cases of misconduct of a civil servant the commissioner may further direct the authorities to institute disciplinary investigation against him.

I submit that that is a very important piece of machinery for the enforcement of civil rights and political and human rights and freedoms.

Mr. BADANAI: I would like to ask the professor if I am correct in assuming that in his opinion of the bill it is efficient in its purpose of protecting the rights of an individual? In other words does the bill answer the purpose for which it is being presented to parliament? Does it serve its purpose to protect the rights absolutely.

Mr. WRIGHT: I may be going beyond the scope of the committee in answering that question. It has been allowed, so I will answer it. I think the bill as it stands might actually be detrimental to rights and freedoms. Dicey suggests that a bill of rights might be detrimental because, when once such rights have been written down in a constitutional document there is created a certain tendency to trespass upon them. I do not like to say that that would happen here. I might be going too far in saying that, although it is conceivable that such a tendency might develop. When a specific wrong is inflicted upon some individual, people who might otherwise have come to the support of the person who was wronged might say "Oh well, if the wrong was actually inflicted, the

bill of rights is in existence so this wrong cannot be as serious as we thought it was and we need not rally to the support of this person". That is rather a perverse argument, I confess. But I think it is a possibility.

Mr. KORCHINSKI: Could it not be that since there were no provisions in any act or within the constitution in which certain rights were set out that these people who were wronged had no place to turn to and therefore they tended to disregard the wrong that had been done to them.

Mr. WRIGHT: I think the remedies for any of the wrongs specified in section 2 are already in existence in the ordinary body of law.

Mr. STEWART: Was not Dicey referring to a codification of the law. Prior to 1951 we had set out in our code certain offences but we still retained in the code and in our criminal law some common law offences from England, but in 1951 or 1952 the new code said that if it was not defined in the code then it was not a crime; but we still retained the common law offences. What Dicey is referring to is that once you get a codification then you are restricted by that. I think that is what Dicey had in mind, as I remember Dicey.

The CHAIRMAN: Is that not the expressed purpose of section 8, to make clear that the enumeration of these freedoms is not exhaustive of all freedoms that may exist.

Mr. WRIGHT: That is true, certainly.

Mr. NASSERDEN: Am I not right in saying that your last quotation from Dicey seems to support the premise that the present bill is a better bill than a constitutional amendment would be.

Mr. WRIGHT: He says this:

> The matter to be noted is, that where the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.

Mr. NASSERDEN: Do you agree with that?

Mr. WRIGHT: Yes.

Mr. NASSERDEN: That was what I was trying to find out.

Mr. WRIGHT: I agree with that. I think I have suggested that the real bill of rights of a country is found in the traditions and character of its people. Dicey makes that point very emphatically in earlier chapters of this book.

The CHAIRMAN: Are there any other questions gentlemen? I presume there are no other questions.

On behalf of the committee I would like to convey to you, sir, our thanks and appreciation for volunteering to come before this committee and give us the benefit of your views on this bill. It has been deeply appreciated and we thank you very much.

Now, we have with us Professor Dehler. Would you please come to the front, professor. Perhaps it might be well if you would give us a biography of yourself and your qualifications.

Mr. RONALD DEHLER: My name is Ronald Dehler. I was born in Ottawa on the 15th of July, 1920, which means I shall be 40 tomorrow, and life begins at 40. I was one of ten children. My father was German and my mother Scottish—McDougall. My father made us all learn French.

I spent fourteen years with the Society of Jesus which means I have had fourteen years Jesuit training. I have a few degrees: a B.A. from the university of Ottawa and the university of Montreal, a licentiate in philosophy, Gregorian, Rome; an M.A. from Christi Regis, Toronto, and a Dsj—degretatis. I have taught at Loyola college, Montreal, and at St. Mary's university in Halifax. I taught

philosophy and theology at Ottawa university for three years and in the past year I was teaching science at St. Eustache—Lake of Two Mountains.

I am interested in the bill of rights because I had the pleasure, slightly over a year ago, of being on a panel discussion in the public lecture series of Ottawa university. I was on this panel with the great Canadian historian Professor Arthur Lower of Queens. On that occasion Professor Lower gave the historic background for the bill of rights. I tried—with what success I do not know—to examine the concept "right" and, by an examination of the concept "right", to try to reach what we might call a valued judgment on the legislation.

I am a little sorry to hear that I cannot discuss the principle of the bill. Apparently the bill is accepted in principle, for what that means. I take it that it means we all think it is a good thing. I go along with that; it is a good thing. I think, as statute law, it does not make sense. To me the attempt to line up these fundamental freedoms necessarily falls into such generalities and abstractions that it could not possibly be called statute law. In respect of all these things—that man is free, that man has a right to property, and so on—all it boils down to is that man is a man; that is all it says. Boing!—We want a man to be a man; that is all it says.

I think perhaps we can get a better seizure of the crux of the question if we look at this notion "right". So many people say they would like a bill of rights and you ask them "that is very nice, but what is a right?" They do not seem to know. Well, of course, one answer may be that it is like saying what is a thing. Well, you cannot define "thing"; but I think you can define "right". I think you get a clue to the meaning of right if you look at the word.

Now, I do not want to say that all thinking should be reduced to logic, but I think we can get a clue to the idea if we look at the word. This word "right" has parallels in other languages—recte, righten, dretto and in French "Droite". All these words say "straight line". I think the word in all those languages gives us a very good clue to the thinking behind the word—to the idea, to the meaning of the word. It would take a long time to take that to strict philosophy and the history of law and what not, but I think "right" does mean that. I think if you investigate the documents you will find that is what it does mean—the straight line. It is the straight line between man and his goal. Man is a very, very funny, funny thing. Man is the only creature we know of in the observable world in the cosmos, the only one who is not completely what he should be, who has not secured his nature. A horse is a horse and if it drops dead it does not matter; it cannot go any further. But man can go further. Man can fulfil his faculties, especially the powers that are particular to man, namely his intellect and his will. So that really means the drive in man to fulfil his nature, to carry out the full potential of his intellect and his will—that straight line which no one else can take him from. That is what right means. In other words man has only one basic fundamental right; to be a man and to fulfil himself—which in the western civilization in the Christian context means reach God. I am sorry if there are some atheists here, but I think that is what it means in the western civilization. That is the only one basic fundamental right of man.

The CHAIRMAN: Professor, I do not want to unduly interrupt, but we have before us a bill of rights which deals with specified types of freedom. Could we get on with that portion of the bill and would you let us know whether you think this bill accomplishes anything in the way of preserving such things as the freedom of speech, the freedom of the press, the freedom of religion, and things of that nature.

Mr. DEHLER: I think the bill is an attempt to put into statute law that which does not belong in statute law and that it transcends statute law. It is an attempt to take a universal and put it into the concrete. To my mind the silliness of it will be clearly shown by clause 2 subclause (a):

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms—

and as a matter of fact they always have existed. They have always existed in spite of what Mr. Scott said. So long as there is a human being in Canada the rights are there.

> —namely, (a) the right of the individual to life, liberty, security of the person and the enjoyment of property, and the rights not to be deprived thereof except by due process of law;

How silly can you get. He has these rights; but the due process of law can sweep them away. He has got those rights and they are his so long as they are not taken away by due process of law.

I think the thing is absurd because it is trying to put on statute law that which cannot be put into statute law. It is trying to take a universal and put it into concrete. These creatures are protected by a corpus which grows and grows with honest judges and not with this kind of nonsense.

Thank you.

The CHAIRMAN: I am sure some of the members may not agree with everything you have said. I think they would like to ask you some questions.

Mr. DORION: I understood that to you the statute law does not make sense.

Mr. DEHLER: The statute law makes great sense. It is the real law, the concrete law which changes from century to century and from country to country. It is the law which says if you hit somebody on the nose in 1600 you get two days in jail and in 1960 you get one day in jail.

Mr. DORION: Pardon me. I would like to finish my question. I understood, in speaking about this bill, that to you a statute law does not make sense. Is that what you tell us?

Mr. DEHLER: No. What I said, or tried to say, was that these universals cannot be put into statute law. It should be a manifesto, something prior to the constitution.

Mr. DORION: Would you accept the Magna Carta? Would you mention some of the principles in the English institutions which are not in form of a statute? Do you agree that the bill of rights of 1688 was in the form of statute law? Is it not true that the English institutions, all the important institutions were in the form of statute law? Is that not true?

Mr. DEHLER: It may be statute law by name, but not by fact.

Mr. DORION: All right, that is sufficient for me.

The CHAIRMAN: What do you mean by that?

Mr. DORION: You protest against that formula "except by due process of law"?

Mr. DEHLER: Yes.

Mr. DORION: Do you believe that every human being has the right to enjoy liberty, even if in doing so he infringe my own liberty? Do you understand what I am saying?

Mr. DEHLER: Yes.

Mr. DORION: I would like to direct that to your attention. If he has not such a right, how can we confine him within the limits of his own liberty, except by due process of law?

Mr. DEHLER: We all know—I hope we all know—that the rights of the individual are always subject to the *bonum commune*, the common good, the good of the group. So there are the necessary restrictions. All I am saying is it is impossible to take these universals and say they are statute law. That is all I am saying.

Mr. DORION: I do not think you answered my question.

Mr. DEHLER: I say this should be a manifesto, a preamble.

Mr. DORION: I do not believe you answered my question.

Mr. DEHLER: Could I hear the question again?

The CHAIRMAN: Mr. Badanai?

Mr. BADANAI: Could I ask the professor whether he believes in a bill of rights, or does not? Do you believe in the institution of a bill of rights? Do you believe the government can legislate?

Mr. DEHLER: Now we are getting into the principle, and I understand we should not.

Mr. BADANAI: I know.

Mr. DEHLER: I think it is a good thing to put it down in writing, but not as statute law. But put it down like a flag, or a song, or a hymn. It is like saying, "We all want to be good."

Mr. BADANAI: You do not believe the bill of rights, even if it is written in the statute, means nothing?

Mr. DEHLER: I think it is very important to have it written, because we are always caught by our senses, and it is better to have it written down and children sing it as a song; but I say, not in the statute law.

Mr. KORCHINSKI: As statute law?

Mr. DEHLER: Not as statute law, but as a preamble.

Mr. KORCHINSKI: As a preamble, would you not take something universal and set it down as something concrete?

Mr. DEHLER: That is what the statute laws have to do. But you cannot try and say, "There is the law," and make it so. Suppose there was a law in the Criminal Code which said, "Thou shall not kill". That is a universal. What good is that? You have to say, "In this and this circumstance, if you kill, then you get such and such a penalty." I think I do not express myself very well, but I think we all agree on that.

All I am saying is that this should not be presented as statute law, because it cannot be statute law. Statute law is a law that changes.

Mr. STEWART: You say it should be in writing?

Mr. DEHLER: Yes, as a preamble, as a song, as a hymn, as a flag, as a symbol.

Mr. STEWART: When passed by parliament it becomes a statute law. I do not agree with you. You can write it on birch bark, if you want to; but once you reduce it to writing and pass it through parliament, then it becomes statute law.

Mr. DEHLER: Then we disagree.

Mr. DORION: It is a set principle of English law to have statutes and not declarations of rights. It is a fundamental difference between the English constitution and the American constitution and the French constitution. I would suggest to you that you read a very interesting book by Mr. Boutmi, in 1933, and I believe that is one of the most interesting studies of this particular point, that the English system of law is different even when we have to proclaim the fundamental rights.

Mr. MARTINI: You said this bill is "silly and absurd".

Mr. DEHLER: Eh?

Mr. MARTINI: I think that is what you said; I think I heard that.

Mr. DEHLER: I said, to try to present that to the public as though it was something that the courts could fall back on—it is so general, it is so vague. I say it should be a manifesto.

Mr. MARTINI: Would you agree that a lot of thought has been put into that bill?

Mr. DEHLER: Yes, obviously.

Mr. MARTINI: By intelligent men?

Mr. DEHLER: Yes.

Mr. MARTINI: Men with schooling?

Mr. DEHLER: Yes.

Mr. MARTINI: The Prime Minister and technicians or advisors have given a lot of thought to this bill?

Mr. DEHLER: Yes.

Mr. MARTINI: And you say it is "silly and absurd"?

Mr. DEHLER: Maybe I put a lot of thought into it too.

Mr. MARTINI: Is that not an insult to the intelligence of these men who have worked so hard to present this bill?

Mr. DEHLER: It was not meant that way.

Mr. MARTINI: Have you something better than that to replace this bill?

Mr. DEHLER: I think it should be a manifesto.

The CHAIRMAN: Are there any more questions? Perhaps we can wind this up?

Mr. NASSERDEN: The only thing that bothers me about this presentation, is, first of all, if I understood you correctly, you said the statute law does not make sense?

Mr. DEHLER: No, I said this, the bill of rights being presented as statute law, does not make sense. And by "statute law" maybe we differ on definitions. By statute law I mean what is technically called positive law, which is the law for this time and this place and for these circumstances. That is what I mean by statute law. Maybe you use the term differently.

Mr. NASSERDEN: Would you not agree there is the necessity for that kind of law in any nation or among any people?

Mr. DEHLER: What kind of law—statute law, as I defined it?

Mr. NASSERDEN: Yes, statute law as you define it.

Mr. DEHLER: Obviously.

Mr. NASSERDEN: Statute law?

Mr. DEHLER: Yes, obviously.

Mr. NASSERDEN: How can you say this is a silly thing?

Mr. DEHLER: I am saying it is so general, so universal, so vague, that all it says is, "A man is a man"; and that is all it boils down to. A man has an intellect, a will, and should be allowed to use it as long as it does not hurt the *bonum commune*, the common good.

Mr. NASSERDEN: It says:

> It is hereby recognized and declared, that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) The right of the individual to protection of the law. . . freedom of religion. . . freedom of the press.

—and these other rights.

Mr. DEHLER: It is so general. It says so much and says nothing.

Mr. NASSERDEN: That is not very vague.

The CHAIRMAN: Thank you, Professor, for coming to us this evening and giving us your views on this bill.

Gentlemen, before we adjourn, I would like to indicate to you that tomorrow we expect to have with us, I think it is, Darren L. Michael of the Seventh Day Adventist Church in Canada. You will recall that the church filed a brief on the bill of rights, and I believe it has been distributed to everybody. That is at 9.30 A.M. I think that perhaps in the morning we may also be able to hear witnesses from Montreal, representing the Canadian Jewish Congress.

In the afternoon, at 2 o'clock, we expect that Mr. McInnes will be here to speak on behalf of the Canadian bar association.

Mr. BADANAI: In this room?

Mr. KORCHINSKI: No, it is 112-N.

The CHAIRMAN: We will be back in room 112-N tomorrow morning and tomorrow afternoon.

Mr. STEWART: I move we adjourn.

The CHAIRMAN: We shall adjourn until 9.30 tomorrow morning.

EVIDENCE

FRIDAY, July 15, 1960.
9:30 a.m.

The CHAIRMAN: Order, gentlemen. I would first like to welcome to the committee Mr. Mandziuk, who is replacing Mr. Jorgenson who has found that he is unable to attend the committee meetings.

We have two witnesses here this morning from whom I would like to hear, if possible; and as I mentioned last night, we expect that we shall have a representative from the Canadian bar association here at 2:00 o'clock this afternoon.

This morning we have with us Mr. D. L. Michael of the Seventh-Day Adventist church in Canada. You will recall that this church submitted a very well prepared brief on the first bill of rights which was introduced in 1958, and it received distribution among all the members of the house of commons.

I would therefore now call upon Mr. Michael who perhaps might in some measure introduce himself, indicating his connection with the Seventh Day Adventist church. Inasmuch as he has brought briefs with him and has distributed them among the members of the committee he might find it convenient to omit reading those portions of the brief which he feels may be simply introductory, and leave that to us to read.

The Rev. Darren L. MICHAEL (*Secretary of the Department of Public Affairs, Seventh-Day Adventist Church in Canada*): Thank you, Mr. Chairman. My position with the church is that of secretary of the department of public affairs. I am happy to have associated with me this morning my colleague, Mr. Ainsley Blair, who holds the same post in a provincial office for Ontario and Quebec.

I want to apologize for the contrast in at least the external appearance of the brief compared with the one we submitted some months ago to the Prime Minister and to the Minister of Justice. We would have liked very much to have had an opportunity to prepare this brief in French as well as in English; but I think, Mr. Chairman, that you and the hon. members of this committee are aware of a factor called time. This prevented us from taking the pains to prepare this brief as nicely as we would have liked to have done.

My brief reads as follows:

> Mr. Chairman and honourable members of the special committee established to consider Bill "C-79", "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms", the Seventh-day Adventist Church in Canada is grateful for this opportunity of presenting its views with reference to this important and significant legislative proposal introduced by the Prime Minister.
>
> Such careful consideration, as this gesture reflects, is worthy of the highest traditions of a free society and democratic responsibility reflected in our parliamentary system. It is only in the light of an articulate intelligent and informed public opinion that the elected representatives of all the people can enact that legislation which will be in the public interest having regard to the legitimate rights of all citizens.

This submission has been prepared by the Department of Public Affairs of the Seventh-day Adventist Church in Canada under authority of its national executive committee which is the highest administrative and governing body of the church in Canada.

With your permission, Mr. Chairman, it is possible for me to omit reading the next two pages which follow, because they contain substantially the same information which we gave in our previous briefs to the Prime Minister.

(The two pages referred to are as follows):

BACKGROUND INFORMATION

The Seventh-day Adventist Church in Canada is a conservative, Christian communion that grew out of the great religious renaissance that swept Christendom in the eighteenth and nineteenth centuries. This Church has an organization that is world-wide in its concept of the Christian witness. With this international viewpoint the members of the Church, who are to be found in every province of Canada, bring to their religious life a strong and passionate commitment to the intrinsic freedom of the individual before God.

The denomination operates a globe-girdling chain of hospitals, clinics, welfare centres, youth camps, publishing houses and colleges dedicated to the service of humanity and the material and physical uplift of mankind. This programme of witness and community service is conducted in over 185 countries of the world.

The Bible as the inspired word of God is accepted at the final and supreme authority in matters of faith. As the name suggests, Seventh-day Adventists observe Saturday as the weekly Sabbath in harmony with the example of Christ and the Apostles and believe in the literal, physical and imminent return of Christ to this earth to establish His eternal kingdom as taught in Holy Scripture.

The injunctions of Scripture calling for the demonstration of those principles of good citizenship which cannot be divorced from true Christian piety are acknowledged and taught by the Church. Adventists hold that where the widest measure of freedom, and in particular religious liberty, exists it becomes possible to serve God and one's country with a fidelity and consistency that knows little, if any, stress of conflict.

In asking for the widest measure of liberty for themselves, Seventh-day Adventists ask that all Canadian enjoy the same freedom so that each citizen might make the maximum contribution toward the development of this country. It is for this reason that the members of this communion believe in the complete separation of church and state as the surest guarantee of freedom of conscience. It is the considered opinion of the members of this church that religious liberty is the keystone of the arch of freedom and this can best be achieved where the legitimate interests of both are kept completely separate, though complementary to each other.

I continue reading now at page 4 as follows:

GENERAL OBSERVATIONS

The Prime Minister and government are to be commended for the genuine concern in the preservation and extension of human rights that the introduction of this bill represents. Members of the Adventist Church in Canada have watched with great interest the efforts of the Right Honourable John G. Diefenbaker, Honourable David A. Croll, Mr. M. J.

Coldwell, Honourable Arthur W. Roebuck and many others to secure the basic rights of Canadian citizens through a comprehensive bill of rights.

The work of many public-spirited individuals now finds fruition in this step that the Parliament of Canada is being asked to take. The passage of this measure will mark an historic and significant milestone for this country in its quest for freedom and peace under the rule of law.

In a rapidly changing society the nature and content of freedom cannot be immune to the stress and strain of the forces of growth and change. The last two decades have shown that fundamental human liberty is not secure from attack. It must be noted in this context that many of the most serious threats to individual human rights have come during periods of war or grave national emergency. This is something which must not be overlooked in any genuine attempt to secure these basic freedoms.

Another point which bears examination is that substantial assaults upon the fundamental rights of the individual citizen and of minorities have taken place in those areas of responsibility considered to be within the jurisdiction of the provinces. If effective measures are to be undertaken to conserve liberty and protect it from such onslaughts as would ultimately destroy it the experience of the past dare not be ignored.

For many years Seventh-day Adventists have looked toward the day when those essential human rights so precious to the devout, patriotic citizen would be more clearly recognized and assured. Assembled here in Ottawa in 1955, the fifth quadrennial session of the Seventh-day Adventist Church in Canada unanimously adopted a resolution calling for the enactment of an effective bill of rights that would secure the fundamental freedoms of all Canadians. Again, at Edmonton, last year, the sixth quadrennial session re-affirmed its commitment to this objective. Provincial or regional conferences of the denomination have given expression to this aspiration as have other organizations and conclaves of the Church.

If, as the Prime Minister and other Honourable Members have pointed out, this bill is a "first step" along a continuing road of enlarging freedom which will be followed by other important developments having as their goal the preservation and extension of liberty, the passage of this measure deserves the plaudits of every Canadian. However, if it is felt that human rights are now secure for all time and all that could be done to secure them has been accomplished in this proposed act, one cannot help but entertain the most pessimistic hopes for the future.

If this is to be the first step along a broadening road that will lead to an increasing enjoyment of individual liberty there must be no delay nor hesitation in the preparation required to take the next step, and the next one after that. Not only is it imperative that eternal vigilance be exercised on behalf of the defense of freedom, but anything short of consistent, persevering efforts to assure the future security of human rights will result in hesitation, uncertainty and the ultimate disaster of a dismal tyranny. This must not happen in Canada.

Seventh-day Adventists pledge themselves to do all in their power as loyal citizens to see that every educational means and legitimate effort will be dedicated to the goal of protecting and enlarging the shrine of Canadian liberty for all Canadians today and for succeeding generations.

No stone will be left unturned by the members of this communion to do their part to the end that Canada might always be known as the citadel of liberty and the haven of the oppressed.

In view of the fact that many of the recent threats to the basic rights of individual Canadians have taken place within the area of provincial jurisdiction, it is to be regretted that this "first step" could not be large enough to encompass both the federal and provincial field. It is to be hoped that the example of the federal government, following as it does the step taken by the province of Saskatchewan in enacting a bill of rights, will encourage other provinces to take the necessary steps required to fill the gaps that now exist.

In the light of the traditional concepts of the supremacy of parliament, there is an uneasiness in the minds of many citizens that legislative measures of this type designed to secure basic human rights are not beyond the reach of an impulsive and capricious majority in the future. While there is probably little technical difference in the mechanics of legislation, it does seem that a bill of rights entrenched within the constitution might possess some additional qualities of permanency which would be desirable. The very difficulty of the process required to secure such an amendment involving both the federal and provincial spheres of jurisdiction is an assurance of the obstacles that would stand in the way of some hasty and ill-advised scheme to diminish those basic human rights which this Bill seeks to guarantee.

Perhaps, federal legislation, complemented by equivalent provincial action will serve as an interim device until such time as these basic freedoms for all Canadians everywhere in Canada can be enshrined in some fundamental constitutional manner beyond the easy reach of some despotic, tampering hands. It is hoped that responsible federal and provincial authorities will not hesitate in taking the initiative to explore the possibilities of discovering a solution to this difficult procedural and constitutional problem. Here is one area where narrow partisanship or bitter parochialism must not be allowed to thwart a spirit of cooperation and every effort toward the attainment of a satisfactory solution. Such a noble cause as liberty deserves the highest and best in terms of statesmanship and leadership.

While it is recognized that specific guarantees of particular rights should be couched in the broadest terms so as to prevent any diminution of rights there is a question as to adequacy of the mere listing of certain categories in clause 2 of the bill. For example, the statement that "freedom of religion" has always existed and shall continue to exist does not specifically assure the citizen of the right to worship as he chooses, propagate his fath, change his beliefs or mode of worship and otherwise manifest his religious convictions so long as he does not significantly impair the equal rights of his fellow-citizens.

Some further definition and clarification carefully drafted along the lines of articles 1, 2, 3, 7, 9, 10, 17, 18, 19, and 20, of the United Nations declaration of human rights could be considered without encountering the legal hazard that what is omitted might be denied by the courts, as this section of the Bill might be interpreted. There are many people who hold with some tenacity to the view that only right and truth have rights, error and heresy have no rights. Within that context the mere affirmation that "freedom of religion" has always existed and shall continue to exist would be meaningless without some further definition and explicit clarification.

In view of the fact that some of the gravest injustices toward the rights of the individual have occurred during a time of war or national emergency, it does seem reasonable to suggest that serious consideration be given by the government and parliament to modifying certain aspects

of the War Measures Act. It seems ironic that when the nation is engaged in a conflict to preserve all that is cherished by freedom-loving citizens the very rights that are supposed to be defended from the attacks of some external foe are often denied and repudiated from within.

Human rights will never be secure until some means are discovered for reconciling the legitimate requirements of the security of the state with the basic, inalienable rights of the individual. It is to be hoped that the suggestion of the leader of the opposition, which appeared to receive a favourable response from the Prime Minister, might result in parliament re-examining the War Measures Act, with a view to ameliorating some of its provisions which do tend to undermine fundamental human rights in times of national emergency, while at the same time providing the appropriate means of assuring the security of the state. Unless this is done, this bill will have to be viewed as only a peacetime guarantee of basic human rights, and in view of the present tense international situation such rights will appear to be tottering on the brink of extinction for some time to come.

While human freedom is fragile, and at times frail, it has managed to exist in the minds and hearts of men ever since the Creator made man a free, moral being endowed with the power of choice. The very survival of liberty imposes upon all the responsibility to assure its continued existence. It is felt that some type of continuing examination by a standing parliamentary committee or other competent body could serve a most useful purpose. The manner in which this proposed act might be operating in actual practice, the changing threats to human rights, new trends and developments in the national awareness or indifference to liberty, could be noted by this type of committee serving indeed, as a sentinel of freedom.

Properly constituted in terms of personnel and drawing upon the legal and judicial resources of the nation, such a body could make a most valuable and worthwhile contribution to the continued preservation of basic human rights in Canada. Its observations, recommendations and reports could very well achieve a prominence and significance second only to the invaluable contributions made by the judicial system through a series of historic and noteworthy decisions in the area of human rights. In the light of such judicial precedents and having regard to the other relevant factors, such a body might well chart the course to be followed in the years ahead, if freedom is to be preserved.

Since the educative process is so essential to the preservation of liberty and human rights by an alert and sensitive public opinion, every effort should be made to make this bill known and understood to as many Canadians as possible. There does seem to be considerable merit in the suggestion that a short, clear, but eloquent preamble would serve a useful purpose in this respect. With the legal skill, literary ability and erudition available to this committee in the person of its distinguished members there should be little difficulty in securing this objective which the Prime Minister has indicated he would welcome, if the committee deems it wise to recommend such an amendment.

SUMMARY

To sum up the views of the Seventh-day Adventist Church in Canada which warmly applauds the Prime Minister for taking the initiative in introducing such a measure the following points are emphasized

with respect to bill C-79, "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms" which it is felt would greatly strengthen the effectiveness of this bill:

1. It could be entrenched in some constitutional manner and thus be less susceptible to tampering or impulsive repeal, and

2. As an interim device the provinces could enact equivalent legislation, and

3. Both federal and provincial authorities could cooperate in undertaking immediately to find a way of securing basic human rights for all Canadians everywhere in Canada, and

4. In clause 2, the simple listing of certain rights without definition or clarification could be strengthened by amplification along the lines of the United Nations Declaration of Human Rights, and

5. The War Measures Act be revised and modified so that even in time of war basic human freedoms need not be negated, and

6. A standing parliamentary committee be established to give continuing examination with reference to the operation of this proposed act in the light of changing circumstances, and

7. This committee could draft, and parliament accept, a preamble to the bill that would in simple, though eloquent language epitomize the convictions of all Canadians with respect to human rights.

CONCLUSION

With other interested groups, the Seventh-day Adventist Church in Canada appreciates the opportunity of presenting the considered opinions of its membership under the authority of its national executive committee with respect to the proposed Canadian bill of rights now before parliament.

The members of this communion are committed to an unswerving faith in the freedom of the individual under God. They pledge their efforts to do everything within their power to foster the preservation and extension of human rights for all Canadians regardless of race or creed. This church cannot admit the justice of favoured treatment for one group at the expense of others. For this reason, it believes strongly in the widest measure of separation of church and state and the complete non-interference in religious matters by the state.

Seventh-day Adventists are loyal citizens who honour and love their Queen and country and consider such devotion as a fundamental element of their religious obligations as Christians to love and serve God supremely while at the same time to love and serve their neighbour.

We are confident that in your hands the cause of freedom will suffer no harm, but that on the contrary, your suggestions and recommendations arising out of your careful study of this bill will serve to strengthen and enhance this significant and historic step which parliament is being asked to take.

We are not unmindful of the heavy responsibilities that rest upon you, Mr. Chairman, and the distinguished members of this committee as well as all honourable members of parliament. Please, be assured of our continued prayers that Almighty God may guide, bless and sustain you in all your endeavours in the public service of Canada and for the security of peace and liberty for all Canadians.

The CHAIRMAN: Mr. Michael I think, first of all, I might very well, on behalf of the members of the committee, thank you very much for the eloquent reference you made to the abilities of this committee. I hope we can fulfil your expectations in that regard.

I think also you should be commended for the preparation of a very fine brief in relatively short period of time. If all the members of the committee were not present at the time of the beginning of the presentation, Mr. Michael expressed his regret that he was not able to have his presentation translated and presented also in the French language, as had been done with a previous brief submitted in connection with the bill that was introduced in parliament in 1958.

Mr. Michael is prepared to answer questions, and I am quite sure that some members of the committee would now wish to ask him a few questions.

Mr. Rapp?

Mr. RAPP: It is stated here, in this brief, that the Seventh Day Adventist Church recommends Amendments to the War Measures Act. Would you elaborate on that, go a little further and specifically state what your intentions are along those lines?

Mr. MICHAEL: Mr. Chairman, not being fortunate enough to be trained in the legal profession, I can only couch my answer in rather general terms, arising out of the observations made in the debate on second reading of this bill, where these observations were made by other honourable members, and in the light of experience with the orders in council and some of the measures that were undertaken during the last war, and other emergencies which came under the authority of the act—which Canadians on sober reflection now feel perhaps should not have been done.

It does seem that if the act is, shall we say, the legal or legislative warrant for these actions, it may be that some safeguards could be written in with regard to the right to access to council, habeas corpus and some of the freedoms that are embraced in this bill and also apply even during an emergency; that the area of freedom that has to be limited when the state is subjected to great stress should be less narrow; that the area of freedom that might have to be put in "cold storage", should be less restricted than is perhaps now possible.

Mr. MARTIN (*Essex East*): You are not opposed to the War Measures Act, are you?

Mr. MICHAEL: I think the state has to have certain authority to cope with emergencies, but I think that authority, in light of experience, can sometimes be improved, amended or revised.

Mr. MARTIN (*Essex East*): What you are saying it, if we can guarantee a greater measure of freedom and guarantee basic human rights, let us try to do that?

Mr. MICHAEL: Yes.

Mr. RAPP: Further, you have also mentioned the preamble and have made a very favourable comment about it. Would you, or would your church be prepared to present a preamble along the lines you would prefer, because I know the committee would appreciate very much if we could have some forms of preamble presented to this committee. I am speaking now as an individual.

Mr. MICHAEL: Mr. Chairman, we had hoped—and I do not say this by way of any criticism of anyone—we might have been able to suggest a draft preamble; but we were working against the problem I have alluded to before, that of time. Not being a lawer myself, we would have had to secure the services of people as skilled and as distinguished as the members of this

committee, to assist us. So we are quite prepared, if there is still time, perhaps to send one by mail, if the committee is still working on it and has not yet come upon a draft that meets their mind.

The CHAIRMAN: I think I can assure you, Mr. Michael, the committee will be glad to receive, at your convenience, any suggested preamble that you may have in connection with this bill.

Mr. Mandziuk?

Mr. MANDZIUK: Thank you, Mr. Chairman. I wanted to ask a question as to whether or not your church has freedom of action in the U.S.S.R. Probably that is off the beat. That will be a short answer, and then I have a comment to make.

Mr. MICHAEL: Mr. Chairman, having regard to the welfare of our members who live there, I would, of course, want to be careful in anything I said. We do not have the normal avenues of access to our church people in that country, and some other countries, that we enjoy in other lands.

Mr. NASSERDEN: Canada?

Mr. MICHAEL: Yes. But such reports as do come to us indicate there is a measure of freedom. I think it would be qualitative and quantitative in degree. We know we have a congregation in the capital city of that country. We have had people who have visited it in recent months. I think our international president, if I am not misinformed, is there now on a visit; but I could not be sure of that. I think, in a limited sense, without making the reservations I think are necessary, we could say there is a degree of freedom enjoyed by our church.

Mr. MANDZIUK: Mr. Chairman, this group is luckier than most other churches. Mr. Michael, are you aware of the fact that the U.S.S.R. has had to—

The CHAIRMAN: Order.

Mr. Mandziuk, I am afraid we are getting very far away from the bill before the committee.

Mr. MANDZIUK: No matter what bill of rights is drawn up there is a statute on the educating of the people. Those two must go together. Educating is just as important as drawing up a bill of rights in no matter what language.

Mr. MICHAEL: I would like to point out that that is one reason we feel the subclauses in clause 2 could benefit from some amplification, because we can list all kinds of things. If there is not a real reciprocal desire to enjoy those freedoms, the mere tabulating of a list is not always sufficient and it becomes less sufficient if the tabulation is sparse or thin. However, we perfectly agree with the observation that you have to have not only the letter of the law but you must have the opportunity of freedom, if both are to work together in the preservation of liberty.

Mr. MANDZIUK: That is what I have in mind.

Mr. DESCHATELETS: In your brief you have outlined several weaknesses in this bill of rights, the most important one being that the bill is not broad enough; secondly, that it cannot apply in time of emergency under the War Measures Act; and, thirdly, that it covers only powers within the federal jurisdiction. Do you imply by this that you are not satisfied with this bill of rights in its present form and that you think it should not pass in its present form? Do you imply that?

Mr. MICHAEL: I do not think so. I think we have indicated in our brief—perhaps not as affirmatively as we should have—that we do applaud the passage of this measure, but in doing so, we are saying that we are not unmindful, in our hopes and aspirations for the preservation of liberty, that this bill could have been stronger. I think even the Prime Minister himself has admitted that

the bill does not do even what he would have liked to see in such a measure. To that extent I think we would agree with the Prime Minister. In pointing out that it does have shortcomings, we are not suggesting we would rather have no loaf at all than the whole loaf. We are prepared to take a quarter or any substantial part of the loaf and hope that the other will be coming from the oven some day soon.

Mr. DESCHATELETS: Also you have mentioned somewhere in your brief that you hope the provinces will adopt a similar course of action and also have their bill of rights. I think you have mentioned this somewhere in your brief.

Mr. MICHAEL: Yes.

Mr. DESCHATELETS: Do you not think it would be a pity if this course of action is followed so that we would have in this country eleven bills of rights, different in their scope, powers and freedoms.

Mr. MICHAEL: Mr. Chairman, I think we would have eleven whether they did so or not. We would hope that in taking the initiative to enact one that the possible differences that might exist would be narrowed. We do not suggest that compartmentalizing the protection of human rights in legislative form is ideal. I think I recall a phrase in our submission that said that until we get the constitutional and procedural problems solved which would give us a uniform protection, then perhaps this would be one more step of which this bill perhaps is a prior step.

Mr. DESCHATELETS: Do you not think that most Canadians would be in favour of one bill of rights which would apply on Canadian territory from one end of the country to the other?

Mr. MICHAEL: Speaking for myself I would—we would.

Mr. DESCHATELETS: Then would you be in favour, since we will have a federal-provincial conference on July 25, of this bill being submitted to the premiers of the provinces so as to have their views on this bill in its present form.

Mr. MICHAEL: Mr. Chairman, I do not know if the terms of reference of this conference would permit of that subject being presented.

Mr. DESCHATELETS: Suppose it is possible.

Mr. MICHAEL: If it was in order I would wish and hope that both federally and provincially no time would be lost in discussing the facets of the problem which would come within the scope of such a conference to find ways where we could achieve the ideals of one uniform legislative measure to protect human rights in Canada.

Mr. MARTINI: You said that the Prime Minister has said that the bill does not go as far as it should go—so far as he would like to see it go. Do you not think that, in expressing his idea about the bill of rights, he felt that, with the material at hand, this is as far as he could go, and that it is the best at the moment. Do you agree with that?

Mr. MICHAEL: I think that construction of the Prime Minister's statement probably is accurate.

Mr. MARTIN (*Essex East*): No one, of course, would suggest that your question is a leading one.

Mr. MARTINI: I am not a lawyer; I am just trying to use common sense. What I am trying to say is that since you say the Prime Minister would have liked to see it go further, he is in the position that he could have made it go further; but there must be something in the laws or statute, which will not permit him at the present time to go further. So would you agree that this is the best at the moment.

Mr. MICHAEL: I do not know that I am competent to pit my legal knowledge against that of the Prime Minister and the Department of Justice. I am quite sure when the Prime Minister said he wished it could have gone further that he meant what he said. Because it did not go further, there must be reasons which to him are sound.

Mr. NASSERDEN: That is a good answer.

Mr. MARTIN (*Essex East*): Mr. Michael, I did not hear you read your whole brief, but I did have an opportunity of reading it. I wish to commend you very strongly upon your submissions. We all are agreed on the bill of rights and we all want it to be as good a document as it can be. You have expressed our views, I think, pretty well in your summary—at least the views I and other members of our party have expressed. As I understand your first recommendation, you would prefer a bill of rights that would cover federal and provincial matters, provided there is provincial consent, and that you would imbed that in the constitution.

Mr. MICHAEL: I think that would be correct. We would like to see it so firmly established that removal, amendment or weakening could not easily be undertaken.

Mr. MARTIN (*Essex East*): Whether or not there is a discussion of this matter at the conference on July 23, I take it that you urge there should be an effort made to arrive at some agreement with the provinces toward that end.

Mr. MICHAEL: I believe, if we think of it in constitutional terms, that we cannot leave the provinces out.

Mr. MARTIN (*Essex East*): And until such time as the bill of rights can be incorporated in the constitution, if I understand your second recommendation correctly, you say that the most satisfactory decision would be if the provinces would enact parallel bills of rights.

Mr. MICHAEL: It is a suggestion of ours.

Mr. MARTIN (*Essex East*): I know; it is your suggestion. As an interim procedure it seems to me it is a very good one. Have you made any submission to any of the provinces along this line, through your organization, which is a very large and respectable one.

Mr. MICHAEL: I thank Mr. Martin for those nice words at the end of his question. We have done it in an informal way in conversations with premiers and attorneys general. We have felt, in the last few years, that possibly we should not press this point vigorously until we saw just what form of action parliament might take. I might say that our briefs and submissions on this topic have been sent to the premiers, attorneys general and opposition leaders in the provincial legislatures.

Mr. MARTIN (*Essex East*): Mr. Martini—my namesake—I know with the best of intentions sought to have you declare that this is a very good bill. No one is suggesting that it is not a good bill.

Mr. MARTINI: At this time.

Mr. MARTIN (*Essex East*): What we are arguing is that it is an inadequate bill; that is different.

Mr. MARTINI: But you voted for it.

Mr. MARTIN (*Essex East*): Yes, I voted for it because, as Mr. Michael has said, half a loaf is better than no loaf. In paragraph 5 you say that the War Measures Act should be revised and modified; and in a previous answer to a question of mine you suggested that an effort should be made to extend as many guarantees of human rights and fundamental freedoms as possible under that act, consistent with national security. Do you think that the War Measures Act should be in the bill of rights at all?

Mr. MICHAEL: Here again I have to confess my inadequacy in the legal profession. I do not know that the act is in the bill, except in so far as the second half of the bill is concerned there is reference to the act. I do not think that the whole act should be incorporated as a part of the bill, but possibly as steps are undertaken to overhaul the act, then maybe the second half of this bill might be affected in the light of such investigations as might be undertaken. It would seem to me that, since there is under the present set of circumstances the possibility that a large portion of our rights are affected when the War Measures Act is proclaimed, it is not inconsistent to have a reference to it in this bill. We would hope that the next step can be taken; that is, that perhaps the War Measures Act can be revised in such a way that some of the basic freedoms will not have to go by the board.

Mr. MARTIN (*Essex East*): I have one more question. I realize that some of these questions are of a legal character, but I think you have answered them very well indeed.

In paragraph No. 6 of your summary you suggest that:

> A standing parliamentary committee be established to give continued examination with reference to the operation of this proposed act in the light of changing circumstances,...

Are you familiar with the new committee or new tribunal of inquiries established in England under the Lord Chancellor for the purpose not only, as you recommend, but to inquire into abuses or violations of human freedom which might come from administrative decisions of boards in the United Kingdom?

Mr. MICHAEL: Mr. Chairman, I am familiar with it to this extent, that I know of its existence; but as to its powers or terms of reference, or as to its scope and authority, I am not conversant with them.

On page 12 we refer to this idea of such a body, but we do not limit it to a standing committee. We say "by a standing parliamentary committee or other competent body"; and for the purpose of brevity on page 14 we left out the "other competent body" from the sentence.

Mr. MARTIN (*Essex East*): My final question is as follows: do you know of the institution they have in New Zealand, which is known as the petition committee, to which any citizen in that country can refer for rectification and alleged violation of any human right, or of a fundamental freedom?

Mr. MICHAEL: I must confess that I am not familiar with it. I have read recently of an institution in one of the Scandinavian countries.

Mr. MARTIN (*Essex East*): Denmark?

Mr. MICHAEL: Where there is a body which fills a parallel role to that suggested by these bodies in the United Kingdom and New Zealand.

The CHAIRMAN: Mr. Michael, apropos of your suggestion about the bill of rights being entrenched in the constitution, to which the provinces would be parties, I presume you are aware of the efforts which have been made over the years to reach agreement between the federal government and the provincial governments on economic matters? You are aware of that?

Mr. MICHAEL: Yes sir.

The CHAIRMAN: Do you think that any greater success would result from the federal and provincial governments attempting to reach agreement on matters such as you feel should be embodied in an effective bill of rights?

Mr. MICHAEL: Perhaps I am a bit of an idealist, but I would like to think that the maintenance of matters of fiscal independence and rights might not provoke quite the same zealous adherence to possessions, and that in the field of human rights there might be more—I would not say a more statesmanlike—but there might be encouragement for a more salutary approach on all sides where the dollar was not involved quite so much.

In the role of the spirit I would hope that there might be less partisanship, and more inspiration.

The CHAIRMAN: I have a supplementary question to that: what is your feeling in regard to the procedure that is now being adopted, namely, that first of all the federal government manifests in this bill, or in a bill which might eventually be passed, its views on the matter of human rights and fundamental freedoms, and then it is open to the provinces to follow suit and indicate in their legislatures how they feel in regard of these matters?

Do you not think that that procedure will expedite the day when you hope that the provinces and the federal government will be able to reach agreement?

Mr. MICHAEL: I think it could very well be that unless we should experience what one hon. member observed here, that the provinces in their legislation might be so divergent in their versions of a bill of rights that the future reconciliation of those views would be impossible.

But I think this bill is possibly the best we can expect at this time. I am not able to say unequivocally that it is the best, because I do not know upon what advice the decision was made. I give the benefit of the doubt, and I will be willing to agree that it probably is the safest we can proceed with at this point.

I hope that complementary legislation in the provincial fields might be a stopgap measure, if a reconciliation of our constitutional problems is a long range, long term and tedious process. I do not think freedom should be exposed to the hazard of attack and onslaught without any safeguards, if there is something we can do, however inadequate it may be.

I think of the experience of the last war in England, when the people armed themselves with old equipment—it was better than nothing—until their war effort caught up. So if we have to get along with something like this, I think we should make the best of it, but not give up our hope of developing something better.

The CHAIRMAN: That is correct; but I do not follow your reasoning. I am not so sure that you adopted the reasoning of the member, but you did make reference to the fact that you thought it might be more difficult if a provincial legislature were to enact a bill of rights which was somewhat divergent from that of the federal authority.

Is it not a fact that if it should enact such a divergent bill, it possesses those views, and those views would still have to be reconciled before any agreement could ever be reached with the federal authority?

Mr. MICHAEL: I think what I meant in making that observation was that there might develop some divergence of view; but when the times does come to get a uniform omnibus statute, there would then have to be definite areas of negotiation reconciled, and I would hope that in the provinces enacting their own bills of rights, they would not be too far from the pattern set here.

I do not think there must be a slavish uniformity to this, because, as you suggest there might be some good ones, or some enlarged concept which they could embrace. But if they were counter in spirit to the federal legislation it would mean that the area of disagreement to be reconciled would be fairly set out.

The CHAIRMAN: That is right, and if we should have difficulty right in this parliament in reconciling the views of the members of the house upon the extent of a bill of rights, then *a fortiori* would it not be more difficult to secure agreement between ten provinces and the federal authority?

Mr. MICHAEL: I do not know. I suppose I would like to think that members of parliament represent the whole country. It may be that ten premiers and that ten attorneys general might not have as many different ideas as to 265 members of parliament, but I am not sure.

Mr. ARGUE: Mr. Chairman, might I ask a question or two? Mr. Michael, the chairman said to you, as we all know, that the federal government and the provinces have had some difficulty reaching agreement on economic matters, although I am sure you are aware that a very large measure of agreement has in fact been achieved from time to time.

But when we are speaking of the difficulty or the possibility of getting an agreement with the provinces on a constitutional amendment, has it been brought to your attention that the premier of Saskatchewan, in January, 1959, addressed a long communication to the Prime Minister, the burden of which was that there should be consultation between the provinces and the federal government on the possibility of obtaining agreement on a constitutional amendment?

Mr. MICHAEL: Again, I am not aware in detail of that communication. But I am quite sure that anything which affected the interest of the provinces would naturally want to be discussed with them, and their views considered.

Mr. ARGUE: I wondered if you knew that at least one province has already taken the initiative to the end that an agreement might be developed, and that Saskatchewan was in favour of such an agreement?

Mr. MICHAEL: In conversation with the premier I know his views in that respect, and his interest in the more comprehensive measure which might even supersede the provincial bill that is in operation there now.

Mr. ARGUE: You would not know that the Prime Minister of Canada has not yet replied to this letter?

Mr. MICHAEL: Not having—

The CHAIRMAN: Let us keep that out.

Mr. ARGUE: I have two or three more questions. Are you unacquainted with the Saskatchewan provincial bill of rights?

Mr. MICHAEL: I have not seen the full draft of it, but I can say this: that in a rather cursory fashion we have been the recipients or the beneficiaries of it in some instances in the province. At least we would like to think that.

Mr. ARGUE: Would you like to tell the committee about it, or would you rather pass over it?

Mr. MICHAEL: It does not matter. It is nothing we are ashamed of.

There was a case where one of the colporteurs of our church—people who sell literature—was apprehended for not having a book agent's licence. He was immediately charged. Now, usually if we discover that we have violated a regulation like that, we try to ascertain what our rights are in it, and if proper, we try to take care of it. But in this case we had no chance to do so. Our representative was charged and taken before a magistrate.

Our solicitor, in preparing the defence, leaned heavily on certain judicial precedents, and on the provisions of the Saskatchewan Bill of Rights Act. I am happy to say that after that episode which was reported to the premier, there was no attempt to complain; but we were informed later that amendments were brought into the Book Agents Act completely eliminating any jurisdiction over that activity of the church, under the terms of that act.

The premier told us himself that he felt that that particular incident indicated one case where the act was being violated by this other statute, and he felt it ought to be made consistent with it; so to that extent we feel that if the bill of rights was a controlling factor in both the magistrate's decision and in subsequent action of the province, we are very grateful for it.

Mr. ARGUE: I have one other general question. I wonder if Mr. Michael is of the opinion that this bill lacks teeth, and should have some teeth in it, and

whether he would say that in his opinion it would be a stronger bill if it contained penalties within the bill for any breach of these provisions, suggested to permit enforcement of these provisions.

As you probably already know, Professor Frank Scott yesterday, at this committee, said this bill lacks "teeth". I want your general comment as to whether you think it lacks "teeth"; and to know if you have any suggestions, if it is desirable, how those "teeth" might be provided?

Mr. MICHAEL: Not being a legal orthodontist I do not know what might be the most effective kind of "teeth" for the measure.

Mr. ARGUE: You agree it does not have any?

Mr. MICHAEL: It may not have them legally. Perhaps time will prove it may have them in terms less specific but, shall we say, more intangible morally. There may be "teeth" in terms of precedents which will enable the establishment of a deterrent which will serve for some breach. But I assume that is perhaps not in the terms you meant "teeth".

Mr. ARGUE: What would you say to the suggestion that this would be more effective legislation if it contained, within it, penalties for a breach of the provisions of the bill and penalties to enable or provide for its enforcement?

Mr. MICHAEL: Mr. Chairman, I really do not know. I think of the Bill of Rights in the United States, and, of course, comparable legislation in the United Kingdom that has served to preserve our freedoms; and some of those very historic documents do not have "teeth". They have provisions for redress and relief, but I suppose one could say some do not have "teeth" in terms of penalties of fines or imprisonment.

Mr. ARGUE: Do you see any provisions for redress or relief in this measure?

Mr. MICHAEL: Only in so far as it will be possibly something that can be cited in appeals to the courts. It may not be strong enough for that. Time alone will prove whether it is strong enough in its persuasive effect upon the judiciary and if appeals are made for redress of grievances.

Mr. STEWART: Would not the "teeth" be in the statute setting up the offence which is the violation of this act? Is that not the reason why there are not any "teeth" in it?

Mr. MICHAEL: Yes, possibly.

Mr. MANDZIUK: Mr. Michael, are you aware of the fact that the previous administration had made a mild effort to set up a committee of attorneys general of the provinces, chaired by the Honourable Stuart Garson, the former Minister of Justice; and that due to the jealousies existing then between the provinces and the federal parliament, this effort came to nought? Are you also aware—

The CHAIRMAN: Perhaps one question at a time, Mr. Mandziuk?

Mr. MANDZIUK: Perhaps he could answer both together, because they are related.

Are you also aware that because the provinces have exclusive jurisdiction over property and civil rights that the provinces would have to give up something? And yet, do you feel the provinces would agree to anything, when an effort had been made by the previous administration—with due credit to them, and I am not depriving them of any credit—and I think my honourable friend, Mr. Martin, knows about this—and nothing was arrived at? So why harp on it?

Mr. MICHAEL: I know some efforts were made and perhaps they came to nought. Perhaps they came to nought because the Minister of Justice, at that time, according to the best lights that he had, may not have himself felt strongly the need for a bill of rights. I do not know. I talked to him back in those years on this question.

Mr. MANDZIUK: I said that he made a "mild effort".

Mr. MICHAEL: That may be. I am quite sure that prior to 1867 there were many overtures made towards confederation that came to nought. But the representatives of the provinces or colonies concerned pursued the topic and persevered, and agreement did come later on.

I do not quite recall the second half of the question that you asked.

Mr. MANDZIUK: It concerned the exclusive jurisdiction of the provinces over property and civil rights.

Mr. MICHAEL: On that question—and here, again, I express this only as a layman, and I know the clause in the British North America Act you have reference to: I do not know that human rights are identical with civil rights or property rights. There undoubtely is some overlapping and meshing, but there may be a difference and distinction. It might still be possible for the provinces to retain jurisdiction over property and civil rights, but there may be something to be said in the use of terms—and maybe this is just dabbling in semantics, but I think perhaps human rights might need a legal definition.

The CHAIRMAN: You will recall that before confederation there were only three provinces involved, and now we have ten. I imagine you would agree that would magnify the difficulties, would it not?

Mr. MICHAEL: I think any statistical change in a situation does create problems, but I think that those three, at that time, seemed quite capable of having lots of problems to resolve.

The CHAIRMAN: I think we should try to wind up as quickly as possible.

Mr. DESCHATELETS: Mr. Michael, we were talking about the "teeth" a few minutes ago. I like your proposal No. 6 in page 14. Do you not think a standing parliamentary committee would serve this purpose of vigilance; that there would be some new rights we might sometimes add to this bill, in the way of effective enforcement, the way to enforce the rights we have already in this Bill of Rights? Do you think that the standing parliamentary committee could serve this purpose very effectively?

Mr. MICHAEL: Mr. Chairman, we made that suggestion because we think it could now—whether it must be a standing parliamentary committee or some other body such as was mentioned by Mr. Martin, in order of what is done in the United Kingdom or New Zealand, and we have no brief for either one. We would like to see that it would be effective, that it would function.

Mr. DESCHATELETS: In other words, this suggestion, in your view, is answering this kind of weakness we have in the bill as far as the enforcement of this bill is concerned?

Mr. MANDZIUK: That is a leading question; that is an expression of opinion.

Mr. DESCHATELETS: Let the witness answer.

Mr. STEWART: Do not put the words in his mouth.

Mr. MANDZIUK: Do not put the words in his mouth.

Mr. MICHAEL: Even if a bill were as ideal as it is humanly possible to make it, I think we would still think the suggestion would have merit, because however perfectly you may draft a bill its application and operation in actual experience is what is important. I think it would be important in this area of human rights, where we are seeing constant change. What once threatened human rights may not now come between; but there are threats that may come from other quarters. Some continuing watch dog might suggest improvements and modifications, and it might be able in its observations to point to possible avenues of approach we have not thought of yet.

Mr. DESCHATELETS: At page 15, in your brief you made this statement:

> This church cannot admit the justice of favoured treatment for one group at the expense of others.

Do you imply here there would be a favoured treatment somewhere in this country for one church at the expense of another?

Mr. MICHAEL: Not in law, Mr. Chairman, because we have no established church. But I was thinking particularly of the specific guarantee against that eventuality that is written into the United States amendment, the first amendment. It is related to our observations with respect to clause 2, that some of these statements of specific freedoms are not amplified and clarified enough. We feel that separation of the church and state does serve in a pluralistic society to provide the widest measure of freedom for all. We could wish for more than just a simple statement, "freedom of religion", as it has always been a fact in Canada and will continue to be. We wish there were some specific guarantees of the type of freedom of religion. That is why we mention the particular passages in the United Nations declaration of Human Rights which we think are relevant to this.

Article 18 reads:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19 reads:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

We think something more specific would help than just the listing of it.

The CHAIRMAN: Gentlemen, I have had a request for sometime from Mr. Macdonnell to ask a question of the witness. He not being a member of this committee. Would the committee give unanimous consent to Mr. Macdonnell?

Agreed to.

The CHAIRMAN: Mr. Macdonnell?

Mr. MACDONNELL: Mr. Chairman, it was merely this. I think there are still some people who have the feeling that once you begin to write down your rights you may forget something. In other words, there is a certain danger in codification. I used to be one of those myself, but I now come to the feeling that, on balance, it is a good thing to have a written bill of rights.

However, I want to ask this. Particularly on page 8, there is a reference to the danger of:

> —impulsive and capricious majority in the future.

Would Mr. Michael tell us whether he knows of any cases where in a free country, in democratic institutions, there has been legislation taking away and reducing human rights? Is this a very practical danger?

Mr. MICHAEL: Mr. Chairman, I think that there are enough instances in history books that will indicate what can happen when there are changes and political and social upheavals in a country.

Mr. MACDONNELL: Germany, for example.

Mr. MICHAEL: Possibly, and we have seen it happen in certain Latin-American countries where there are changes which are not always brought about by a change in boundaries or a change in immigration which alters the complexion of a country's population. These things have happened in the past.

They may not have happened in recent years in the so-called free countries—the western countries. Yet I would not be so sure that under a different regime, in the interests, shall we say, of economic dangers or other physical dangers which may be apprehended, that certain steps may not be taken. It seems that we must constantly think, as the Prime Minister said, that this is not just for this day; this bill is not being presented just for our time, but we are thinking of the future. If we are prudent citizens we much think of the eventualities. We never like to think of sickness striking us in our homes, but we have the medicine cabinet and the doctor's phone number underlined in a rather prominent place. It seems we much think of the possibility that under stress, external or internal, there might be pressures at that moment nd we must do away with some of these things which impede our hope in an emergency.

Mr. MARTINI: A moment ago you said that this bill of rights goes very well as far as it goes at this time, and that from time to time we would have to improve it as we go along. Do you still agree with that?

Mr. MICHAEL: I do not know whether or not it is the bill itself that may be subject to continuous improvement. It seems it goes deeper than that. It is a matter of our constitutional procedures and some of these other matters. I hope, however, that we will always take the view that measures to protect freedom can stand improvement.

Mr. MARTINI: But you feel that it goes as far as it can go at this time.

Mr. MICHAEL: The Prime Minister apparently felt—

Mr. MARTINI: I am saying that in your opinion you think it goes far enough at this time?

Mr. MICHAEL: Under existing circumstances.

Mr. MARTINI: Do you agree with Mr. Martin that this bill is inadequate?

Mr. MICHAEL: Well, time alone will prove whether it is adequate or inadequate.

Mr. MARTINI: Then it should be tried?

Mr. MICHAEL: I would like to see it tried. I think we can say this much, that in our view it is not the final answer, and we think time will prove that. We would hope it could be just a little bit more comprehensive. It may be the only thing we can do at this stage.

Mr. MARTINI: Will you agree it is not inadequate right now.

Mr. MICHAEL: We do not know. We have not seen it in action. The next few years, or a decade, might prove it is more adequate than even some of us may think at this time. It may prove less adequate than its ardent champions think it is. We will hope, in the interest of freedom, that it will prove more adequate than we think at the present time.

Mr. STEWART: As I understand it you are basing this on the concept of the fundamental freedoms.

Mr. MICHAEL: We hope that this act will give that development impetus.

Mr. DESCHATELETS: In respect of your answer to Mr. Martini's question, is it not a fact that at page 14 you have enumerated seven suggestions which in your opinion should be adopted so as to strengthen the bill we have now.

Mr. MICHAEL: In making these observations we recognized, of course, that neither this committee nor perhaps even parliament at this session, in respect of for instance No. 2, the enactment of equivalent legislation, could do that; but we are hopeful that perhaps in the committee's report encouragement could be given to that idea. Probably the amendment to the War Measures Act cannot possibly be undertaken at this session, but we hope that this might encourage action being taken to review it.

Mr. DESCHATELETS: Several times in your presentation you have mentioned that you hope this is only a first step and that with time this bill could be

amended and be strengthened in the light of new conditions. Could you give me an example where a bill of rights in any country of the world has even been amended once?

Mr. MICHAEL: If we take the example which is perhaps closest to us, in the United States, we know that there are more amendments today than there were in 1876 or very shortly thereafter. The fourteenth amendment certainly chronologically followed the tenth, and did it timewise too. Even in the United States the first ten amendments are not considered as special legislative enactments to stand alone; they were amendments to something else.

I do not know that the Magna Carta or the petition of right have been amended, but other steps have been taken which had the effect, perhaps of improving and enlarging the concept of freedom which they were at first designed to protect. I think it could be said of the United States that certainly the subsequent amendments which followed the first ten—I do not know what the count stands at now, although I think there are over twenty and at least the fourteenth we know has a definite bearing on human rights, and that could be said to have modified the first ten.

The CHAIRMAN: I think perhaps I could ask you this question which I think is relevant to what you have been speaking about. If it is suggested that this bill should not be enacted at this session of parliament and that an effort should be made to reach agreement with the provinces, do you think we should recommend that this bill be deferred, or should we pass it and go on from there.

Mr. MICHAEL: Mr. Chairman, we would all wish we had the capacity for foresight. If the enactment of this bill should encourage complacency toward human rights, we would of course be sorry; but on the best information we have we would like to see it enacted even if we cannot take as big a step as we would like to take and which we feel maybe should be taken. We feel that a small short step perhaps is better than no step at all.

Some Hon. MEMBERS: Hear, hear.

Mr. MICHAEL: If the history of the confederation of our country means anything it has shown that some small steps have led to big one. It also has shown that some steps have been the last steps that have been taken. We hope this is not the last; we devotedly hope and pray that it will be the first of many and that others will be big ones.

The CHAIRMAN: Gentlemen, we have with us Mr. Saul Hayes, vice president of the Canadian Jewish congress and Mr. Michael Garber, Q.C., of the national executive committee of the Canadian Jewish congress. These gentlemen have prepared a brief which has been distributed to you. I am sure they would like to appear before this committee. I hope we can afford them an opportunity to do so. As you know, we are committed this afternoon to hear the Canadian bar association. I would hope that the committee would unanimously agree that we adjourn now and reassemble at 11:30 or as shortly thereafter as the questions preliminary to the orders of the day have been disposed of, and that we hear these gentlemen at that time. I am in the hands of the committee, but I think in the circumstances we should try to hear them and then go on this afternoon with the Canadian bar association. Is the committee in unanimous agreement?

Agreed.

The CHAIRMAN: I would like to express, on behalf of the committee Mr. Michael, our thanks and appreciation to you for preparing this brief and submitting to what I thought were quite pointed questions. Recognizing the fact that some of the questions have been upon legal matters, and you do not profess to be skilled in the law, you did a very excellent job in answering them. I am sure you have been very helpful to the committee.

Mr. MICHAEL: Thank you, Mr. Chairman, and through you to every member of the committee for this privilege.

—The committee recessed.

AFTERNOON SESSION

FRIDAY, July 15, 1960.
11.30 a.m.

The CHAIRMAN: Gentlemen, let us come to order. We have with us Mr. Saul Hayes, who is sitting on my right. He is executive vice-president of the Canadian Jewish congress. Next to him is Mr. Michael Garber, Q.C., immediate past president of the national executive committee.

I shall ask Mr. Hayes to introduce the third gentleman.

Mr. SAUL HAYES (*Executive Vice-President, National Jewish Congress*): The third gentleman is Dr. Manfred Saalheimer, who is in charge of legal research for the Canadian Jewish congress.

The CHAIRMAN: May I express on behalf of the committee our regret at our inability to accommodate you this morning. I hope it has not incommoded you too much. We appreciate your coming before the committee to present your views on this proposed legislation.

I suggest then that you proceed in whatever manner you feel you would like.

Mr. HAYES: In view of the shortage of time, might I take a leaf out of the book of the second speaker. And this reminds me of a case when there were two speakers; one was very elequent and took up a good deal of time. But after he was through, after having spoken for one and a half hours, the second speaker got up and said "I have only one word to say."

So, following his advice, I would shorten the proceedings. But I do not wish to reflect upon the very complete presentation which was given to you this morning.

We share the former speaker's point of view in the reason for our inability to provide you with a French version of our presentation. Undoubtedly it was no one's fault; but the fact remains that it was impossible to effect a translation and to mimeograph it and provide it. We regret it, because we always, when we appear before public bodies, like to present our brief in the two official languages; but we have not had an opportunity to do so today.

We, of the Canadian Jewish congress, have been interested in the matter of human rights for a very long time. It may be that to some extent we are prime movers in this field, because in 1945 we were one of the non-governmental organizations which attended at San Francisco; and I shall not be immodest when I say that we, at least, made some contribution to the formulation of the human rights provisions in the United Nations charter. From that time on we have been very much concerned with the possibility of Canada's adopting some form of legislation which would conform to the spirit of the universal declaration of human rights.

I see that Mr. Martin is here now, and I would remind him that when he was secretary of state in 1947, we went before his department and suggested that in the Citizenship Act there be placed a human rights declaration, so that at least in a declaration of citizenship that would appear.

Mr. RAPP: Was your suggestion incorporated at that time?

Mr. HAYES: Not completely. Perhaps we were a little too much in advance of our time, and our suggestions were not wholly incorporated.

Mr. MARTIN (*Essex East*): Since the question has been raised, the declaration of human rights involved so many matters having to do with provincial rights that it was not possible to put it in a bill of human rights.

Mr. MANDZIUK: You did not have a bill of rights at the time.

The CHAIRMAN: I think we should allow Mr. Hayes to proceed with his brief.

Mr. HAYES: I assure you our reputation is not that of a stormy petrel, and I regret that I might have brought about some argument. But in 1950 we were very active before committees and in communications with various departments of government on this matter.

I would like to refer to the original terms of reference, and the first committee I think which was in 1947, was it not, when the first committee sat, and when it was the intention to conform to the suggestion that was made at the time, that inquiries should go out to the heads of law schools, the deans of law schools, and the attorneys general of the provinces in regard to what might be the area of jurisdiction in civil rights.

I raise it now, not because I have a feeling for the history of it, but because I think it is of practical importance.

At that time we felt, and we still feel, that the issue was being bedevilled from the fact that the words "property" and "civil rights" are in juxtaposition, and for not leaving enough room for the feeling that the civil rights program is possible in the federal jurisdiction.

We hammered away at that point for some time in conferences and in communications and so on. And it is of importance now, in our opinion, because we are going to make a submission here which indicates that this whole matter should be referred again to the Supreme Court.

We feel that the original idea of a reference to the Supreme Court is however fraught with many difficulties; but it is a very useful device to find out exactly the import and meaning of that one phrase, if it did nothing else, and that is: what do "property" and "civil rights" mean.

And beyond the interminable arguments, and the consultations with the heads and deans of law schools, we have felt that it was to be expected, certainly in the light of conditions in 1947, that the attorneys general of the provinces would undoubtedly say that property and civil rights were matters of provincial jurisdiction, because it says so in the British North America Act.

But that is not the story at all. That is not the answer. The question is: what does the term property and civil rights, in juxtaposition with property, mean? That is one of the matters we feel which requires a royal commission before a truly effective bill of civil rights can guarantee to Canadian citizens and to Canadians what it proposes to do.

Mr. MARTIN (*Essex East*): Would you have a reference to a court before the passage of the bill?

Mr. HAYES: In our original submission some years ago we did suggest it; and in our present submission on page 3, paragraph (1), we highly commend the Canadian government for having introduced the bill, and we recommend its early adoption with such refinements of text as the labours of this committee will produce. But we say that we did not have, in the time that was given to us, an opportunity to have our legal committee meet in order actually to frame certain recommendations.

We nevertheless knew intuitively, and from past experience over the years; because, while notice was short, we knew about the bill of rights for many years, and we knew that a bill sooner or later would come down. But on certain issues we refrain from listing what we believe to be the shortcomings; or, to put it bluntly, we are prepared to say that we want this bill of rights, because it is a good deal better than nothing.

But please do not get the impression that we believe it to be a perfect instrument, because it does have shortcomings. Some of those shortcomings I think could be remedied in one way, and that is by having a really sound examination of what are property and civil rights, what do they really mean; because before you can ask for one, or go and ask a province to pass a bill of rights, they may get into the same mischief as anybody else, if they assume that the entire gamut of civil rights is covered under the phrase "property and civil rights", and it would double the confusion.

Nevertheless in our brief we do suggest refinements, one of which comes quickly to mind. I shall give it to you only because I want to show the trend of our thinking.

In the original bill, the C-60 bill, there was a provision—I think it was in the same section, section 4, that the Minister of Justice insure that the purposes or provisions of the bill be fully carried out. That was a positive order to the Department of Justice through its minister.

But we thought that that version was a great improvement over the present version which is the negative one. It says:

> 4. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the clerk of the Privy Council pursuant to the Regulations Act and every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this part.

Now in the views of our legal committee sitting on this matter, they would suggest to you that this waters down the bill, and that it is not as good a proposal as the first one, which was a positive one, that everything must be in conformity to the bill of rights legislation, while this is the negative one, and it talks about nothing being inconsistent with it. There is a very big difference both from the point of view of the goal of ideals, and also of the surrounding ministerial approach to the problems, as well as their implementation. At least, that is our submission.

Our second submission—and in all of these matters here, we are speaking for the Canadian Jewish congress which, by a democratic process of election elects delegates every year at the Canadian Jewish congress national convention. Those delegates in turn elect a dominion council, which is the governing body in between sessions; and this dominion council in turn elects an executive committee; and it is upon the authority of that executive committee that we make this presentation to you.

So, by and large, you can say that our submission does represent the viewpoint of Canadian Jewry, which numbers more than a quarter of a million in Canada today. I would also like to point out that, as I said before, we were somewhat pioneers in this matter on human rights. We have had our concern with it. If you will remember your history, it was referred to, I believe in parliament recently, that this year the Canadian Jewish community is observing its 200th anniversary of settlement in Canada. One of the dramatic incidents in the history of the past 200 years of Canadian Jewish life was the admission of Zachary Hart, of Three Rivers, to represent those people, or a large majority of those people in his constituency who twice elected him to sit as their representative for parliament. Perhaps it is well known, and I need not remind you, but I will say briefly that due to the oath that had to be taken in those days in the faith of Christianity, Mr. Hart, being Jewish, could not sit. This was in 1807-08. In 1832, twenty-five years later, the Imperial parliament passed a statute removing these disabilities, which made history, because it was the first place in the United Kingdom or in Britain itself,

and the first place in what was then the British Empire, to remove these disabilities and therefore to accord these measures of civil rights by allowing a citizen of Quebec to take his seat, at the behest of those who wanted him to sit, being the majority of the citizens. It was our first real experience, that we can recall, of a fight for civil rights and civil liberties. I mention this because I think it is a matter of some historic interest, and perhaps the Jewish community, to some extent, have been alive to the issue of human rights and fundamental freedoms with a certain sensitivity that may not be true of other groups.

I will not read the brief, Mr. Chairman. I think you enjoined the previous witness not to, and I will not either, but I shall give you the highlights of our presentation. They are as follows: that some study should be given therefore to the shortcomings of the bill, if the basic premise is agreed to, and our basic premise is that there are shortcomings; (2), that the bill ought to be adopted as a first measure. I think we really believe the old Chinese adage that if you go on a thousand mile trip you still have to take the first step, and we believe this is a first step that should be taken; we believe that it is imperfect, and we believe that you will not get a perfect bill of rights in the first few years of attempt.

Mr. MARTIN (*Essex East*): I do not follow this.

Mr. HAYES: I am at page 3, Mr. Martin.

Mr. MARTIN (*Essex East*): Are you dealing with number 3?

Mr. HAYES: I am dealing with number 1.

The CHAIRMAN: May I just interrupt at this point. I would suggest that we have the brief in its present form printed as an appendix to the report of the proceedings of the committee, and then Mr. Hayes in the course of his reference will be referring to paragraphs and portions of that brief, and we can follow that in the printed proceedings by referring to the appendix.

Mr. MARTIN (*Essex East*): I agree with you in regard to this particular brief, but I do not think this can be the practice to follow. It has been easy for us to read this brief while Mr. Hayes was talking, but we will have another association presenting a brief this afternoon which we will have never seen which I think should be read carefully in the committee so that we can study it as we go along, otherwise we will not have a chance to study it at all. There is no point in having witnesses come here to just put something before the committee which we do not understand. We can understand this one because it is succinct, but I do not agree with your suggestion, Mr. Chairman, that this should be regarded as practice.

Mr. DESCHATELETS: May I suggest that Mr. Hayes read this brief from page 3.

Mr. HAYES: May I be permitted, Mr. Chairman, to add one or two observations to the brief?

The CHAIRMAN: Oh, absolutely yes.

Mr. HAYES: Our first statement is that we commend the Canadian government for having introduced bill C-79 and recommend its early adoption with such refinements in text as the labours of this committee will produce. We suggest that one of the things that might be considered by your commitee is a reference to the Supreme Court on the issue of what that section of the B.N.A. act really means.

Mr. MARTIN (*Essex East*): From what you have said I take it that you mean there should be a reference to the Supreme Court before the bill is passed?

Mr. HAYES: No, after.

Mr. RAPP: Mr. Chairman, maybe we should follow the same procedure as we did with the other two or three briefs which we have heard. The brief should be read first and then questions asked after.

Mr. MARTIN (*Essex East*): We should consider it clause by clause. That should not affect anybody. We should be allowed to ask questions as we go along.

Mr. RAPP: You will be here until four o'clock before we get finished.

Mr. MARTIN (*Essex East*): What you suggest will not shorten this.

The CHAIRMAN: What we have done before, and if it is agreeable to the committee and to Mr. Hayes now, we should allow him to read it and to make any extraneous comments he wishes to, and when he concludes that then we will proceed with the questions.

Mr. MARTIN (*Essex East*): I agree with you, Mr. Chairman, but the reason I am doing this is because we are working under these difficult, frustrating and impossible conditions. I am just waiting—

The CHAIRMAN: Well, now—

Mr. MARTIN (*Essex East*): Just a minute. Mr. Pearson is going to be speaking in the foreign affairs debate and I am going to have to go back into the House of Commons. I am just running in and running out again. The whole thing shows how ridiculous it is that we should be meeting when an important debate like that is on. I reserve the right to ask questions when I feel the circumstances warrant it, under these circumstances.

The CHAIRMAN: Mr. Martin, may I say this; we are meeting at the direction of the steering committee.

Mr. MARTIN (*Essex East*): The steering committee makes no directions.

The CHAIRMAN: We have a job to do, and it was agreeable to the committee to meet. Now, I do not think it is incommoding you any more than it is incommoding any other member of this committee. We have set the procedure and we have been getting along harmoniously.

Mr. MARTIN (*Essex East*): Well, the steering committee does not—

The CHAIRMAN: Mr. Martin, when I am speaking will you please refrain from—

Mr. MARTIN (*Essex East*): I want to say that the steering committee does not make directions, it makes recommendations to the committee, and it is the committee that decides what shall be done.

Mr. STEWART: The committee decided before that we should adjourn and meet again now.

Mr. MARTINI: We are only wasting time. Surely if Mr. Martin wants to get away we should let him ask his questions. We should not be that rigid. If he wants to ask some questions as we go along, I think we should let him ask his questions and let him get away if he has another job to do. I do not think we should be so tough or so rigid, but let us get along with the meeting.

The CHAIRMAN: Is it correct then that we are going to turn the question of the presentation of this brief and the asking of questions over to Mr. Martin entirely? Is he going to carry on from there?

Mr. MARTINI: No, I do not mean that. We have accommodated everyone else and we should accommodate Mr. Martin as well.

Mr. MARTIN (*Essex East*): Thank you, Mr. Martini, for that wise suggestion.

Mr. MARTINI: Let us get on with clause 1, sir.

The CHAIRMAN: We have wasted I guess about ten minutes already. I think you should go ahead now, Mr. Hayes.

Mr. HAYES: Succinctly, Mr. Chairman, our suggestion is that the bill be proceeded with, and that it be a continuing obligation of the House of Commons, in recognition of the fact that there are shortcomings to the bill, to study the number of propositions that not only will be advanced by us, I am sure, but by legal authorities such as the bar association, perhaps, which will be put

before you. We feel that among the matters that should be studied are the questions of amending clause 4 of the present bill in order to give the Minister of Justice a positive rule to apply, rather than the present negative one. We feel that the question in regard to the War Measures Act should be considered, and the matter should be examined as to whether it is needed at all, in the same way that in times of emergency, one of the greatest protections to the freedom of an individual, being the Habeas Corpus Act, is suspended, so in times of emergency the wisdom of parliament will decree, if it has to, that an act such as this will be abrogated during the period of emergency; I do not know, but it is our contention that is all that would be necessary because, with great respect for those who think otherwise, we believe that the introduction of this question of the War Measures Act draws a false net across it, and that is this bill of rights is good providing you do not have emergencies. That should not be the philosophy of the bill. It should be good for the people. If emergencies are such, in the judgment of parliament, that these emergencies beset community, then their good judgment will change and the bill will be suspended. Its operation will be suspended during the period of such emergency. In respect of clause 4 all that needs to be inserted and substituted for the mention of the War Measures Act is simply that parliament during a period of war can amend, or that some legal parliamentary legislation be found to cut out the entire reference to the War Measures Act, or any such parliamentary phraseology as befits such section and cut out the entire reference to the War Measures Act.

Mr. STEWART: This is section 6.

Mr. MARTIN (*Essex East*): Or could you not have a section there saying, "This act does not apply to the War Measures Act"?

Mr. HAYES: Yes.

Mr. MARTIN (*Essex East*): You have not discussed this thing with your own legal people?

Mr. HAYES: In the past, as this part was substantially the same as in Bill C-60, therefore our legal committee did discuss a number of these matters. Indeed, in December, 1958 we were participants in a nation-wide conference that was held in Ottawa called, I think, the human rights conference. No, I am told it is the citizens commission on human rights. We made a presentation at that time, and some of our views, such as a reference to the Supreme Court, were therein contained.

Mr. MARTIN (*Essex East*): Are you through with the War Measures Act?

Mr. HAYES: Yes.

Mr. MARTIN (*Essex East*): Have you any suggestions to make as to what liberalization could take place in the War Measures Act itself?

Mr. HAYES: None at all, because we felt, in our view of it, it is an unnecessary feature of the act.

Mr. MARTIN (*Essex East*): I did not mean whether it should be in the act, but has your organization given any consideration as to what liberalization should take place in the War Measures Act itself?

Mr. HAYES: No, it has not.

The second point is we urge that subsequently provision be made for the establishment of a joint committee of the senate and of the house of commons on human rights and fundamental freedoms, whose main task it would be to lay the groundwork for obtaining that measure of agreement with the provinces which, after adoption by a federal-provincial conference, would in due course make possible a joint address to Westminster. An amendment to the B.N.A. Act should thus be sought, placing a bill of rights covering the fields of provincial as well as federal jurisdiction there, alongside the language-rights

and school-rights which are already there. We do not have pessimistic hopes, but we have optimistic hopes that, in due course, something will eventuate. We are not that optimistic to believe that a mere declaration will produce the desired result, but it will take a lot of meetings and a lot of discussions. The Canadian law is practical, and the climate is different in 1960 from what it was in 1950, and it was different in 1950 from what it was in 1940, and so on; and we do believe there is ample hope, not being guilty of wishful thinking, of such a thought developing, if the guide posts along the road are available.

The CHAIRMAN: Have you any idea how long that would take?

Mr. HAYES: It would be just a sheer guess, and I would not like to have that guess recorded.

The CHAIRMAN: It is not in the immediate future?

Mr. HAYES: No, I would not think so.

Thirdly, we recommend that every consideration be given to making the year 1967, when Canada will mark the centennial of confederation, the very final date for the achievement of two all-important goals. To some extent, your question is really answered in that.

The two goals are: the entrenchment of the bill of rights in the Canadian constitution, and, perhaps maybe even more momentously—we dare hope—it would be possible to have a "nationalization"—the word "nationalization" we put in quotes because we want to direct attention to the fact it has a special meaning—the "nationalization" of our very constitution, which would then no longer be the British North America Act, but the constitution of Canada. A bill of rights in a Canadian constitution, therefore in our opinion, would be the most fitting permanent monument to the Canadian centennial. As it relates to your labours at the present time, we do not think we are irrelevantly putting it before you, in suggesting that be one of the goals of parliament. While it is true that parliament today cannot legislate for 1967, nevertheless we feel it ought to be in the minds of the legislators that the most fitting monument to the Canadian centennial would be the inclusion in a bill of rights the power to amend the constitution.

We have a cautionary note to make on the difficult question of the agreement between the provinces and the federal government to bring about a bill of rights. Our caution is this, that we do not think that a substitute for a federal bill of rights would be a complementary bills of rights within the competence of the provincial jurisdictions, because while there is merit in it and we have due respect to those who believe it would be an important point, we do feel it might involve us in so many different versions of a Canadian bill of rights as to be incomprehensible.

Mr. MARTIN (*Essex East*): I agree with you, but if we cannot entrench a bill of rights in the constitution, do you agree that the next best thing, notwithstanding its shortcomings, which you know, would be the existing of parallel bills of rights for the provinces?

Mr. HAYES: I would like, not to evade the question, but be a little conditional in my answer, because I really feel—and this is a personal view and I would not like to commit my legal committee or Mr. Garber to it—that until there is real appreciation of the terms "property" and "civil rights" now, legally and constitutionally,—

Mr. MARTIN (*Essex East*): Surely that applies to this present bill of rights?

Mr. HAYES: —that until a proper definition is given as to what they really mean, I am afraid that ten provincial bills of rights alongside one federal would probably create more difficulties than it would solve.

In reply to Mr. Martin's question as to whether that same statement does not affect the proposition now before us, that of Bill C-79—I do not think so, because it is a bill within what is stated to be the competency of the federal

jurisdiction, and if there are disputes on it the courts will decide the answers to those disputes. Whereas, if you had it with eleven such disputes and eleven such arguments, I think, to use Judge Brandeis' famous phrase, uttered in another context, "It would be a curse of bigness to proceed."

Mr. MARTIN (*Essex East*): Are you a lawyer?

Mr. HAYES: Yes.

Mr. MARTIN (*Essex East*): I just do not understand this argument. A bill of rights passed in Saskatchewan, let us say, has no legal implication as far as the province of Alberta is concerned. A bill of rights that is wholly within the competence of section 91, that is the federal authority, has no effect whatsoever, let us say, in any of the jurisdictions that come under section 92 of the British North America Act with regard to the provinces. Surely, the situation is that in the case of any provincial bill of rights it attends this one?

There are dangers of not covering all the rights, as you point out, and so on. That could happen in any bill of rights. I do not see why the suggestion of a parallel bill of rights disturbs you, when we offer that only as an alternative to what you advocate and we support the proposed bill of rights as entrenched in the constitution.

Mr. HAYES: Only to this extent, and I believe it is important enough to underline. We could have no guarantee that any of the provincial bills of rights would be uniform.

Mr. MARTIN (*Essex East*): Any more than you could have a guarantee that the federal bill of rights would be uniform with the provincial bill of rights.

Mr. HAYES: No; but it will be uniform with itself: it has no area of comparison.

Mr. MARTIN (*Essex East*): Is this your concern—and if it is, I am inclined to be sympathetic—that you are afraid that if you were to have provincial bills of rights, the liberties and the rights of the Jewish people might be more seriously violated in one province than another?

Mr. HAYES: No.

Mr. MARTIN (*Essex East*): You are not afraid of that?

Mr. HAYES: Not at all.

Mr. MARTIN (*Essex East*): Then I do not understand your argument.

Mr. HAYES: Our argument is that it would tend to do two things: (1), create 11 concepts of citizenship—because unless the 10 were uniform, it would create this; and, secondly, it would solidify and put in a mould certain concepts that belong to the provinces, which may not belong to the provinces.

Mr. MARTIN (*Essex East*): Agreed; but I am assuming that we do not have an entrenched bill of rights. That is what we want, you and I, and others in this committee. But if we have not got that, is it not better to have a bill of rights in a province, than none at all?

Mr. HAYES: Not unless one saw its terms. It might be quite the contrary. To give you a good example: I would say that if the terms of this bill C-79 were different—to theorize—I might say, "No, this is a bad bill of rights. and I do not want it; the committee does not want it". In the same way, unless I saw something before me as to what these provincial bills of rights are, I could answer in advance. Is it better to have that which I cannot see, than nothing at all? I do not know: it might be infinitely worse.

The fifth point that we make is as to concrete suggestions—almost, you might say, procedural, because the substantive part has been dealth with by us, and this would be the procedural part that would come upon the enactment of the bill—for "next steps" which we recommend: that immediately

upon passage of bill C-79 a human rights section be established within the Department of Justice, the function of which would be, on a continuous basis, to deal with the subject matters covered by this bill.

Indeed, it might go further. We raise the point, although candidly I am not sure that we are very dogmatic about it, that it might even be a very great advance if a human rights section could receive complaints of citizens of the violations of human rights. There would be an ever vigilant department which would have to guard and protect the rights of citizens by human rights section, to which all complaints would go.

The objection to it might be that there would be a multiplicity of complaints, frivolous complaints, even stupid ones. Perhaps that might be so; but even so, the feeling that has pervaded some of our thinking is that the attainments and goals of this would be worth the frivolity and, perhaps, some of the multiplicity of complaints.

Mr. RAPP: This would be exactly along the lines that the previous brief presented by the Seventh-Day Adventists suggested, where they suggested a committee should be set up later to more or less review, or keep in touch with this matter.

You recommend that it should be under the Department of Justice?

Mr. HAYES: I may be wrong, but I assumed that their suggestion was for a committee to discuss future improvements of the act, so as to be able to bring forward new improvements all the time.

We have stated that in our opening statement; that is, that the bill is imperfect and there should be some improvements. That is another aspect This aspect has to do with Mr. Citizen, who feels that his rights have been taken from him in some way, shape or form.

Mr. STEWART: A grievance section?

Mr. HAYES: A grievance section; a section to which one could go to complain. There is a bill of rights, and the Department of Justice is administering that bill of rights. It is slightly different.

The CHAIRMAN: Would you let me interject just for a moment. I am not happy with the choice of the word "imperfect". I do not think you mean that it is imperfect in that it is a bill that is meaningless, or anything of that kind.

Perhaps you can enlarge that. I think I know what you mean.

Mr. HAYES: I would put it this way: that if we were asked the simple question to which a "yes" or "no" answer should be given: do you think this is an ideal bill of rights for Canada?—we would have to say "no".

If you were to ask us: do you think this bill of rights is adequate for a start?—we would have to, and would want to say "yes".

Mr. STEWART: Worth while?

Mr. HAYES: Worth while. In fact, with different phraseology we make those very two points in our submission. We want the bill of rights as it is. We think it has shortcomings. I will put it another way, if I may interrupt myself by putting it another way: there are two ways of looking at this bill, in our opinion. One way is that many people in Canada will feel that this is it for all time, and they will assume that this is the perfect instrument.

If we could measure Canadian public opinion, and thought that were so, we would be completely against it, because we would not want that.

There is another way of looking at it and saying that if you are going to wait for ideal conditions as of July 1960, or any time in 1960, and do not have the bill until it is a perfect one, we would say that we are not prepared to wait, that there should be this initial bill.

Mr. RAPP: But still I think the object of clause (*a*) in section (5) here and No. 6 in the previous brief, is trying to achieve the same goal; that is, a standing parliamentary committee to be established to give continual examination.

Here you say:

> That immediately upon passage of bill C-79 a human rights section be established within the Department of Justice, the function of which would be, on a continuous basis, to deal with the subject matters covered by this bill.

In other words, both briefs stress this point, that it should be done by either a committee or a department set up within the Department of Justice, to achieve this goal.

Mr. HAYES: I think I misled you—of course, unwittingly—in so far as our written brief is concerned and the previous submission. Yes, it is more or less the same thing, only that we suggest it should be a human rights section of the Department of Justice, and Mr. Michael's brief puts it the other way.

Mr. MICHAEL GARBER (*Immediate Last Chairman, National Executive Committee, Canadian Jewish Congress*): One does not really exclude the other.

Mr. HAYES: One does not really exclude the other; but I added a second section. It is not written down; but I added another section, that there should be a complaints department, a grievance section, where citizens would feel entitled to make known their complaints.

It is not in our submission, and it is not in the other one; it is an additional piece of work.

Mr. BATTEN: Supposing that this grievance committee were set up and some Canadian citizen, who felt he had not received his rights under the bill of rights, were to complain to that committee: what would you do from there?

Mr. HAYES: The Department of Justice would examine the law and decide whether the factual story before it comes within the four corners of the instrument by which it has to act; and if there was a deprivation, the extent to which it was a federal matter—and it could only be one which was a federal matter—would have to be corrrected.

Mr. BATTEN: Are you suggesting that the Department of Justice give legal opinion to Canadian citizens?

Mr. HAYES: I would have to say that it might come to that, in this sense only: legal opinion as to whether the matter complained of was a violation of the Canadian bill of rights.

Mr. BATTEN: Yes.

Dr. MANFRED SAALHEIMER (*Canadian Jewish Congress*): If I might interject, Mr. Chairman: there is one example of precedent in Canadian federal law, since the enactment of the fair employment practices legislation in 1951, where there does take place an investigation of these things by departmental officers of the Department of Labour regarding complaints of people who think that their rights have been infringed.

There is, of course, within the general set-up of that department, a section specially for the purpose of dealing with that kind of situation.

Mr. HAYES: I am glad Dr. Saalheimer reminded us of that, because our latest knowledge from the Department of Labour is that they are not inundated with complaints: it is very workable.

The CHAIRMAN: That brings this point to my mind: references have been made to the shortcomings of the bill, and things of that kind. The committee would find it most helpful if you could spell out what you think this committee should do with this bill in order to make it as near perfect, or acceptable, as you think it should be.

Mr. HAYES: In summary, Mr. Chairman, I can do it in two or three minutes.

The CHAIRMAN: There is no limitation of time in that respect. If you can be helpful to the committee, I am sure you will shorten our later deliberations.

Mr. HAYES: I want to go back to section 5, where we have two concrete suggestions for what we call, "next steps". We have discussed one of them, which was the formation of the human rights section. The second is that a clause be inserted in all relevant federal enactments—that is, all relevant; those things where federal jurisdiction is involved and which lend themselves to maintaining respect for human rights. This, not necessarily, would have to be all comprehensive—such as the National Housing Act, which is a source of some difficulty, in practice; the Civil Service Act, which should assert specifically that the principle of non-discrimination is guaranteed by the Canadian bill of rights, and that that clause so declareth.

The CHAIRMAN: Do you not recognize the difficulty there?

This committee has before it a bill of rights. You are now suggesting that we make amendments to many other statutes.

I was wondering if you are able to suggest that this bill of rights be extended or altered in some way that would make it more acceptable to you.

Mr. HAYES: We would say, while this clause may be, in the rush, a little infelicitously worded, we do not suggest the bill include in it references to the National Housing Act and the Civil Service Act; we merely say it include in it an order to the Department of Justice that it examine the federal legislation—and these are examples of it—and be ordered, by the statute itself, to insert in these acts the relevant clauses, such as we described.

Mr. STEWART: You could do that with a section in the Interpretation Act—that all which are hereinafter passed, be subject to the provisions.

Mr. SAALHEIMER: Just to clarify this submission; the submission under No. 5 deals with subsequent steps—subsequent to the passage and enactment of the act—one, the human rights section in the Department of Justice, and the second one— then, in the orderly course of the work of parliament, clauses be inserted in all federal enactments, such as the National Housing Act, Civil Service Act, and so on, asserting specifically the principle of non-discrimination, as guaranteed by the Canadian bill of rights, because we believe—and not only we—that the results of the general statement of the rights of a Canadian in the bill of rights can only be as good as these specific enactments that spell out these rights.

Mr. NASSERDEN: If I might interrupt here, I believe that there was some indication in the house at the time the bill was brought in—or about that time; during the question period—that the National Housing Act will be amended to take care of it.

Mr. HAYES: By Mr. Walker.

Mr. NASSERDEN: Yes. And, there is no doubt it will affect a lot of other legislation as well.

The CHAIRMAN: Well, that is why I wanted to point out, that we are creating a little confusion here by dealing with things to be done subsequent to the passing of the bill of rights, and referring, in general terms, to this legislation as being unsatisfactory, because these other things will later have to be done. I think we should delineate somewhat,—and, I am going to give latitude, and say it is in order to discuss all the other things we should do later on, such as specific amendments to specific bills. However, that would hardly indicate we should not now deal with a bill of rights, and enact a bill of rights.

Mr. RAPP: Mr. Chairman, as far as this clause is concerned, I think the bill of rights, under clause 2, paragraph (a), specifically states security of the person and enjoyment of property—and that would take care of it as far as the National Housing Act is concerned.

Then, further on, in the same section of the bill—in paragraph (b), it states the right of the individual to protection of the law without discrimination by reason of race, nation origin, colour, religion or sex. I suppose you would like to see the Civil Service Act inserted in the bill of rights, because it is for the protection of race, national origin and so on. Therefore, I cannot see why (b), under your recommendation, should be inserted, when it is covered already under clause 2 of the bill of rights.

Mr. HAYES: Mr. Chairman, I would be happy to clarify that by saying our submission falls into two parts.

Firstly, there is the present bill, C-79, to which we say there are a number of amendments that should be considered before the bill becomes law. One is the power to be given to the Minister of Justice, making it a more positive responsibility on his part than it is now and; (2), to re-examine the War Measures Act, and see if it is not a weakness of the present bill and tenuates its real import by allowing it to remain that way; (3) not as a next step, but as part of the bill of rights, to insert a human rights section of the Department of Justice, ordering it to carry out the spirit and the intent of the bill.

The CHAIRMAN: Somewhat similar to what was in the first bill that was presented?

Mr. HAYES: No; the first bill told him to examine it. Well, I can read it directly from Bill C-60.

Mr. STEWART: You think the clause in Bill C-60 was stronger than the present clause?

Mr. HAYES: Yes.

Mr. STEWART: Do you want it a little stronger?

Mr. HAYES: I will come to that.

Bill C-60 reads as follows:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in council, examine every proposed regulation submitted in draft form to the clerk of the privy council pursuant to the Regulations Act and every bill introduced in the House of Commons, to ensure that the purpose and provisions of this part in relation thereto are fully carried out.

The new version waters it down somewhat. It says:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in council, examine every proposed regulation submitted in draft form to the clerk of the privy council pursuant to the Regulations Act and every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this part.

The difference might be slight to some, but it is important to a number of us who believe that if your bills have a positive aspect, as C-60 does, and not rushed aside because the department says it is inconsistent, I think we would go further toward a recognition by the public for the need of a bill of rights, and its protection.

The CHAIRMAN: Those are the views we like to have presented. We now will follow it up and, perhaps, ask the Minister of Justice to explain why the change was made.

Mr. BATTEN: Could I ask Mr. Hayes what importance he attributes to a preamble to a bill of rights.

Mr. HAYES: I do not think we attribute too much importance to a preamble, in the eloquent phrases that have been suggested. I say this with sincerity, and with a great deal of respect, to those who hold a contrary opinion. However, we feel that the greatest documents in human history, including the decalogue, and those other than of biblical origin—even the declaration of a bill of rights by the United States—do not have the grand eloquence, at all. We feel it is not essential to have that for a meaningful bill of rights. If it is there, fine; it may be very useful for many functions—for pomp, for ceremony, and so. However, it does not add to the strength of a bill—or, to put it perhaps in a way that may be a little unfair, we would much rather have a bill of rights with certain amendments as such, than a wonderful preamble, without the teeth in it.

The CHAIRMAN: But, you would have no objection to a preamble?

Mr. HAYES: It could not harm it. As the lawyers say, it is not of the essence to us.

The CHAIRMAN: Laymen seem to feel they would like to see a preamble, and it may be the committee will go along with that idea.

Mr. DESCHATELETS: Mr. Hayes, I refer you to page 3, section 1 of your brief:

> We refrain from listing some of the shortcomings of the bill that have occurred to our legal committee.

Have you any other suggestions apart from the one you have already made to this committee.

The CHAIRMAN: I think he made three.

Mr. HAYES: We made three, plus the general statement that it should have been part of the Canadian constitution; that is something to be hoped and wished for. That is one of the shortcomings, but we do not think the bill should be held up because of it.

Mr. RAPP: That is a good statement.

Mr. DESCHATELETS: I refer you to page 4, section 5. Do you really think that a section of the Department of Justice could be as effective as a parliamentary committee, especially if this committee has the required advice and assistance.

Mr. HAYES: I think—

Mr. DESCHATELETS: Excuse me. In short do you think that the representatives of the people would not be a better safeguard to this bill than the employees of the Department of Justice.

Mr. HAYES: I think it is quite human of me to want to have the best of all qualities. I would like to see such a committee as you describe—a joint committee of the houses—and I would also like to see a human rights section of the Department of Justice which would work hand in glove. If you put the hypothetical question: if you had to choose and could only get one which one would you take—I do not think I would be prepared to say at the moment.

Mr. DESCHATELETS: You have expressed very serious doubts as to the mutual jurisdiction of the provinces and the federal government as to the exercise of civil rights. Do you not think that this question should be admittedly referred to the Supreme Court of Canada as a reference in order to decide the exclusive field of each party?

Mr. HAYES: Before the enactment of this bill?

Mr. DESCHATELETS: Yes.

Mr. HAYES: No, I do not, for a number of reasons. I think we have the temper of the Canadian community at the present time—that portion of it

which thinks about these things—which feels that there should be a bill of rights. Certainly, I do not think it is necessary to believe that once you have a bill of rights you are not going to amend it. You might even take the United States bill of rights; there have been several amendments to it. It did not start off with the number of paragraphs it has today. I think originally there were ten paragraphs and perhaps now there may be twenty odd.

Mr. DESCHATELETS: Are you aware that last February in the Quebec legislature the former government of Quebec as well as the opposition expressed their serious concern about this bill of rights so far as the civil rights are concerned.

Mr. HAYES: I am, sir. I followed it very closely. In fact, I was quite a little agitated about it and wondered what had become of it. Much to my present surprise Mr. Rivard, the then attorney general, recanted and said that that is not what they meant. If you remember Mr. Rivard's statement, they watered down completely the interpretation of what the Qubec legislature meant, because I believe they felt they went too far.

Mr. DESCHATELETS: Are you not of the opinion that in this country we should have one bill or rights which would express the aims and the goals of any Canadian citizen, no matter to which province he belongs—that we should have only one bill of rights.

Mr. HAYES: I am expressing here a view which probably is borne out, in some sense, by the history of Canada when I say that perhaps it is an objective in time, but I do not believe that it is a feasible objective at the present time in the light of the development of the Canadian constitution and the Canadian conception of citizenship.

Mr. DESCHATELETS: As a lawyer, Mr. Hayes, do you not feel that since we are dealing here with powers—and when I say powers I mean of course civil rights—which are questionable, and since we will have in Ottawa in a few weeks a fedefal-provincial conference do you not think it would be wise, before passing this bill in its present form, that it be submitted to the premiers of each province in order to have their views on it?

Mr. HAYES: I would not feel competent to reply. If I knew the temper of each of the premiers or delegates representing the provinces on it, a temporizing action might be useful; but I do not know enough about what are the views which would be expressed, so I would not like to do so for that reason.

I would like, however, to amplify an answer to another question you have put to me. That is on the question of having one bill, and having the property and civil rights in one elongation. In the last ten years we have seen a very different concept of the meaning of property and civil rights from what used to be the standard answer in 1947. In 1947, when you discussed the bill of rights the standard answer of the newspapers, the deans of the law schools and the attorneys general was, what is the use of discussing it because it says in the B.N.A. Act that the matter of civil rights belongs to the province. Since then you can see a new look. The Supreme Court of Canada in a number of judgements have looked at that section and have said that that is not exactly what it says—it is not true that all civil rights pertain to provincial rights. So we have made a great many advances in this viewpoint. I think it should be accepted that this concept is a growing one—it is an organic one. I hate to be guilty of moralizing—and if anyone thinks I am I will stop. However, I think if you are going to wait until the final concept of what a bill of rights is, that you will not see it in our time.

Mr. GARBER: If the heading of bill C-79 were "an act for the recognition and protection of civil rights and fundamental freedoms" then I would be immediately seized of the question that was put by Mr. Deschatelets. You

mentioned civil rights. That definitely is a provincial matter and you cannot pass any legislation until you have that decided by the Supreme Court. For the moment I say we are dealing with something much above civil rights, and that that is human rights and fundamental freedoms and we are not generally in conflict with the provinces. Until there is a definite infringement of the civil rights we say let the bill go through and then watch for the reaction of the attorneys general of the provinces.

Mr. STEWART: Mr. Hayes, I am not going to disagree with your proposition on the entrenchment in the constitution, but I have some practical difficulties.

You suggest that it would be a better bill of rights if it were included in the constitution, which of course is something which could only be done by the agreement and consent of the imperial parliament. What would happen to these rights under the British North America Act which are now guaranteed to the provinces in that event? Would they also be waived by agreement?

Mr. HAYES: Not unless they agreed to waive them.

Mr. STEWART: All right. And then you came along with another proposition, that after this was done, the next step would be a wholly Canadian constitution. I was wondering just how far you had gone ahead in visualizing that event.

Mr. HAYES: I must admit in respect to that question that we went a little beyond the terms of reference, because we were enjoined to restrict ourselves solely to what is good about this bill, and what is bad about it; and it would be irrelevant to suggest this matter of nationalization.

We felt that we wanted to take the opportunity in appearing before this august committee to say that we realize the ideal of a bill of rights in Canada is more solid, and will be more solid in the days to come when it forms part of a Canadian constitution; and when the Canadian constitution is a matter of amendment by the Canadian parliament.

Mr. STEWART: I agree with you, but we must remember that our setup in Canada is altogether different from that in the United Kingdom or in the United States of America. We have a two barrelled section, so to speak.

Mr. HAYES: Mr. Garber feels that I should further state what we mean by that is that these matters should not be radically subject to the imperial parliament, as theoretically they are, although customarily they are not; and that all these matters should be within the powers of the Canadian people through their parliament.

Mr. STEWART: Just as we do in respect to our laws. We put a stop to it.

Mr. HAYES: You put a stop to going to the privy council, yes. And if you call me to account for introducing it, because it is not strictly at issue at the moment, I would agree with you; but we felt that we should make our point of view known.

Mr. STEWART: If you think that that could be done in subsequent amendments, by putting a clause in any of the acts that are passed to this effect: "This act is subject to the freedoms as set out in the bill of rights", then there is no procedural difficulty.

Mr. HAYES: Yes.

Mr. DESCHATELETS: Would you agree, Mr. Hayes, that this bill of rights would apply only in peace time in its present form?

Mr. HAYES: No. There is a nuance of meaning there which I think I should take pains to indicate; it should apply in peacetime and in wartime, except that it can be abrogated, if, in the judgment of parliament, wartime conditions make it necessary. But it should not be automatically abrogated. Probably it is not necessary to abrogate a bill of rights in wartime; but if it has to be done, then it has to be done.

Mr. DESCHATELETS: Do you think that this bill of rights in part 2, for example, would apply even under the War Measures Act?

Mr. HAYES: You mean part 2 of the present bill?

Mr. DESCHATELETS: Part 2 of the present bill of rights, yes, having to do with freedom of speech, freedom of assembly, and so on. My question is this: do you contend that the rights enumerated by clause 2, dealing with bill C-79 would apply under the War Measures Act in case of a war or emergency?

Mr. HAYES: As I said before—and I must repeat it—I am afraid that our committee never paid any attention to the War Measures Act. I suppose they felt that these old war measures acts are a little out-dated in the light of the world today, and that the kind of war, if there is to be one—and God forbid it should ever happen—will be a type of war where a War Measures Act would be considered at a very early stage. Consequently we did not give it any observation or thought at all.

My own view of it is simply that parliament in its good judgment will decide, as it does on matters such as suspension of habeas corpus, and say that this whole apparatus, in this time of emergency, and threat of invasion and so on has to be abrogated for the common good. If it does not feel it, it will not say so. If it does feel so, it will say so.

Mr. STEWART: Even if the War Measures Act was repealed, that would still apply?

Mr. HAYES: Yes, because it has the sovereign power to do so.

Mr. DESCHATELETS: Would your remarks imply, Mr. Hayes, that the Canadian Jewish congress had no worries in regard to what happened during the last war, for example in Canada?

Mr. HAYES: No, it would not be fair if I said they had no worries. They did have worries. A number of individuals thought that some of the procedures may have been high-handed. That was an individual feeling. That was not a fixed view of the Canadian Jewish congress, so I can only tell you what the individuals in the Canadian Jewish congress may have thought.

Mr. DESCHATELETS: In spite of the experience you had during the last war, your congress did not feel that they should not have made reference to similar conditions existing in the future?

Mr. HAYES: I do not think we ever met in this regard, no.

The CHAIRMAN: Are there any further questions, gentlemen?

Mr. HAYES: Thank you very much on behalf of my colleagues here as well as the Canadian Jewish congress for the opportunity of appearing before you and for the hearing which you have given us.

The CHAIRMAN: May I assure you on behalf of the committee that we appreciate very much your coming before us. I think we have enjoyed the discussions that have emanated from your attendance here, and I again thank you very much.

We now stand adjourned until 2 o'clock this afternoon in this room.

EVENING SESSION

FRIDAY, July 15, 1960.
2:00 p.m.

The CHAIRMAN: Well, gentleman, let us come to order.

Mr. MARTIN (*Essex East*): Before we begin our meeting, I would like to raise a matter of business before the committee. It arises out of some of the things I am going to ask, and which you should know. Other members have

divided obligations here and in the house, and if Mr. Green speaks, as I think he will be doing very shortly, I must go back. But I would like to have some idea of what our agenda is for next week, because I have a list of people I think should be called before this committee.

Undoubtedly you have arranged to have some of them called, but I do not know. Can you first of all, give me an indication of what the business is for the next week in this committee?

The CHAIRMAN: I can in a general way, but I suggest perhaps it would assist matters if you would indicate who you have in mind to Mr. Badanai, and then we will hold a meeting of the steering committee.

At the moment it does not appear that we shall have any work before the committee on Monday. I have been endeavouring to interest as many people as possible, and organizations, to come before the committee. I think we will be back on Tuesday.

Mr. MARTIN (*Essex East*): I do not mean right this minute, but I would like to know if you are going to hear any of these people. That is my point. I am thinking of: W. F. Bowker, Dean of Law, university of Alberta; O. E. Lang, college of law, university of Saskatchewan; Prof. A. R. Lower, Queen's university; Prof. Murray Donnelly, university of Manitoba; Edward McWhinney, faculty of law, university of Toronto; H. D. Woods (economic rights) McGill university; Dr. Frank Vallee (social rights) McMaster university; P. E. Trudeau—who spoke at the national human rights conference—(economic rights); Gerard Pelletier, c/o the Canadian Catholic confederation of labour; Miss Agnes Roy, c/o the Y.W.C.A., headquarters, Toronto; John Louis Gagnon, c/o La Presse, Montreal, Que.; Canadian Welfare Council; Canadian citizenship council; Canadian association of adult education; representatives of the Chinese community; Charles B. Bourne, professor of law, U.B.C., Vancouver; Maxwell Cohen, professor of law, McGill university, Montreal; Miss Pauline Jewitt, c/o the Roxboro apartments, Ottawa; Hon. J. T. Thorson, 20 Crescent avenue, Rockcliffe park; Fred P. Varcoe, 38 Monkland avenue, Ottawa; W. R. Jackett, 710 Echo drive, Ottawa; John E. Read, 35 Wilton crescent, Ottawa; Saul Hayes, executive director Canadian Jewish congress, 493 Sherbrooke street west, Montreal, Que.; A. N. Carter, c/o Ritchie building, 50 Princess street, Saint John, N.B. (P.O. Box 849); David Mundell, 68 Kendal street, Toronto and G. Eamon Park, 178 Cottonwood drive, Toronto.

Mr. NASSERDEN: On a point of order, I think this is something which should properly come before the steering committee, because we have people here right now ready to make their representations, and I think we should proceed with them.

Mr. MARTIN (*Essex East*): The reason I raise it today is because I have not been able to be here continuously for reasons which everyone can understand. I am interested in this subject and I know these people to be eminent people in this field, and that they have various points of view. So it is for that reason I bring it up now so that the chairman can make arrangements for the business of next week.

The CHAIRMAN: I am very sorry that you did not give that list to the representative of your party on the steering committee. In fact it was after I consulted you that you informed me that Mr. Badanai was available to act on the committee, and I appointed him to the committee, and he attended a meeting of the steering committee on Tuesday.

On Tuesday we set up meetings for yesterday, today, and tomorrow, and instructions were given, and wires were sent to all those who were revealed to us at that meeting of the steering committee, advising them that these meetings of the committee would be held, and that we would be anxious to receive representations from any of the organizations.

As the result of that we have been attempting to set up the work of the committee for the three days that we felt at least would be required. But I fear that we face the position now that the committee has no work before it tomorrow, and I am not sure there will be any work before it on Monday. But had more of those people been notified last Tuesday, it is quite possible, and I think very probable, that they would have been available for Monday. So the work of this committee will be delayed as a consequence.

However I suggest that it be handed to Mr. Badanai. I will have a meeting called of the steering committee immediately following the adjournment of this meeting, and we will do everything we can to see that they are notified, and that the facilities of this committee are made available to them.

Mr. MARTIN (*Essex East*): This list was only formulated this morning, but some of the names on it have already been given to the committee. Some of the men are those whose articles appeared in the consolidated bar review of March 9, 1959.

The CHAIRMAN: We are very happy to have with us this afternoon—no doubt at great personal sacrifice—I happen to know that after discussing the matter with Mr. Merriam on several occasions—Mr. Donald McInnes, who, I believe, is vice-president of the Canadian bar association. He is from Halifax. Undoubtedly he is very much better known to many of you on the committee than he is to me, so I do not think that any extensive introduction is required.

He holds, naturally, a very responsible position, and I understand that he is here to make representations and to present this brief on behalf of the Canadian bar association. We are very happy to have him with us, and I now ask Mr. McInnes to proceed with his presentation.

Mr. MARTIN (*Essex East*): Would you mind clarifying for us this point? We are very happy to have Mr. McInnes here. He is a very eminent member of the bar.

There was a committee of the bar association under the chairmanship of Mr. Mundell. Is Mr. McInnes appearing on behalf of that group, or pursuant to executive decision of the Canadian bar association?

Mr. Donald McINNES, Q.C. (*Vice-president of the Canadian Bar Association*): Mr. Chairman, Mr. Martin, and gentlemen: I appear on behalf of the Canadian bar association as such, that is, the whole body. And I might say that I have associated with me Mr. W. A. MacKay, associate professor of Dalhousie university, Halifax. His specialty is constitutional law.

A part of my memorandum, Mr. Martin, and gentlemen, deals with the study that has been given to this bill by the Canadian bar association. Perhaps some of these matters that are referred to will come up; but I am not appearing for any group of the association. I am appearing for the association as a whole, which consists roughly of some 8,100 members.

Mr. MARTIN (*Essex East*): My point was this: I am trying to get the authority—not that I question the authority—but I wondered if you are speaking on behalf of the bar association, of which I know you are vice-president.

Mr. McINNES: Yes.

Mr. MARTIN (*Essex East*): Are you appearing as a result of a resolution passed by the bar association?

Mr. McINNES: This is as a result of a resolution passed by the bar association in Vancouver, and this particular memorandum was studied by the executive in part. Of course it has been refined somewhat since then, but it has been studied in part.

Perhaps, Mr. Chairman, and gentlemen, it might be convenient if I should read this memorandum which has been prepared, I believe with great care, following which there may be some questions arising out of the representations that are made. I hope to be able to answer them.

In any event some of the matters that are dealt with, I sincerely hope, will assist this committee in its deliberations.

The CHAIRMAN: May I interrupt you at this moment. Does the committee agree that we adopt the same procedure that we have adopted on other occasions and which seems to have worked out very well? That is that Mr. McInnes will proceed to present his representations and brief to the committee without interruption, and at the conclusion of that, any members who wish to ask him questions may do so then. Is it agreed?

Some Hon. MEMBERS: Agreed.

Mr. MCINNES: Perhaps before I proceed with the formal part I would like to thank you, Mr. Chairman, and members of the committee for meeting my convenience. You were kind enough to make a comment about that in your introductory remarks. I have come from Halifax today, and as I say, I appreciate your giving me this opportunity of being here.

I am now reading from the brief at page 1.

An Act for the Recognition and Protection of
Human Rights and Fundamental Freedoms[1]

Mr. Chairman and gentlemen, it is a privilege to appear before this special committee and members of The Canadian Bar Association are grateful for the opportunity given to the executive to comment, on behalf of the association, on the proposed Canadian bill of rights. At the outset we would like to emphasize that the association welcomes the concern for securing human rights and fundamental freedoms in this country which the consideration of this measure so clearly illustrates. Not all members of the association support the enactment of a statutory bill of rights by parliament. Their views should not be misunderstood as implying a lack of concern for the need of assuring, to all, the rights and freedoms essential within a democratic state. Indeed, the members of the association and of the legal profession generally are concerned in their day to day activities, probably more than any other group in this country, with the problem of protecting the interests and the position of the individual. There is unanimity among us that human rights and fundamental freedoms must be preserved and protected for everyone in Canada. The views put forth by members of the association all reflect this unanimity; the differences among us illustrate our various views of the most appropriate method to attain this objective.

Our views on method do differ, despite continuing study and discussion of the proposed Canadian bill of rights within the civil liberties section, within provincial branches, among members of the council and the executive and at our annual meetings since the original bill was introduced in the House of Commons in September, 1958. Still no single viewpoint can apparently command support of a majority of members within the association. Some people talked, by the way, of taking a poll but that was not done, of course. Because the different methods put forth for securing individual rights and liberties are based in part upon different interpretations of the law of our constitution we propose to review the law briefly. Then we would like to sketch the different views of our members and finally to concentrate our attention on the bill now before you.

The British North America Act does not refer in express terms to human rights and fundamental freedoms although it does provide assurance of certain rights, which may be described as minority and parliamentary rights, in this country. It assigns to the provincial legislatures and to parliament exclusive legislative powers in relation to certain classes of subjects and it

[1]Bill C-79, The House of Commons of Canada, 3rd Session, 24th Parliament, 8-9 Elizabeth II, 1960. First reading, June 27, 1960.

does refer, in the preamble, to the desire of the former colonies to be federally united "with a constitution similar in principle to that of the United Kingdom". Those words I referred to from time to time on various legal cases that have arisen dealing with human rights of one kind and another.

Legislative power to affect the rights and liberties of individuals is divided between parliament and the provincial legislatures, provided that statutes passed by each body concern matters within its respective exclusive powers, and provided that in the event of conflict between otherwise valid statutes federal legislation is paramount and the conflicting provincial legislation is inoperative. Whether legislative power to deal directly with the rights and freedoms of the individual is also divided between the provincial legislatures and parliament is uncertain. That is one of the submissions we make.

Some members of the association believe that this power relates primarily to "property and civil rights" or to the "administration of justice" or to matters of a "local or private nature" in each province and thus, except in so far as rights and liberties may be incidentally affected by valid federal legislation in relation to criminal law or some other head of power vested in parliament, it falls within exclusive provincial legislative jurisdiction. Others believe that this power lies within the exclusive powers of parlament. Recent decisions of the courts seem to indicate that provincial legislative powers do not extend to the imposition of restrictions upon that measure of liberty deemed essential for the maintenance of a parliamentary democracy, the basis of "a constitution similar in principle to that of the United Kingdom".[2] There is listed as footnotes some of these cases which have arisen within the last several years. Some of them are cases arising out of the Jehovah Witness case; some from the early closing laws, such as in the case of Birks and the city of Montreal; some relate to closing on religious holidays; and there is the Alberta press case, 1938, and then there is the Switzman and Elbling case on freedom of association, and the Chaput and Romain case in regard to assembly. All these cases, or substantially all of them, are decisions of the Supreme Court.

The CHAIRMAN: May I just interrupt for a moment. I notice that in the brief there are citations quoted. I do not think there is any need to give the citations. I was wondering if we could agree that the reporter when recording this evidence, would also record at the appropriate places these various authorities that are listed.

Some hon. MEMBERS: Agreed.

Mr. MARTIN (*Essex East*): The whole brief will appear in the minutes, of course.

Mr. MCINNES: I am reading gentlemen at page 3, at the bottom.

> It has even been suggested that the imposition of serious restrictions would be beyond the power of parliament as well.[3]

That, by the way, is a comment by Mr. Justice Abbott in the Switzman and Elbling case which concerned the padlock law in the province of Quebec. He mentioned one footnote. This is not in the brief but I will read from an accompanying document that I have. This is Mr. Justice Abbott of the Supreme Court

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[2] For decisions dealing with
(1) freedom of religion, see *Saumur v. Quebec and A.-G. of Quebec* [1953] 2 S.C.R. 299; [1953] 4 D.L.R. 641; *Henry Birks & Sons (Montreal) Ltd. v. Montreal and A.-G. of Quebec* [1955] S.C.R. 799, [1955] 5 D.L.R. 321; *Chaput v. Romain* [1955] S.C.R. 834, 1 D.L.R. (2nd) 241;
(2) freedom of speech and of the press, see, *Alberta Press Case* [1938] S.C.R. 100, [1938] 2 D.L.R. 81;
(3) freedom of association, see, *Switzman v. Elbling and A.-G. of Quebec* [1957] S.C.R. 285; 7 D.L.R. (ed) 331;
(4) freedom of assembly, see, *Chaput v. Romain* [1955] S.C.R. 834 1 D.L.R. (2d) 241.

[3] per Abbott, J., *Switzman v. Elbling and A.-G. of Quebec* [1957] S.C.R. 285 at p. 328, (1957) 7 D.L.R. (2d) 337 at p. 371.

of Canada: "I am also of the opinion that as our constitutional act now stands parliament itself cannot abrogate this right of discussion and debate".

That is a little footnote, as I say, that comes from one of the cases.

I am reading from the top of page 4 of the brief.

> To sum up, there is uncertainty whether parliament or the legislatures of the provinces may deal directly with human rights and fundamental freedoms, and if either or both may, the extent to which such power may be exercised.
>
> In light of this uncertainty members of the Canadian bar association are not agreed on the way in which human rights and fundamental freedoms can best be assured in this country.

As I say, we have 8,100 members and I suppose, with lawyers, you get 8,100 different opinions. However, there is not unanimity.

> Some believe (and I should point out that there is no special significance in the order in which we present these views) that the way to protect rights and liberties is through the provision of remedies under the regular statute and common law of the land and thus a general declaration of rights and liberties is unnecessary and perhaps even undesirable. Others believe that any general declaration of rights and liberties applicable in Canada should be instituted by an amendment to the British North America Act. Finally, others support a federal statute dealing with human rights and fundamental freedoms, with or without complementary provincial legislation. It seems fair to say that members of the association, whether they agree that a federal statute is the most appropriate method or not, would suggest that the bill now being considered needs clarification. These views and our comments are all reflected in greater detail in the March 1959 issue of the Canadian Bar Review, (Vol. XXXVII, pp. 1-264) which was devoted in its entirety to the bill introduced in September, 1958.

Those amongst you who are lawyers will, no doubt, have received the pamphlet copy of the *Canadian Bar Review* which gives some seven or eight articles by very eminent men; and I think this particular work and the comments and articles submitted give, in a very excellent way, the problems dealing with the bill. I would commend that pamphlet to you, if I may.

> Although your committee is concerned with a particular bill and although views of members who do not support a statutory bill of rights have already been echoed in your own debate within the House of Commons, may we briefly deal with these views, which are strongly supported, in order to emphasize again that this difference is one of method. Many lawyers, particularly those trained in the common law.

I might say common law as distinct from civil law, which relates, as you know, to the province of Quebec.

> Distrust general pronouncements and respect the British constitutional approach of protecting the interests of individuals by ordinary legal remedies provided by legislation or the common law to meet particular situations. To them a general declaration of rights and freedoms which provides no new remedies for their preservation, which omits from its scope, without limitation, anything done under the War Measures Act, and which will not bind the hands of parliament in future, is unnecessary. Some suggest it is even undesirable, either because it may introduce rigidity into the law and prevent its adaptation to changing circumstances in our society, or alternatively, if specific limitations are not to be inferred in the rights and liberties declared,

because its application may be entirely unpredictable. To those who do not favour a general declaration of rights and freedoms any deficiency in our law should be made up by appropiate specific remedial legislation. Many members of the association would agree that such legislation should be considered even if the proposed bill of rights is enacted, as a means of implementing the principles of the Bill. Resolutions adopted by the Alberta branch of the association at its 1960 mid-winter meeting, which are attached as Appendix A, are illustrative of support for a review of existing legislation.

I will come to the appendix, if I may, a little later, Mr. Chairman, and gentlemen. Appendix A is found in the submissions which you have in your hands.

Those who support an amendment to the British North America Act as the most satisfactory method of assuring the rights and liberties we have come to consider as our heritage seek to ensure that neither parliament nor the provincial legislature can enroach upon them. This method would vest power in the courts to strike down contradictory statutes enacted by any legislature in Canada. Although it has widespread support, not all members of the association would endorse this approach. Even if it were possible to secure an amendment to the act at this time, some would oppose it on the ground that final authority over individual rights and liberties, basic to our democratic society, should remain vested in the elected representatives of the people in our legislatures and should not be transferred to our judiciary. The case for an amendment to the B.N.A. Act has already been ably argued in the house and, since you are not concerned with it, I take it, Mr. Chairman, we do not propose to dwell upon it.

If we may, we would turn now to bill C-79, which your committee is considering. Some members of the association would suggest that the proposed bill is too limited in scope.

These views I have expressed of some members are taken from articles that have appeared, from the meetings at the Seigniory Club at Montebello, and from correspondence and representations of one kind and another. This is the carrying together of the views in the best way we can interpret them.

The Ontario Branch of the Canadian bar association has approved a resolution incorporating a draft bill more extensive than that now before you. This resolution and draft bill are attached as appendix B to these submissions, so you have the bill as it was submitted in Ontario.

Whether the scope of bill C-79 should be enlarged is a matter which we would prefer to leave for your consideration. Whether the terms of the present bill can be clarified is the matter upon which we would like to concentrate. In many respects the proposed bill of rights as originally introduced created uncertainty about its application and not all of this uncertainty has been removed by revisions incorporated in the present bill.

—at least, that is our submission.

It may be useful to suggest some questions raised by this bill of rights which illustrate the uncertainty;

—and that is our anxiety to try to help the committee by pointing out what we think are matters that might be clarified or might be the subject of review.

These and others are dealt with in greater detail in the March 1959 issue of the Canadian bar Review, to which I have referred.

First of all, there is uncertainty about the possible application of section 2 of the bill and its effect upon provincial legislation.

I take it, Mr. Chairman and members of the committee, the members are fully conversant with the bill, and I do not need to refer to the text. But I have it in front of me as, no doubt, you have, if the particular text needs to be referred to.

This section recognizes and declares that certain rights and freedoms exist "in Canada", implying that they exist not merely in the federal legislative sphere but throughout Canada as a geographic entity. When the bill was introduced in the House of Commons, the Right Honourable the Prime Minister said, "We, proceeding in parliament to bring about the achievement of fundamental freedoms must scrupulously respect whatever provincial jurisdiction exists in reference in whole or in part to this matter".[4] Many consider the bill as one applicable to the legislative sphere allotted to parliament and one that can in no way affect provincial legislation. Yet it can be argued that, in so far as the declaration in Section 2 is valid, it may affect provincial legislation, notwithstanding the apparent intent of the bill's supporters, for our courts must apply the statute without recourse to external evidence. Recent decisions of the Supreme Court of Canada have indicated that the provinces may have no power to pass legislation directed towards restricting the freedoms deemed essential for the working of parliamentary government, freedoms of speech and press, of association and assembly, and of religion. Other provincial legislation, validly enacted to deal with an aspect within Section 92 of the British North America Act, but which is deemed to conflict with the freedoms and rights enumerated in this section, might hereafter be declared inoperative in the absence of a preamble to the bill or a declaration as to the intended limits of application of section 2. Not all the rights sought to be secured by section 2 would prevail over conflicting provincial law. For example, the right to the "enjoyment of property"—which is part of the bill—would appear to lie largely within the exclusive legislative jurisdiction of the provinces, at least so far as real or personal property situate in any province is concerned. The right to protection of the law without discrimination by reason of race, national origin, colour, religion or sex may also, in many phases, fall within provincial legislative competence. Other clauses of section 2 may, however, affect provincial law in the absence of any limitation on the application of the section. Suppose for example, a provincial legislature were to enact a statute further extending the law of libel or slander, or restricting the campaign activities of political parties, or a municipality under provincial authorization were to pass by-laws in good faith restricting use of the streets or the use of property for meetings. It is at least—I am submitting—reasonably arguable that such measures would be in conflict with the freedoms of speech, the press and of association which section 2 declares to exist "in Canada". Such a result could have significance for all the provinces and it is possible that much provincial law could be affected. Whether the interpretation of section 2 would bring about this result is uncertain, but if it were to occur it would be out of keeping with what some consider to be the scope of the bill of rights.

Specific provisions of the bill raise other questions, the solutions of which are uncertain.

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[4] Debates, House of Commons of Canada, September 5th, 1959, at p. 4643.

We have used that word two or three times. I want to be helpful in raising these uncertainties for your own deliberations, if these representations have any merit.

Section 2(*a*) of the Bill includes a "due process of law" clause which has created uncertainty. It may have a narrow meaning spelled out by the procedural requirements—I emphasize the words "procedural requirements"—dealt with in sub-sections (*c*), (*d*), (*e*) and (*f*) of Section 3 or it may have a wider meaning embracing matters other than these.

That is, substantive matters, as distinguished from procedural.

If it is considered as imposing procedural requirements only, will the law of evidence be imposed in administrative proceedings, for example, under the Immigration Act or other statutes affecting the rights set out in Section 2(*a*)? Does the clause intend more than the use of procedures dealt with in Section 3? Will it mean the evolution of our law in light of certain fundamental substantive standards of justice which the courts may infer? If it does, will the idea of substantive due process preclude forfeiture of property owned by innocent parties but used by others contrary to the Customs or other acts of Parliament?

Section 2(*b*) also gives rise to uncertainty.

Perhaps I may just read that clause:

the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex.

To what extent does it modify existing laws which create unequal rights and obligations for various classes of people, such as Canadian Indians, immigrants and aliens, and infants or juveniles, now treated specially in ways intended to be beneficial? Is this provision intended to modify immigration legislation? Will mere absence of counsel from proceedings be a ground for upsetting decisions, or must the right to counsel be first claimed as is now the case with the rule protecting against the use of self-criminating evidence given in a previous proceeding? Is the protection against self-crimination meant to prevail against Section 5 of the Canada Evidence Act, which now requires a witness, including an accused, to answer questions put to him, though it provides that such answer may not be used in any subsequent criminal proceeding, except one for perjury? In other words, does the protection against self-crimination imply a procedure similar to that used in connection with the Fifth Amendment to the United States Constitution?

What is the difference between the requirements of Sections 3(*e*) and 3(*f*), "a fair hearing in accordance with the principles of fundamental justice" and "a fair and public hearing by an independent and impartial tribunal"?

If I may read clauses 3(*e*) and 3(*f*) on page 2 of the bill:

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; or

(*f*) deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

Is Section 3(*f*) intended to modify—this is a distinction I endeavour to make—provisions of the Criminal Code and the Juvenile Delinquents Act which provide for hearings in camera, provisions which hitherto

have been afforded primarily as a protection to the accused? What entities in addition to our superior courts will be deemed independent and impartial? Will decisions of the Minister of National Revenue on taxation matters now be open to question by the courts before appeal to the Tax Appeal Board?

These questions point up the major problem of interpretation involved in Section 3 of the proposed Bill, which sets out rules of construction for legislation enacted by the Parliament of Canada or under its authority. This section is open to two possible interpretations. One is that the words "construed and applied" are intended to refer to the operative effect of federal legislation, so that an enactment would not be given an effect that denies or abridges any of the rights or freedoms or procedural protections enumerated, that is, that existing enactments would, in effect, be repealed in so far as they directly conflict with the Bill of Rights. The other interpretation is that a general declaration such as this will not affect existing provisions that are directly contradictory, for had Parliament intended to repeal the contradictory provisions it would have done so explicitly. If the latter interpretation prevails, the Bill of Rights will not substantially modify existing law. It would be a courageous judge who would rule the Lord's Day Act inoperative in a prosecution against a non-Christian member of our community who raised the Bill of Rights in his defence. Yet if the first interpretation is to prevail it can be argued that whipping and hanging, punishments imposed under our Criminal Code, are intended to be degrading or inhuman and that they must therefore not be imposed if this Bill is to be effective. But Parliament itself in debate has not yet determined to change our existing law on the imposition or form of capital punishment. Will the Immigration Act be limited by the Bill of Rights?

These are questions I have raised, not to confuse, but to point out, as I say, the difficulties that we see.

Specific questions such as these illustrate the uncertainty about existing law to which Section 3 of the Bill gives rise. If Bill C-79 is enacted these and many other questions mut be answered by the courts. There will be great latitude for judicial law-making. Lawyers generally oppose granting wide discretion to those who must apply the law, even the granting of discretion to our judiciary, for which we have the highest regard. It inevitably introduces, for some time at least, uncertainty into the law. If the bill in its present form is enacted, serious consideration should be given to a thorough review of existing legislation to amend those provisions that may conflict with the bill of rights, not only to restore certainty to the law but to assist the courts in applying this bill.

Section 6 of the proposed bill, which, as you recall, deals with the War Measures Act, it is suggested by many, should be omitted and enacted as a separate measure since, unlike the other sections that seek to assure human rights and fundamental liberties, it expressly provides for abridgement or infringement of the individual's rights and freedoms. It is also suggested by some that subsection (5) of this section should be redrafted to provide simply that the bill of rights does not apply to any regulation or order made or authorized under the War Measures Act.

Even if the uncertainties in the proposed bill are removed, some members of the association suggest that the bill be referred to the Supreme Court of Canada before it is brought into force for an opinion

whether it is in all respects within the powers of Parliament. However, since in all likelihood the measure would be dealt with in litigation at an early date after it is brought into force, it may be preferable to leave the issue of the constitutional validity and the limits of application of the bill to be considered as particular cases arise before the courts.

In addition to specific comments illustrative of the detailed criticisms raised by members of the association about the bill, there are some general considerations that should be borne in mind in connection with this or any other declaratory bill passed by parliament. In the first place, a declaratory statute without specific remedies to enforce the rights or redress infringements on the liberties said to be secured will not in itself guarantee their preservation. The detailed application of the bill must be worked out by legislators, by the judiciary and by all the people of Canada. Their success will vary directly with their vigilance for protection of these rights and freedoms from infringement.

In the second place, the rights and liberties enumerated in the bill cannot be absolute but must be subject to qualification. For example, freedom of speech must mean the area within the bounds defined by the law of libel and slander and by the law of criminal libel and sedition. The qualifications implied in the rights and freedoms declared will continue to be essential if the conflicting interests of the individual and society as a whole are to be properly balanced. One of the important qualifications on the protection to be afforded to the interests of the individual is set out in section 6 of the bill now being considered.

That is the war measures one.

All of us realize that emergency circumstances which would give rise to a proclamation bringing the War Measures Act into force may necessitate limitations upon the rights and freedoms of the individual in the interests of the state as a whole. The burden of reconciling these conflicting interests in situations of emergency may have to be borne almost exclusively by the executive. Perhaps limitations on the power of the executive to restrict the rights and liberties of individuals can be introduced, after thorough study, into the War Measures Act, but the best safeguard will be the maintenance of strong parliamentary institutions in periods of emergency.

A third general consideration about a federal statute purporting to secure human rights and fundamental freedoms is the effect of the doctrine of the sovereignty of parliament when legislation is passed subsequent to its enactment that conflicts expressly, or, if not expressly, directly with the statutory bill of rights. The later conflicting legislation will be enforced in derogation of the rights and liberties declared. This will be so whether the later legislation is passed by parliament itself or as subordinate legislation within the powers delegated by parliament. The doctrine of parliamentry sovereignty is too ingrained in our constitution to permit the courts to refuse to apply later legislation merely because it conflicts with a statutory bill of rights, for parliament must be taken to have intended the later enactment to modify the former. Whether section 4 of the proposed bill will prevent the abridgement of rights and liberties is doubtful. This section might be more useful if it were to require the Minister of Justice to report to parliament those bills and regulations which might be considered to abridge the enumerated rights and freedom. You may recall that the word "ascertained" was used in the previous legislation.

Even this suggestion, however, would not prevent parliament from enacting conflicting legislation.

> Despite the limitations attendant upon a bill of rights enacted as a federal statute, many members of the Canadian bar association see merit in a measure of this type at this stage in Canada's constitutional development. A federal bill will undoubtedly be of educational value. It may provide leadership in the development of better measures for securing rights and freedom in this country as the general principles and their detailed implications interact with changing social conditions. As a political charter, it will inevitably invite debate when the vigilance of our parliamentarians detects some departure from its terms. It may also strengthen Canada's position within the United Nations organization, the charter of which proclaims the intention of members to promote human rights and fundamental freedoms.

You may recall, that is part of the charter of the United Nations.

The Canadian bar association and all its members—and, I am sure I am speaking for all its members—

> are intensely concerned with the protection of the rights and liberties of the individual and we are grateful for the opportunity of presenting our views upon the bill of rights now proposed. Among ourselves our views differ, but only over the most appropriate way of securing essential rights and liberties. We are all agreed, however, that one of the principal agencies for ensuring the interests of the individual is parliament and that its democratic character, and that of our other legislative bodies, must be preserved. It is essential that the fairness of electoral laws and of procedure within our legislatures be maintained. Even with completely democratic parliament and legislatures, vigilant to prevent erosion of individual rights and liberties, the task of protecting our basic rights and freedoms must ultimately fall to the judiciary. The bill of rights now proposed may strengthen the hand of the judiciary in preventing unwarranted encroachments upon our rights and liberties. Indeed, the bill leaves very wide discretionary power in the hands of the judges. To ensure that this power continues to be exercised reasonably, the high quality of the courts and the complete independence of the members of the judiciary must be preserved. Only in this way can their difficult task of striking the appropriate balance between conflicting interests in society be achieved.

(See appendices.)

Those, Mr. Chairman and gentlemen, are my representations.

I seriously hope they may be of some use to this committee. I pointed out the uncertainties and, it might be said: if there are some uncertainties, why does not the Canadian bar association produce a bill of its own, or some specific amendments? Well, that might be a very difficult thing for us to do, with so many converging opinions and so much diversification as to what any such bill would be. These resolutions, as I say, are put forward in the best of faith.

I might turn to appendix "A" which contains resolutions concerning the proposed bill of rights adopted by the Alberta branch of the Canadian bar association in February of 1960. I do not know that I need read them all. The second one is:

> Resolved that the council recommend to the government consideration of the need for anti-discrimination legislation bearing in mind that the victim of discrimination often needs not merely protection against discriminatory legislation, but affirmative help in the form of government intercession, and sanctions against those persons who discriminate against him.

Then the next one is:

> Resolved that the government consider the implications on the existing law of the declarations of freedom, and whether it might be desirable to use the Criminal Code and other statutes as a medium for securing these freedoms.

Then there is another resolution there. The association brings these resolutions to the attention of the committee as they are passed by the Canadian bar association, the Alberta branch.

I also would mention that appendix "B" is a resolution passed by the Ontario subsection on civil liberties which was recommended to a general meeting of all the Ontario members of the Canadian bar association and passed by them on February 6, 1960. There is some preamble there, but the operative part is:

> Now therefore be it and it is hereby resolved that this association recommends that if any Canadian Bill of Rights Act is passed by parliament at its current session, there should be included as essential parts thereof the provisions, rights and freedoms contained in the hereunto annexed draft Bill of Rights Act, realizing that the assurance of such rights can be accomplished by such act only in the areas of legislation within the competence of the parliament of Canada.

The bill which has been prepared by the Ontario section is here. I do not propose to read it. It is longer than the bill which is before the committee. It is a statement of human rights as the Ontario section sees it and it is offered for such value as it might have.

Mr. DESCHATELETS: Could I put a question in respect of the draft bill of rights?

The CHAIRMAN: First of all I would like to again express to Mr. McInnes our appreciation for the very careful manner in which he has presented this brief to us. I believe you are willing to submit to being asked some questions by some of the curious members of this committee.

Mr. MCINNES: I will be delighted, sir. I will do my best to answer the questions. How successful I will be I do not know.

Mr. KORCHINSKI: You are accustomed to asking the questions.

Mr. MCINNES: That is right.

Mr. DESCHATELETS: This is a draft bill of rights which is proposed by the Canadian bar association?

Mr. MCINNES: No; by the Ontario section. It is not proposed by the association as a whole.

Mr. DESCHATELETS: You have read it?

Mr. MCINNES: Yes.

Mr. DESCHATELETS: Do you contend that this draft bill of rights is drafted in a way that there is no conflict between the powers of the legislatures and the federal government?

Mr. MCINNES: I am making no such contention. I am offering this bill for information as passed by the Ontario section.

Mr. DESCHATELETS: I would draw attention to article 2 which reads:

> Every person who comes under the jurisdiction of the parliament of Canada—

Mr. MCINNES: Yes.

Mr. DESCHATELETS: In this case it is very clear that in this bill the people would fall under the jurisdiction only of the parliament of Canada.

Mr. MCINNES: That is so. I am not sponsoring the Ontario bill.

Mr. DORION: I believe that every person may come under the jurisdiction of the parliament of Canada. Every Canadian citizen has the advantage or the disadvantage of coming under the jurisdiction of the parliament. I do not believe that it is so clear. This may be more dangerous. I would like to have your own interpretation about this part of the presentation at page 7, the first paragraph:

> This section recognizes and declares that certain rights and freedoms exist "in Canada", implying that they exist not merely in the federal legislative sphere but throughout Canada as a geographic entity.

Mr. MCINNES: Yes.

Mr. DORION: Would you express your own opinion about this in terms of "in Canada". Do you believe that it is only its geographical sense that we have to understand by these words, or is it the legal sense?

Mr. MCINNES: I would think probably that the meaning of the bill is in its legal sense rather than its geographical sense. However, we have suggested that as a possible matter which may require clarification.

Mr. DORION: But your own opinion is that it is in the legal sense.

Mr. MCINNES: Yes.

Mr. DORION: Also we have to take into consideration the context. We have paragraph 3 of the present bill of rights which refers to "all the acts of the Parliament of Canada". I believe we have to take that into consideration when we have to determine the meaning to be given to a part of the bill.

Mr. MCINNES: Yes.

Mr. DESCHATELETS: If I understand it correctly the main concern of the members of the Canadian bar association is this difficult question of the authority to act when we are speaking about property and civil rights and this question of the jurisdiction of the legislatures and the federal government. This is the main point.

Mr. MCINNES: One of the main points I have endeavoured to suggest is the uncertainty, as you say, in the respective spheres of legislative jurisdiction.

Mr. DESCHATELETS: On pages 12 and 13 there is reference to a possible way of overcoming this uncertainty by referring it to the Supreme Court of Canada to have a decision as to the respective jurisdiction in respect of property and civil rights. At the end of your quotation on page 13 I note that there are some members of this group who would consider that we should wait until particular cases arise. Could you tell me if it is the feeling of most of the members of the Canadian bar association that we should submit the bill of rights in its present form at this stage to the Supreme Court of Canada?

Mr. MCINNES: To answer you I would say that that thought has been expressed by many, but when I say that it is the feeling of the Canadian bar association, I would have to say that there are 8,100 members and I can only interpret what some of them say. Some of the people have put it forward in debates that we have had, and in correspondence, and these articles, suggesting that this bill should be submitted to the Supreme Court for a ruling or interpretation.

Mr. DESCHATELETS: Arising out of my question, could you tell us if most of the members of your association would think that we should have in this country only one bill of rights, which would apply to the whole territory, instead of having 11 bills of rights, one for each province?

Mr. MCINNES: That is a difficult question to answer. There is a bill of rights legislation in Saskatchewan, and there was one in Alberta, which I believe was declared to be invalid. Other provinces have various bills which are, in part, bills of rights; but to say that we should have one as distinct

from 11, and to express the belief of the whole of my association—I cannot do it. I can only express my own thoughts about it. I do not know that I have ever heard a full explanation of that.

Mr. DESCHATELETS: Is it not your personal view that before this bill be passed the provinces should be consulted as to the opportunity or the advisability of adopting this bill in its present form?

Mr. MCINNES: I find that very difficult to answer.

Mr. MANDZIUK: On a point of order; I do not believe these are fair questions to put to Mr. McInnes. I think he expressed an unbiased view. He expressed the views as they exist in his association and I do not think he should be asked to express his personal views.

Mr. DESCHATELETS: If you will permit me, the witness has shown so much knowledge that he can defend himself, I think, quite easily.

Mr. MANDZIUK: I accept that. I would like to know if he is speaking for the association or for himself, because the association is not agreed. There are many members of the association who are not in favour of a submission of this bill to the Supreme Court. But you are attempting to try to put it into his mouth that it is the view of the majority of the members of his association.

The CHAIRMAN: Might we resolve this difficulty in this way: may we first of all question Mr. McInnes in the field in which he has agreed to answer questions, and direct our questions to the views of the groups or members of the bar association, in so far as he is able to express them, inasmuch as he has already in his brief indicated the present views that exist; and then after having done that, if Mr. McInnes would be good enough to express willingly—and he is under no obligation whatsoever to do so—but everyone has great respect for his personal opinion; and if he would care to qualify them as being his personal opinion, and if he would care to advance his personal opinion, I am quite sure that the members of the committee would be glad to have his personal opinions; because in the final analysis we are going to be called upon to exercise our own personal opinions.

That would mean, then, that any questions may be proceeded with dealing with the views of the bar association or of portions of the bar association; and then we will come to his personal views later on. Is that agreeable to the committee?

Agreed.

Mr. BATTEN: I am looking for personal information. I am not a lawyer. Is it usual to ask the Supreme Court to decide whether a bill is within the constitution before the bill has been passed?

Mr. MCINNES: It has been done, and within recent years. I have forgotten what the bill was. There was one—yes, a reference of the Alberta statute, was one.

The CHAIRMAN: Your question was whether it was usual.

Mr. MCINNES: There have been a few references, but how many I am not prepared to say.

The CHAIRMAN: The question was whether it was usual to do that. I would be inclined to disagree with you, personally, on that, because we pass many, many statutes in parliament.

Mr. BATTEN: The chairman is a lawyer, you know.

Mr. MCINNES: It is not usual, no. There have been references; but as to whether bills have been actually passed and then referred to the Supreme Court, frankly I do not know, and I do not want to say something about which I am not sure.

Mr. RAPP: I would like to ask Mr. McInnes a question: the brief stated that there is merit in the bill of rights at this time, when it more or less strengthens the position of Canada within the country, and outside among other nations. Would you then consider that the step taken by parliament by this act to produce a bill of rights was a timely step?

Mr. MCINNES: That is the view of many; it is an educational matter, especially with human freedoms being pertinent as they are right now.

Mr. RAPP: You do not think it is more or less overdoing it? That is your opinion of it?

Mr. MCINNES: That is my own. My own views and those of the Canadian bar association may be different. It is not that I am trying to hedge away from your question.

Mr. RAPP: Thank you very much.

Mr. KORCHINSKI: I would like to ask about page 9 of the brief where Mr. McInnes makes reference to section 2(a) of the bill, which includes a "due process of law" clause; and he suggests that it creates some uncertainty. I wonder whether the Canadian bar association has given some consideration to that point, or if not consideration, whether it has given any consideration to an alternative in any way so as to avoid that particular uncertainty that is created?

Mr. MCINNES: I have not attempted, nor has the association attempted to draft any amendments. That may be a complaint which might be legitimately made of us, that is, why we have not come here with some draft bill. But we did not consider it to be our function.

Our purpose in coming here is to bring up some of the anomalies or uncertainties. I do not know if I can ever specify a remedy, and we certainly do not have any instructions from our association to do so.

The CHAIRMAN: I wonder if your failure there is not also indicated by your brief, in that you doubt that you could arrive at a draft bill which would meet with the approval of the members of the association, or even with the approval of a majority of them?

Mr. MCINNES: That is the difficulty. The association met last year in Vancouver, and it will meet next year in Quebec. These matters are referred to sub-sections, and you get the views of those sub-sections and then they are referred to the whole convention in general meeting. A full debate on a matter of this kind is very difficult. However it has been studied by the sub-sections.

Mr. KORCHINSKI: In section 3 you ask the question whether capital or corporal punishment would be in fact abolished. My question is this: in instances where other countries have a bill of rights, no doubt some of those countries also have capital or corporal punishment. Could you possibly explain how they get around that conflict?

Mr. MCINNES: I do not know if I can. But thought changes; legislative and judicial thought changes; and what may be acceptable in one generation, may not be so in another. I would remind you of the awful penalties there were under English acts of long ago, which you would not have now.

The suggestion has been put forward by some at least that whipping or hanging may not be proper under this bill, and that it would be in conflict with the provisions of the Criminal Code in that respect. That has been offered as one of the matters we have to consider.

Mr. RAPP: Mr. Chairman.

The CHAIRMAN: Just a minute.

Mr. RAPP: I have to go, Mr. Chairman.

The CHAIRMAN: Would you yield to Mr. Rapp, Mr. Korchinski?

Mr. KORCHINSKI: I beg your pardon, Mr. Chairman?

The CHAIRMAN: Would you yield to Mr. Rapp who has to leave?

Mr. KORCHINSKI: Certainly.

Mr. RAPP: I have to go a special meeting.

The CHAIRMAN: I have been listening to the democratic convention.

Mr. RAPP: Two briefs that were presented to us this morning expressed the view or the desire that a standing parliamentary committee be established to give continued examination to the bill of rights. Another brief stated that immediately upon the passage of this bill a human rights section should be established within the Department of Justice. Do you consider there is a need, if the bill passes, for either a committee to be established to review from time to time the need for amendments, or the addition of new paragraphs, and so on?

Mr. MCINNES: I can only express a personal opinion in this regard.

Mr. RAPP: Yes, that would be fine.

Mr. MCINNIS: My personal opinion is that parliament is sovereign and it can bring up its bills at any time, and can report them at any time.

Mr. RAPP: By a committee?

Mr. MCINNIS: By a committee or otherwise, so my personal view is that there is hardly any need for this. That is my own view only.

Mr. RAPP: Thank you very much.

The CHAIRMAN: Would you like to complete your questions, Mr. Korchinski.

Mr. KORCHINSKI: Dealing with clause 4, which is a provision in respect of the minister's studying to determine if there is any conflict with existing legislation, in your opinion, would you think this bill would override all existing legislation?

Mr. MCINNIS: Expressing my personal opinion, I do not think so, no.

Mr. KORCHINSKI: You would not think so?

Mr. MCINNIS: No, I would not think so, not all existing legislation, no.

Mr. KORCHINSKI: What effect would legislation have which is enacted in the future and which might be contrary in some aspects?

Mr. MCINNIS: That is what I am saying as part of our brief; legislation may be passed in the future, and the later legislation would be, I would think, regarded as abrogating the bill of rights. A great deal would depend on the language that is used. It is difficult to make a particular statement. As I say, you would have to see the subject matter of what the future legislation is.

The CHAIRMAN: I was wondering in connection with that, Mr. McInnes, if you are quite conscious of the words that have been inserted in clause 3: "unless it is otherwise expressly stated in any act of parliament of Canada hereafter enacted"?

Mr. MCINNES: What I had in mind, Mr. Chairman, is, does the bill of rights effect juveniles and the powers that certain people have over them? I cannot believe that it abrogates those things, and that is what I had in mind.

Mr. KORCHINSKI: That brings up another question. Would it be a matter of interpretation by the Supreme Court as to which act overrides the other?

Mr. MCINNES: It is certainly a matter for the courts, and when I say, "courts", I remind you that you said the Supreme Court. This situation would be referred to the Supreme Court, again, by way of reference, and then they would deal with it. If it involved a matter that arose in one of our ordinary courts, or was sent to that court, then it would be dealt with by that court.

Mr. KORCHINSKI: This would leave certain leeway as to interpretation. One judge might interpret the bill of rights as having jurisdiction over another particular act, and another judge might have an entirely different view?

Mr. MCINNES: That could happen and has happened in regard to other matters, of course.

Mr. STEWART: Mr. Chairman, possibly Mr. McInnes has been asked this question when I was out, but the association's opinion is that a reference would be better made to the Supreme Court, as the circumstances required, rather than before the bill was enacted?

Mr. MCINNES: I can only answer that, Mr. Stewart, by saying that some individuals have put forward that view. The association as such, has not passed any special resolution that it should be referred to the Supreme Court of Canada.

Mr. STEWART: It was also suggested at one of our previous meetings that there might be some retroactive effect to the words in clause 2 of the proposed bill, that it did apply, by setting out that these freedoms had always existed, and that legislation had been made in contemplation of these rights. Is that idea too far fetched?

Mr. MCINNES: The view of many is that these rights, which are set out there, already existed, and we already have safeguards by decisions, by custom, and by general recognition.

Mr. STEWART: And by implication, any statute was made, in contemplation of that?

Mr. MCINNES: That is right.

The CHAIRMAN: Mr. McInnes, I do not know whether this would be a fair question to ask you or not, but it has been indicated that the statement that these rights have always existed, is sort of a legislative lie; would you care to make any comment in that regard?

Mr. MCINNES: I do not know if I can usefully add anything. Some of these freedoms, such as freedom of religion and freedom of speech, go back to earliest times. We have had a series of judicial decisions dealing with these. I am not sure if I have got your question exactly, Mr. Chairman.

The CHAIRMAN: I was simply stating that it had been indicated to the committee by another witness, who took quite decided exception to that statement,—I do not know whether he called it a statutory lie or legislative lie—and said that it was not true. I was just wondering if you felt that perhaps the committee should modify that statement in some way.

Mr. MCINNES: My own view is that—I am speaking personally now—our decisions and our courts have safeguarded these rights throughout generations. I am expressing, as I say, my own personal view on that.

Mr. KORCHINSKI: Perhaps Mr. Chairman, you might have Mr. McInnes also express the opinion that these rights have always existed but we do not always respect them.

The CHAIRMAN: It would be entirely correct to say that it is not without some truth.

Mr. KORCHINSKI: Mr. Chairman, I would like to ask one more question, and then I will yield to anyone else.

In the submission presented by the Alberta bar association it was suggested that perhaps some penalty should be provided against persons who discriminate. I notice that there is no reference in your submission to the provision of any penalties in the event that a person does not abide by these provisions. In your opinion, or in the opinion of the association, do you feel that perhaps we could strengthen this bill by adding such a provision?

Mr. McINNES: My own opinion is that it would not.

Mr. KORCHINSKI: All right.

Mr. DORION: Coming back to the formula at the beginning of clause 2 which reads: "it is hereby recognized and declared that in Canada there have always existed and shall continue to exist—", may I note that there is something similar in chapter 175 of 14-15 Victoria in respect to religious liberty, and we have, in the preamble, this expression, "whereas, the recognition of equal quality among all religious denominations is an admitted principle of colonial legislation". I believe that it is a historical mistake, or error. I understand by that, that it is only equal in respect to the formula of interpretation, do you not believe that?

Mr. McINNES: That may be. I would like to answer your question usefully but I do not know that I can do so sir.

Mr. DORION: You do not know that?

Mr. McINNES: I am not familiar with that statute, to which you refer.

Mr. DORION: This is the statute of worship.

Mr. McINNES: I am not familiar with the terminology.

Mr. DORION: No. I quoted it to you only to emphasize the point, and to show that it is only a question of interpretation.

Mr. McINNES: Yes.

Mr. DORION: It is only for the interpretation of the statute that we have these words.

Mr. McINNES: Your are referring to "in Canada"?

Mr. DORION: Yes.

Mr. McINNES: I think that may be a fair assumption.

Mr. DORION: I would like to ask another question. Do you believe that this draft of the bill of rights would affect the provincial libel act?

Mr. McINNES: It may very well be. That is one of the uncertainties that could very well exist, I would say, even if we interpret the words "in Canada" by meaning without the federal jurisdiction.

The CHAIRMAN: Do you mean "within" the federal jurisdiction?

Mr. DORION: Yes.

Mr. McINNES: Well, there is room for a conflict there; that is all I can say. I believe there is one of these uncertainties.

Mr. DORION: There would be room for interesting debate for lawyers?

Mr. McINNES: Exactly.

Mr. DESCHATELETS: Mr. McInnes, do you think that the bill, in its present form, can be used as a legal basis, if passed, by any Canadian citizen who would be denied any rights set out in article 2—and perhaps I could make myself clear with an example.

Suppose this bill is adopted in its present form—and let us take Ontario and not Quebec, because we will leave Quebec alone for a while. Suppose in Ontario a coloured man is being refused admission to a hotel because of his colour. Do you think this man could find relief in this bill of rights and use it as a legal ground under article 2?

Mr. McINNES: He could certainly say, "This is one of the fundamental freedoms that the parliament of Canada has set out, that there should be no colour bar", or, "that there should be freedom of race", and so on. I would say that he could put his feet on that bill.

Mr. DESCHATELETS: As a lawyer, would you take this case?

Mr. McINNES: Lawyers, as you know, raise all sorts of defences; whether they believe in them or not is not always the point.

Mr. DORION: On that question raised by Mr. Deschatelets, I believe that the first question to decide would be the following one: Is a tavern a public place or a private place? And if the courts decide it is a private place it is not within the federal jurisdiction. I remember a case—the Christie case, a case to which a witness referred; but there is also another very interesting case on it, the case of Bouchard.

Mr. McINNES: Yes, I have a memorandum on it here.

Mr. DORION: It was decided by the Supreme Court, and it was decided that the seashore may be a public place but may also be a private place. In that precise case it was decided it was a private place. It was decided by the appellate court of Quebec and not the Supreme Court.

Mr. STEWART: The parliament of Canada could, under the guise of criminal law, make it a criminal offence to discriminate against a coloured person by refusing him beer.

M. McINNES: This is one of these uncertainties.

Mr. DESCHATELETS: Do you not think, if this bill of rights means something, there will not be in the future any question about whether it is a public place or a tavern, or anything? There is nothing there which says that. They say there will be from now on no distinction by reason of race—

Mr. DORION: There is a question of evidence to decide before.

Mr. DESCHATELETS: Otherwise the bill of rights does not mean anything.

Mr. McINNES: As I understand it, it is intended to be a statement of fundamental rights, wherever they are.

Mr. DORION: We have not to forget it is a bill of rights. The purpose of a bill of rights, I believe, is to fix the nature of relations, not between individuals but between the individual and the state. If we take that principle into consideration, if we go into a private place, I do not believe the bill of rights may be applied against another individual. It may be applied against the statute of a state and against the laws of that state. Do you not believe that?

Mr. McINNES: What you are saying, as I understand it, is that this is between the state and the individual, rather than individuals as such; and that something can take place in a residence that the bill would not be applicable to at all, a private house. That is something I do not know.

The CHAIRMAN: I wonder, Mr. McInnes, if we are not becoming a little unduly apprehensive about the field upon which this bill operates. Take, for instance, civil property rights. It is not correct to say that the federal government has no jurisdiction in respect of property, because we know that the theft of

property is constituted a crime, and there is no question about the jurisdiction of the federal government to legislate in that respect affecting property. So that all legislation of the federal government must be within the powers of the federal government, if it is to have any effect. The courts are set up and do determine whether or not in any statute of the federal government there is any excess of jurisdiction.

Mr. McINNES: There is some revelance of matters over which both provinces and the dominion have jurisdiction. They both legislate in some fields—insurance, in part, I believe, and some others I have forgotten for the moment.

Mr. DORION: But I believe we have to avoid litigation as much as possible.

The CHAIRMAN: We should not promote any litigation!

Mr. DORION: We have sufficient work to do already!

The CHAIRMAN: I have one final question, as far as I am concerned, Mr. McInnes. Do you believe that the enactment of this bill would be worse than having nothing at all, or anything to that effect?

Mr. McINNES: No, I do not believe that. I see that one witness said that, or one representation was made to you to that effect. Personally, I do not join in that thought.

The CHAIRMAN: Thank you. Are there any further questions?

Mr. BADANAI: Mr. Chairman, I would like to ask Mr. McInnes: Does he think that a term of the present bill, if enacted, might prompt people to engage in litigation which may be unsuccessful because of the existence of prior and later enactments which, because they are more precise and more applicable, may prevail?

Mr. McINNES: I do not know I can answer your question. I think I can foresee—and, again, I am speaking personally—that there will be a great deal of litigation arising out of this bill. I believe that is the case. Perhaps I have not answered your question though.

Mr. BADANAI: That is the question I would like answered, yes, whether the bill is provocative of litigation?

Mr. McINNES: I do not know it is provocative of litigation, but I think litigation will result, because this bill will be raised as a defence, I believe, in a great many instances. Just what they will do—and we have drawn out some suggestions it is a little hard for me to anticipate; but I say it will be quoted as a defence in a great many cases where people are charged.

The CHAIRMAN: I have one more question I will ask you privately.

Mr. STEWART: That will cost you money!

The CHAIRMAN: Mr. Martini, I believe you had a question to ask.

Mr. MARTINI: Mr. Chairman, what I have to say has nothing to do with asking any questions. I only want to draw to the attention of the committee that this bill has been talked about for about three days in the House of Commons. With the overtime, I would say it took about six times; that is, counting the overtime that we are working now.

It was known for over two and a half years—or even before that—when Mr. Diefenbaker, the Prime Minister, was first elected, that he was going to present this bill.

Several briefs have been turned in to Mr. Diefenbaker, and I am sure that every brief has been given serious consideration. I also feel that when the Prime Minister called in his advisers, or technicians, or whatever you want to call them—experts—to draft this bill, they also consulted with the Department of Justice. I feel that they have done that.

Also, I feel that the thought behind that was to present a bill that would do the job. The men who were called together to draft this bill have looked over all the briefs—and I think everyone who has turned in a brief, including these gentlemen who have come here today, are to be complimented for trying to help the government—any government—to make better laws.

Therefore, Mr. Chairman, I feel that this bill has been given serious consideration, and they have come up with a bill that at this time goes as far as it can go. I think that if we permit this bill to be passed as soon as possible, then from time to time we could see just what effect it is going to have in Canada; and when a specific case comes up, in any field, to an individual or to organizations, we should have a test case of some sort to remedy what faults it may have.

So I think, Mr. Chairman, that we could go on listening to all sorts of people and it would not get us very much further. I respect the bar association: I feel that they should, of all people, present one of the best bills, because they would always present something that would have its good effects and its bad effects, so that they could get out of it at some time. You find one lawyer will defend you for your liberties, and another lawyer will try to take those liberties away from you. But at this moment I think we could go on listening to all sorts of briefs, and it would not improve this bill; it would not make this bill any better than it is at the moment.

What I am trying to convey is this: even when the aeroplane was first invented, it did not do the job, perhaps, and some people said, "It cannot be done; it will not fly". But look at what we can do today! The automobile, or anything else, is another example of this.

This is a bill of rights that everybody was talking about. Everyone was saying, "Why does he not introduce it now"? We have reached the point where it has been introduced, and I think that the best minds in Canada in that field have been called together by the Prime Minister; they have given their best to bring out a bill that will do the job at the moment.

Most people said, when this bill was first introduced, "It is a good bill; but it does not go far enough". I think we all agree that it does not go far enough; but we cannot put our finger on where it does not go far enough.

Also, I may say that in the house everybody voted in favour of this bill, and the Prime Minister made it clear that he himself was not satisfied with it as it is today. We do know that he intends to improve it: not only he, but whatever we present at future cessions is going to improve it. But the only way we can improve it is by having some specific case, so that we can say, "This is where it does not function", and we can make the necessary change when the time comes.

Mr. CHAIRMAN: I hope I have made myself clear. With that, I should like to move—if I can get a seconder; and I do not know if I am in order—that we report this bill to the house and let it be passed. That would not stop any delegations coming before this committee to present their briefs. Let us see what future amendments we can make to it; but let us put it to work and see just what it can do. Until we see what it can do, we do not know what amendments will be needed. Right now, all we have been getting is general criticism; but no one can put his finger on any one clause in this bill and say that it should be changed to such-and-such—because I feel that the Department of Justice, and every other department that was called in on the drafting of this bill, must have given advice on clause 6, where parliament will be called in case of war, and its effects on this bill. You have to change the War Measures Act for that, if this bill does not have any effect. Then later it will have more teeth, perhaps, in this bill of rights.

Therefore, Mr. Chairman, I should like to move—if I can get a seconder—that this bill be brought to the house and reported without amendment, and let us see just what it can do.

Mr. BADANAI: Mr. Chairman before you put the question—

The CHAIRMAN: Mr. Badanai, I do not think discussion is open unless there is a seconder.

Mr. BADANAI: I want to say this—

The CHAIRMAN: You may make a statement later. I will call for a seconder.

Mr. BADANAI: All right.

The CHAIRMAN: Is there a seconder for the motion? Before you make your statement, Mr. Badanai, I gather that what Mr. Martini had in mind was that we should not hear further evidence; but I would expect that he would want us to consider the bill. He is apparently disposed to be satisfied with the bill as it is presented, and wants this committee to report it without amendment.

There is no seconder, so the motion is dropped.

Perhaps, inasmuch as we are getting into another field, and I believe that our witnesses would like to leave, we might continue with this matter, if you would just wait for a few moments. I want to call a meeting of the steering committee. But I think we should dismiss the delegation now.

Mr. STEWART: Are there no other witnesses for this afternoon?

The CHAIRMAN: There are no other witnesses for this afternoon. Before Mr. McInnes, Mr. MacKay and Mr. Merriam leave, I would like, on behalf of the committee, to express to you gentlemen our deep gratitude for not only coming to the committee—I think this may be a little repetitious of what I have said before—but it is a very excellent brief that has been presented by you.

I do not think it solves our difficulty; but at least it is going to be very helpful, and we appreciate it. It certainly has pointed up the differences of opinion which exist in your bar association and, I think, amongst the public generally. We want you to know that we are very grateful to you, and I hope we have not been too hard on you in our questioning.

Mr. MCINNES: That is very kind of you, sir. Thank you all very much.

Some Hon. MEMBERS: Hear, hear.

The CHAIRMAN: Mr. Badanai, if you feel that you would like to make a statement, please proceed.

Mr. BADANAI: Mr. Chairman, I was going to say that I could not let the statement of Mr. Martini go by unchallenged. We are trying to make a better bill, if possible; that is the reason why we have asked these witnesses to appear—and we hope to hear more. With their help and assistance we are going to be able to improve the bill. That is the reason we are meeting here; that is the reason the Prime Minister has indicated that the bill should be examined by a committee.

If there was no intention of trying to improve the bill, then the committee would be quite unnecessary. For that reason, I could not very well go along with my good friend, Mr. Martini.

The CHAIRMAN: Let us not get into a debate on that point.

Mr. MARTINI: Before we adjourn, Mr. Chairman, I know you are going to be talking about a preamble some time or another.

This one is not perfect, but I would like to present it to you so that you can have copies made and pass them around. It may be that you will not use it; however, it does not matter. I have four or five copies here of my suggested preamble, which reads as follows:

> There are certain rights which Canadians claim as their birthright to which our laws conform, and by which we demand to be governed. Some of these come down to us through ancient liberties won by the British people over the centuries; such rights, inherent in Canadian law, as those set forth in the Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights of 1689.
>
> Other liberties have become part of our way of life and are generally recognized as fundamental to it. To these, the natural rights of all Canadians, may be added the broad statements of principle contained in the United Nations universal declaration of human rights which has been subscribed to by representatives of the Government of Canada. These are our rights.
>
> Some of these have been obscured by passage of time. Others, though taken for granted, are nowhere explicitly set forth in constitution or statute. And there is not a single document to which Canadians can refer to find their essential and rightful liberties enumerated.
>
> It is timely and useful, in a world torn with conflicting ideas and forces, that Canadians should affirm their rights and incorporate them in a broad statement of principle, in a single document.
>
> In order that all shall know that everyone in Canada has the right to life, liberty and security of person this declaration of the rights of Canadians is endorsed. The enumeration in this declaration of certain rights shall not be construed as denying or disparaging others retained by the people.

The CHAIRMAN: Thank you, Mr. Martini.

We have a letter—at least, I think it is presented in the form of a letter—from the Canadian chamber of commerce, and it is dated July 14, 1960. I think this letter should be tabled at this time, and distributed amongst the members of the committee.

Perhaps it could be referred to at the next meeting.

We have no witnesses scheduled for tomorrow and, as yet, we have none scheduled for Monday.

I would suggest that the adjournment be at the call of the Chair. However, we will endeavour to secure an organization to appear before the committee on Monday. I do know that we will have work for Tuesday.

Mr. DORION: Before we adjourn, Mr. Chairman, I would like to submit to the committee a suggested preamble. It reads as follows:

> Whereas it is meet and proper to set out by way of preamble to this act that Canada is a christian, sovereign and democratic country; that Canadian citizens have a fundamental and sincere belief in God; that they wish and desire to preserve the rule of law, to maintain the rights and freedoms obtained through their own efforts and the heroic struggles of their fathers throughout the years and more particularly during the first and second great wars; that they believe also that those rights and freedoms are conducive to a true social order based on justice and charity and are part of their inheritance;
>
> Therefore . . .

APPENDIX A

Resolutions concerning the proposed Bill of Rights, adopted by the Alberta Branch of The Canadian Bar Association, February 1, 1960

Resolved that approval be given to efforts to assure trial by due process of law and that the government be recommended to give careful consideration to the examination of the Criminal Code and other statutes and the common law rules with a view to determining how they can be strengthened, and to consider whether it might be desirable, with a view to convenience and avoidance of conflicting provisions, to put any further safeguards in the statutes themselves, and in the case of administrative agencies to consider a code of administrative procedure.

Resolved that the Council recommend to the government consideration of the need for anti-discrimination legislation bearing in mind that the victim of discrimination often needs not merely protection against discriminatory legislation, but affirmative help in the form of government intercession, and sanctions against those persons who discriminate against him.

Resolved that the government consider the implications on the existing law of the declarations of freedom, and whether it might be desirable to use the Criminal Code and other statutes as a medium for securing these freedoms.

Resolved that the government consider whether safeguards might not be provided in The War Measures Act to protect against possible abuses that might recur and that have no relation to the war effort, such as the denaturalization of Japanese, sale of Japanese lands in World War II, internment provisions and the espionage case.

APPENDIX B

BILL OF RIGHTS

"The resolution hereunder was passed at a meeting of the Ontario Subsection on Civil Liberties and recommended to a general meeting of all the Ontario members of the Canadian Bar Association and passed by them on the 6th day of February, 1960.

"Whereas the Government of Canada has announced that it intends to ask the present session of parliament to enact a Canadian Bill of Rights Act;

"And Whereas the legal profession and members of this Association are vitally concerned with any legislation having to do with the fundamental freedoms and human rights of the individual;

"And Whereas the Association for Civil Liberties has prepared a draft Bill of Rights Act which has been placed before this Association for endorsement or otherwise;

"Now Therefore be it and it is hereby resolved that this Association recommends that if any Canadian Bill of Rights Act is passed by Parliament at its current session, there should be included as essential parts thereof the provisions, rights and freedoms contained in the hereunto annexed draft Bill of Rights Act, realizing that the assurance of such rights can be accomplished by such Act only in the areas of legislation within the competence of the Parliament of Canada."

DRAFT BILL OF RIGHTS

The history of mankind establishes, as the United Nations Universal Declaration of Human Rights proclaims, that recognition of the inherent dignity and worth of every member of the human family and the preservation of the human rights of the individual are the foundation of freedom, justice and peace in the world.

Because these human rights form a fundamental part of our Canadian heritage and citizenship, respect for these rights is the cornerstone upon which the welfare of our people and the future of our nation rest.

It is therefore essential to the maintenance and development of the democratic way of life in which we Canadians are dedicated that the human rights of every person within our borders be clearly stated and protected to the end that each individual may achieve fully his inherent dignity and worth.

Her Majesty by and with the advice and consent of the Senate and House of Commons of Canada therefore enacts this Act for the recognition and protection of the Human Rights and Fundamental Freedoms of the people of Canada.

Article 1

This Act shall be known as the Canadian Bill of Rights Act.

Article 2

Every person who comes under the jurisdiction of the Parliament of Canada is entitled to the human rights and fundamental freedoms set out in this Act and shall be protected against their violation.

Article 3

Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except on such grounds and in accordance with such procedures as are established by law.

Article 4

No one shall impose or authorize the imposition of or be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 5

No one shall be held in slavery or servitude or required to perform forced or compulsory labour.

Article 6

Everyone is entitled, in the determination of his rights and obligations or any charge against him, to a fair and public hearing, in accordance with the principles of fundamental justice, within a reasonable time by an independent and impartial tribunal established by law.

Article 7

Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Article 8

Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language he understands, of the nature of and reason for the charge against him;

(b) to defend himself in person or to retain and instruct counsel of his own choosing without delay or if he has not sufficient means to pay for legal assistance it shall be provided free when the interests of justice so require;

(c) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(d) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 9

Everyone who is deprived of his liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 10

(a) No person shall be compelled to give evidence before a court, tribunal, commission, board or other authority if he is denied the right to counsel or other constitutional safeguards;

(b) No person shall be compelled in any criminal case to be a witness against himself.

Article 11

(a) No person shall be denied the right to reasonable bail without just cause.

(b) No person for the same offence shall be put in jeopardy or be required to stand trial twice.

Article 12

No one shall be subjected to arbitrary or unlawful interference with his private and family life, his home and his correspondence.

Article 13

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to maintain or to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief in worship, observance, teaching and practice, all without coercion in any way.

Article 14

Everyone has the right of freedom of opinion and freedom of expression. This includes freedom to hold opinions and to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers.

Article 15

Everyone has the right to freedom of peaceful assembly and to freedom of association with others.

Article 16

Every person is entitled to the peaceful enjoyment of his property and shall not be deprived of his property except in the public interest and in accordance with the law.

Article 17

Every person legally entitled to reside in Canada has the right to freedom of movement and residence within the country and the right to leave and return to Canada and shall not be subject to exile.

Article 18

Everyone is equal before the law and before all courts and tribunals and is entitled to the protection of the law and to the human rights and fundamental freedoms set forth in this Act without discrimination of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 19

The human rights and fundamental freedoms above set forth shall not be denied by anyone. Any person whose human rights or fundamental freedoms have been violated shall have an effective remedy by reason thereof and may apply for relief on notice of motion to the Supreme or Superior Court of the province in which the violation occurred.

Article 20

The Minister of Justice shall in accordance with such regulations as may be prescribed by the Governor in Council examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every bill introduced in the House of Commons to assure that the rights and freedoms recognized by this Act are fully respected.

Article 21

Nothing in this Act shall be construed to abrogate, exclude or abridge any rights or freedoms not set out herein to which any person is or may become otherwise entitled.

23534-1—9

SOURCE NOTES ON ARTICLES IN DRAFT BILL OF RIGHTS APPROVED BY ONTARIO BRANCH OF THE CANADIAN BAR ASSOCIATION

Preamble is original.

Article 1—Title.

Article 2—Original.

Article 3—From Prime Minister's Bill C-60, United Nations Declaration and Draft Covenant, Council of Europe Convention on Human Rights and Fundamental Freedoms of 1950.

Article 4—From Prime Minister's Bill C-60, United Nations Declaration and Draft Covenant, Council of Europe Convention on Human Rights and Fundamental Freedoms of 1950.

Article 5—From United Nations Declaration and Draft Covenant and Council of Europe Convention.

Article 6—From Bill C-60, United Nations Declaration and Draft Covenant and Council of Europe Convention.

Article 7—From United Nations Declaration and Draft Covenant and Council of Europe Convention.

Article 8—From Council of Europe Convention; most of it from United Nations Declaration and Draft Covenant and part in Bill C-60.

Article 9—In Bill C-60, United Nations Declaration and Draft Covenant and Council of Europe Convention.

Article 10—(a) In Bill C-60, United Nations Declaration and Draft Covenant.

(b) In United Nations Draft Covenant and U.S. Bill of Rights; Constitution of India.

Article 11—(a) In Prime Minister's resolution of 1955; in U.S. Bill of Rights, Convention of Council of Europe.

(b) In U.S. Bill of Rights, Constitution of India.

Article 12—In U.N. Declaration and draft covenant; Council of Europe Convention.

Article 13—In Bill C-60, United Nations Declaration and Draft Covenant; Council of Europe Convention.

Articles 14, 15 and 16—In Bill C-60, United Nations Declaration and Draft Covenant; Council of Europe Convention.

Article 17—In United Nations Declaration and Draft Covenant.

Article 18—In Bill C-60 and in United Nations Declaration and draft covenant and Council of Europe Convention.

Article 19—In Prime Minister's resolution of 1955.

Articles 20 and 21—In Bill C-60.

APPENDIX "1"

Submission presented
to the
Special Committee
of the House of Commons
on Bill C-79
by the
Canadian Jewish Congress
at the Parliamentary Buildings in Ottawa
on July 15, 1960

Mr. Norman L. Spencer, M.P.,
Chairman, Special Committee on Bill C-79,
House of Commons,
Ottawa.

Sir:

We appreciate the opportunity of placing before you and the members of the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms our representations on the proposed Canadian Bill of Rights.

The Canadian Jewish Congress has been intensely interested in and directly concerned with the promotion of human rights and fundamental freedoms, both by international and domestic legislation. A delegation of our Congress attended the 1945 San Francisco Conference advising on the formulation of some of the basic articles of the United Nations Charter dealing with the protection of human rights, and ever since has been active in the field. Our Congress has worked for the rights of all human beings and regarded the rights for Jews as being simply one manifestation of the rights for all.

We like to recall that on June 9, 1948, we appeared before the Special Joint Committee on Human Rights and Fundamental Freedoms of the Senate and the House of Commons of Canada, then sitting under the chairmanship of the Rt. Hon. Mr. J. L. Ilsley and the Hon. Sen. L. M. Gouin. We then submitted a statement on the significant contribution which Canada could make by associating herself with the international endeavours, then incipient, for the protection and preservation of human rights and we made a number of comments on the drafting of an International Declaration of Human Rights.

Then again, on April 27, 1950, when the Special Committee on Human Rights and Fundamental Freedoms of the Senate held its hearings, we once more had the privilege of appearing. We then were much impressed with Senator Roebuck's motion which favoured the inclusion in the Canadian constitution of a section guaranteeing human rights. At the same time we pointed out some of the areas in which human rights could be protected by federal legislation, including fair employement practices concerning persons coming within federal jurisdiction and the possible uses which can be made of the

criminal law power reserved to the federal government. Indeed, some of these ideas have since become fully accepted means of advancing human rights in Canada—and we are far from claiming more than a very modest share of credit.

When a Citizens' Commission on Human Rights met in the National Capital on December 8, 1958 to mark the 10th Anniversary of the Universal Declaration of Human Rights, we again made a submission, dealing inter alia with Bill C-60 as at the time the Prime Minister's draft Bill of Rights was known, the principles of which we highly commended, coming however to the conclusion that they were deserving of "a better framework of application and enforcement than is presently provided."

We gave further consideration in co-operation with other organizations and on April 29, 1959 we associated ourselves with a submission to the Prime Minister, made by a number of national groups under the leadership of the Association for Civil Liberties, welcoming "as an interim measure" the adoption by Parliament of a Canadian Bill of Rights Act, pending achievement of the ultimate goal of a constitutional amendment.

This indeed is still the pervading conviction of our organization. We are able today to express here some of the sentiments of the Canadian Jewish Congress, speaking for the Canadian Jewish community, by stating the following:

(1) We highly commend the Canadian Government for having introduced Bill C-79 and recommend its early adoption with such refinements of text as the labours of this committee will produce.
(We refrain from listing some of the shortcomings of the Bill that have occurred to our Legal Committee, most of which have also been identified during the parliamentary debate and which will doubtless be dealt with by legal authorities appearing before this Committee.)

(2) We would urge that subsequently provision be made for the establishment of a Joint Committee of the Senate and of the House of Commons on Human Rights and Fundamental Freedoms, whose main task it would be to lay the groundwork for obtaining that measure of agreement with the provinces which, after adoption by a Federal-Provincial Conference, would in due course make possible a Joint Address to Westminster. An amendment to the B.N.A. Act should thus be sought, placing a Bill of Rights covering the fields of provincial as well as federal jurisdiction there, alongside the language-rights and school-rights which are already there.
(It would be our fervent hope that such Joint Address would be the last one and that at the same time agreement could be reached for a modus by which all constitutional amendments may be obtained in Canada.)

(3) We would recommend that every consideration be given to making the year 1967, when Canada will mark the Centennial of Confederation, the very final date for the achievement of two all-important goals, namely
   (*a*) the entrenchment of the Bill of Rights in the Canadian constitution, and—maybe even more momentously—
   (*b*) the "nationalization" of our very constitution, which would then no longer be the British North-American Act, but the Constitution of Canada.

   A Bill of Rights in a Canadian Constitution—what more fitting way could be conceived for Parliament to mark Canada's Centennial?

(4) One word of caution with regard to the suggestion sometimes advanced that, if all provinces were to enact uniform complementary bills of rights within the competence of their own jurisdiction, the desired complete coverage would then be achieved for the protection of human rights and fundamental freedoms.

While there may be merit in the enactment of provincial bills of rights—again on the premise that they should be interim measures —we cannot help being apprehensive lest these provincial bills turn out less than uniform legislation. In this event, of course, Canada would in this most important field become balkanized and, indeed, the meaning and content of Canadian citizenship would vary from province to province.

It is for this reason that we continue to urge the pursuance of the ultimate goal of an entrenched Bill of Rights covering all jurisdictions.

(5) Finally, as concrete suggestions for "next steps" we would recommend to you, Mr. Chairman and members of the Special Committee,

(*a*) that immediately upon passage of Bill C-79 a Human Rights Section be established within the Department of Justice, the function of which it would be on a continuous basis to deal with the subject matters covered by this Bill, and

(*b*) that clauses be inserted in all relevant federal enactments, such as the National Housing Act, the Civil Service Act, etc. asserting, specifically, the principle of non-discrimination as guaranteed by the Canadian Bill of Rights.

All of which is respectfully submitted by

THE CANADIAN JEWISH CONGRESS

MICHAEL GARBER, Q.C.,
Immediate Past Chairman,
National Executive Committee.

SAUL HAYES,
Executive Vice-President.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 2

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MONDAY, JULY 18, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESS:

Professor W. F. Bowker, Dean of the Faculty of Law, University of Alberta, Edmonton.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23538-2—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer Esq.

Vice-Chairman: Noel Dorion Esq.

and Messrs.

Argue	Jung	Nasserden
Badanai	Korchinski	Rapp
Batten	Mandziuk	Stewart
Deschatelets	Martin (*Essex East*)	
Jorgenson	Martini	

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

MONDAY, July 18, 1960.
(7)

The Special Committee on Human Rights and Fundamental Freedoms met at 2.10 p.m. this day. The chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Badanai, Batten, Korchinski, Mandziuk, Martin (*Essex East*), Rapp, Spencer and Stewart—8.

In attendance: Professor W. F. Bowker, Dean of the Faculty of Law, University of Alberta.

The Chairman observed the presence of quorum and introduced Mr. Bowker, who set forth his views with respect to Bill C-79.

Mr. Bowker's questioning being concluded he was thanked and retired.

At 4.28 p.m. the Committee adjourned to meet again at 9.30 a.m., Tuesday, July 19, 1960.

J. E. O'Connor,
Clerk of the Committee.

Note: The 9.30 Tuesday meeting was subsequently cancelled.

23538-2—1½

EVIDENCE

MONDAY, July 18, 1960.

The CHAIRMAN: Gentlemen we now have a quorum. I will call the meeting to order.

Inasmuch as we have with us Professor Bowker, I am going to defer, with your consent, until later on in this meeting a report of the steering committee, which met on Friday, primarily to deal with the suggestion made by Mr. Martin that certain individuals and organizations should be at least invited to appear before the committee. I think we should not take up the time of the committee in dealing with that report. I will simply content myself at the moment with stating that wires were sent, and a considerable number of replies have been received.

It was as a result of the sending of those wires that Professor Bowker is with us here this afternoon. It was convenient for him to be here this afternoon and as a result of that we immediately set up this meeting. I would request, therefore, that those members of this committee who are on the steering committee remain after the adjournment of this meeting so that we may deal with these replies.

As I mentioned, we have with us Professor W. F. Bowker, dean of law at the university of Alberta, and without further remarks from me as chairman, professor, I would ask you to proceed to make your presentation to the committee, and you might indicate your interest in the matter of this bill.

Professor W. F. BOWKER (*Dean of Law, University of Alberta*): Thank you very much.

Mr. Chairman, if it is not out of order, I would prefer to stand.

The CHAIRMAN: Yes.

Mr. BOWKER: I am in the habit of speaking while standing.

I would like to express, Mr. Chairman, my pleasure at being invited to appear before the committee. The Clerk did ask me if I had prepared a written summary. Well, I have not, except in my own handwriting, because I received this invitation on Saturday afternoon and our stenographers seem to think they have the constitutional and fundamental right to a five-day week.

I would like to make observations about the bill, and in doing it I assume two things. Firstly, that this is designed as a statute dealing with matters within federal competence and not an attempt to interfere with matters of provincial jurisdiction except, of course, to the extent that any valid federal act may do so, in the event of a conflict. I do not propose to say a great deal about the constitutional problems that have been debated a great deal. I would make this observation about the constitutional question, that many thus have discussed. I think it is perhaps particularly difficult in the case of freedom of press and freedom of religion because of the half dozen cases, starting with the Alberta press case and ending with, perhaps, the padlock law case, that indicated in increasing measure by way of dicta, or an understanding in the minds of at least a growing minority, that these things are outside provincial competence. The only significance that trend of

decisions has, I would say, is that it might indicate that the bill is unnecessary in declaring these two freedoms, because they already belong to parliament. Apart from that I do not propose to discuss constitutionality.

Now, on the question of the purpose of the act, I take it that the purpose is better to secure human freedoms so far as they relate to parliament's competence. Agreeing that that is so, then the question is; do I approve of this method of doing it? I would like to dissociate myself from two criticisms that I have noted. One criticism is that it should not be passed because it is unnecessary. In many respects I think it is unnecessary because in the large majority of instances these rights are now secure. I still feel however that it is commendable for parliament to concern itself with the question as to how we stand in these matters; and if parliament finds there are certain respects in which we are wanting and then is trying to cure the deficiencies, that seems to me to be only common sense. I do not share the view of those who object to this bill on the ground that if should be a constitutional amendment. My objections to this bill would apply so much the stronger to a constitutional bill. I propose to give those reasons as we go along.

I would say, before giving examples from the bill, my criticism is that the object will be better attained by looking at both statutes and common law rules, and then asking the question: how does our law square with our concepts of human rights? Where it does not, then we should proceed to amend the specific statute to cure the defect rather than to do it by the method of this bill.

I think I can best illustrate my position by taking the main headings of the bill. Everybody has his own classification of human rights and fundamental freedoms, and no two are alike. My favourite has about six headings but I do not think I will enumerate them because nearly all of them are tucked into the three main headings that I find in clause 2. I know you are familiar with clause 2 but I would like to list the three main headings as they appear in the bill. The first is the proposition that everybody is entitled to life, liberty and property and not to be deprived thereof without due process of law. That is all one, though it covers a great many diverse things; the second one is anti-discrimination; and the third is the freedoms of communication because, for my purposes, I think we can lump press, speech, assembly, and even religion, together. Some might prefer to deal with religion separately, but I do not think that is necessary. So we have those three large groups. Taking clause 2, alone, I do not think there is any doubt about this. It is a mere declaration without "teeth". Then clause 3, by providing canons of construction of federal statutes, may provide some "teeth". I think it fair to say that most of the details in clause 3 have to do with the general subject of what might be called due process of law in the sense of fair procedure.

Now I would like to take an illustration from paragraph (a) of clause 2, to show the difficulty that I find in this bill from the standpoint of its efficacy. I would just extract the phrase, "the right of the individual to enjoyment of property" and the right not to be deprived of it "without due process of law". Let us imagine we have a statute that deprives a person of property without due process of law. I would like to give an example. The Opium act says that any vehicle used for smuggling opium may be confiscated. I do not know whether the committee, Mr. Chairman, would be familiar with the case in the Supreme Court of Canada that says when the finance company owns the car and the car is seized it is forfeited.

Mr. MARTIN (*Essex East*): That is the Excise Tax Act.

Mr. BOWKER: I cite *Industrial Acceptance against the King;* and that was under a similar provision in the Opium act. There are decisions too in the Excise Act, but I was referring to the one under the Opium act, because it was under that act that this case went to the Supreme Court of Canada. As far as I know, the act still stands the same way and has not been amended. I did not have time to check the amendments.

Let us imagine this bill is passed, and the same thing happens again. I am sure the finance company will come in and say, "Here is the bill of rights. We are entitled to the enjoyment of our property and we are not to be deprived of it without due process of law. 'Due process of law' means 'fairness' and this is the most unfair thing in the world, and we ask for a declaration that it is contrary to the bill of rights." That puts on the court the task of making up its mind whether the Opium act does deprive the finance company of its car without due process of law. I do not know what the court would say. I am quite sure what the American court would say: they would find for the finance company.

It seems to me that if that piece of legislation is unfair, the best way of curing the unfairness is to have parliament consider it; and if it decides that it is unfair, to amend it. By the same token, if parliament thinks it is fair, I am not happy at seeing that piece of legislation left for the court to decide whether it squares with a broadly worded phrase such as "due process of law" in the bill of rights.

I think one of the tendencies of people who strongly want a constitutional bill of rights seems to be that everybody is fighting parliament and parliament is the enemy. I am sure I am not in a hostile audience when I say I do not take that view.

While the courts have done a great deal to secure our basic rights, I think that in a democracy we can properly look to parliament to perform this task. I do not think that parliament is doing it in the best way, when it passes a bill like this which leaves it to the courts to tell everybody whether parliament has passed unfair legislation or not.

Now, I take that example from paragraph (a), and the only other remark I would like to make about paragraph (a) is this: The whole subject of fairness of procedure in criminal matters is one of due process of law. After all, that phrase came from the Magna Carta—Well, the phrase "due process of law" does not appear in Magna Carta, but it does appear in the statute of Edward III, and the Americans followed it. When we talk about the fairness of procedure that we grant to an accused man in a criminal trial, we are talking about due process of law, even though the phrase does not appear in the criminal code, and our judges do not use it very often. But it does appear in the bill.

Addressing one's mind to the criminal code, it seems to me that if we feel that the accused is not fairly protected under our criminal code and the common law rules that apply in criminal proceedings, such as the admissibility of confessions—that is not in any statute, it is in the common law—then we are entitled to go through the code, and if we find that it squares pretty well with our concept of fairness, then I think we should leave it alone. If we find it does not, then I think we should amend the code.

This example has probably been pointed out before, and I do not want to make too much of this, because if my criticism is correct, it can be easily remedied. One of the provisions in clause 3 is that everybody is entitled to a public trial. I think everyone knows that the public trial is a hallmark of British justice, and we are proud of it. But the criminal code has always said that certain trials may be held in camera, if the judge thinks they should

be—sexual crimes and crimes where state secrets might be disclosed. That exception is in the code. If this bill is in effect, it wipes out that exception: I cannot see any other opinion on that.

My position is this: I do not think I have to express an opinion whether that exception should be in the code, or not—I think probably it is a wise one. When parliament revised the code so carefully, as it did a few years ago, it did not touch that provision; and it did not touch hundreds of others. I do think that it is not a suitable way to change the code, to put in a bill of this kind a section that all trials must be in public.

I want to say this about our criminal procedure. You see, sir, my position is that I favour remedial legislation where we have weak spots; but the first thing I think anyone should do is to ask himself: what are the weak spots? I am speaking of the Criminal Code and the law governing criminal procedure. I did do this a few years ago: I was troubled by remarks, both from this country and the United States, that we would not have had the procedure that was followed in the espionage case if we had had a bill of rights; so I thought I would study the subject in a comparative way. I examined, not only the provisions in the American bill of rights that deal with criminal trials; I compared them with our law, and in large measure the provisions are the same. A man is entitled to a jury trial, though in the United States he is entitled to a grand jury, and half the provinces in Canada do not have one. Some of the American safeguards are now outmoded; but he is entitled to know what the charge is; he is entitled to call witnesses; he is entitled to be confronted by the witnesses against him; he is entitled to bail, the right to counsel, and so on.

Those are all in the code. Another example is that no man shall be arrested on a blank warrant. That is in the code; it is in the American bill of rights. There are practically no differences. Our procedure, so far as is laid down in the law, is just as good as their constitutional protection. I do not think it is proper to make any comment about the execution of the law. This is not a Wickersham commission, and we are talking about what statute law can do, not the administration of it.

There is one respect in which I think our code does not compare well with the American bill of rights in criminal procedure, and it is this: both say that a man has the right to counsel. Incidentally one of these provisions in the bill says that even the witness has a right to counsel, which puzzles me. It is in one of these paragraphs of clause 3. But certainly an accused is entitled to counsel; but all this means in Canada is that, if he has a lawyer, the judge cannot exclude the lawyer. Our right to counsel does not require the country to provide counsel. In the United States, in recent years, the Supreme Court has held that the right to counsel means in capital cases, and probably in other serious cases that if a man does not have a lawyer, the state has to provide one; and if the state does not, he is deprived of his constitutional right to counsel, and his conviction is set aside.

Once again, I do not think I have to express here my opinion as to whether the code should be amended to say that the state shall provide counsel. I know perfectly well that in capital cases they usually do; certainly in our part of the country—and maybe in other cases too. But I think, in fairness, I am obliged to point out that in that one particular we do not show the accused quite the solicitude that the American bill of rights does.

In many ways I think I could say that our law gives perhaps greater security to the accused—perhaps not in many cases; but in some. I do not think I need say anything more about—

Mr. MARTIN (*Essex East*): Mr. Chairman, I do not know that I fully follow this last point, and I wonder if you do.

I want to clearly understand what your point is, Professor Bowker. As I understand it, you said that in the United States bill of rights, the right of counsel seems to be confined to capital cases; and then you went on to say that—if I understood you correctly, and I want you to correct me—in our Criminal Code we did give greater guarantee to the individual with regard to the right of counsel than they do in the American legal system.

Would you mind telling me more about that; I am a little confused.

Mr. BOWKER: What I meant, sir, was that, taking our law generally with their constitutional guarantees, we square up pretty well; but in the one example, of right to counsel, the Supreme Court of the United States has held that that means the state must provide a lawyer. My understanding—

Mr. MARTIN (*Essex East*): In capital cases?

Mr. BOWKER: In capital cases, yes. I have the citation of those cases. Here, I do not think the provision of the Criminal Code means that, though I am aware that in practice counsel is provided.

The only other comments I would like to make under clause 2 (a) have to do with civil procedure, and procedure before administrative tribunals.

A due process clause, which (a) is, clearly refers, among other things, to procedure in civil trials as well as in criminal trials. I do not know enough about procedure in the Exchequer Court and the Admiralty Court to make any criticism of it; but there again, I would say that if the procedure is not fair, the most satisfactory way to remedy the defect would be by amending the particular act.

I think the problem of administrative tribunals is a complex one. I find it hard to gain a picture as to what effect the various provisions in clause 3 will have on procedure before administrative tribunals. They are of many kinds, and they do so many things, ranging all the way from the most trivial to the most important, in an economic way, and the most important by way of the human himself. I am thinking of decisions under the Immigration Act. They are certainly more important than a lot of other decisions we can think of.

I find it hard to generalize. I would not like to have to answer the question: what safeguards do you think should be given in administrative proceedings? Now, the courts have built up a great many, and the cases are not all consistent. Sometimes statutes provide that, for an example, a man is entitled to a hearing, and that he shall be able to call witnesses, and so on. Now, I would think that if parliament is interested in safeguarding the fairness of procedure in administration boards—maybe the position is all right now, or maybe in given statutes it might provide, for example, an appeal to the court—it could pass a general act along the lines of the American Administration Procedure Act that would apply generally. I have no firm view on that; but I do have difficulty in determining the impact of these provisions in section 3, dealing with administrative boards.

Mr. Chairman, I would like to move on to the second main provision of section 2—that of protection against discrimination. It is in this area, above all, that I say that a bald declaration such as we have here, even though it is supplemented by these provisions for construing statutes, does not take us very far toward securing the subject against discrimination. I do not think, under federal law, there is a great deal of discriminatory legislation in relation to race and religion. I think the incapacity of the Indians to vote is,

perhaps, the remaining one. However, I am not aware of unfair federal legislation on this subject. On the other hand, we have federal legislation that recognizes the desirability of preventing discrimination. Now, the two acts I have in mind are the fair employment practices act—I do not remember the title of the dominion act. But six provinces have a similar act, and that is certainly the type of device that I have in mind for dealing with this subject, because it is directed to a specific situation where discrimination, presumably, did exist, and it has sanctions to back it up. The second act is the Equal Pay for Women Act. And, in this area, above all others, a mere declaration does nothing.

I would like to make this point clear. Even a provision in the constitution to this effect would not take us very far. I would like to elaborate on that by an example. I think we are all aware that the United States constitution provides that no state shall deny to anyone the equal protection of the laws. That is the anti-discrimination provision. It was passed to protect the negro after the civil war. However, when that amendment was passed, everyone realized the amendment itself would not do a great deal. So, a section was put in the amendment—it is the fourteenth—that the Congress of the United States should have power to pass statutes fortifying the amendment.

Now, this has been the history. Congress tried, around 1870, and the acts were held to be outside the amendment. From 1870 to 1957, there was not a single act passed by congress to strengthen the anti-discrimination clause in the fourteenth amendment. We are all aware, just from reading the daily papers, that every bill that is brought in is defeated by southern votes.

In 1957, Congress did pass an act that strengthened the right to vote. Then, this year, they found it did not work very well, and they passed another one. Congress has never passed a Fair Employment Practices act like we have in Canada, but they have the constitutional protection—and the point I wish to make is that the protection is only as strong as the sanctions behind it.

Although I think I have been talking too long on this, I would like to give one example. In the United States, each state has its own constitution and has its own bill of rights. New York passed a new constitution in 1938, and they put in one of these anti-discrimination provisions. By itself, it does not do anything, in my opinion, and in the opinion of the New York legislature because, in 1945, they passed an act to set up a commission against discrimination. That is the device they used, and the commission mediates between the man who is discriminated against, on account of his race, and so on, and his employer, or whoever it might be who is discriminating against him. A lot of people in New York state said that it is no good, that you cannot legislate morality—and that you should not pass such a law. It was passed and, although I do not pretend to have a first-hand knowledge, I am confident the position of the negro, in employment, in New York state, is vastly better. To take an example, we all know, I believe, that New York's anti-discrimination law helped to get negroes into baseball. It may not have been the main cause, but it was a contributing factor.

Mr. MARTIN (*Essex East*): That is a great service, of course.

Mr. BOWKER: Oh, yes; I am glad you agree.

Mr. MARTIN (*Essex East*): There was Jackie Robinson.

Mr. BOWKER: Yes. We were not being facetious—

Mr. MARTIN (*Essex East*): I know that.

Mr. BOWKER:—about that, because I feel that very deeply.

I will not take time to mention the ball game I was at on Labour day in 1951, in Brooklyn.

Mr. MARTIN (*Essex East*): The chairman and I are Detroit fans, so you had better be careful.

Mr. BOWKER: I had better not digress. I am too.

I think the point I want to make is that the man who is discriminated against in employment and in public places, for instances, going into a restaurant and so on, does not want to be protected the way a man wants to be protected in his freedom of speech. He wants and needs the help of the legislature, of the organs of the law, to enable him to do what the discriminating person refuses.

My last examples in respect of that are these. Probably this is well known to the members of this committee. Several provinces, I think at least three, have passed Fair Accommodation Practices acts. So far as I can learn Ontario's has been of some value. I am not able to give a personal opinion on that; but that is an act with sanctions. Saskatchewan has a Fair Accommodation Practices act with sanctions. The declaration here does not.

I do not intend to labour that. The reason I wanted to mention it is so many people who speak about this subject do not seem to realize this. They seem to think all you need is a statute or constitutional amendment to solve it, and it does not.

My third heading is on freedom of speech, press, assembly and religion. If the question were asked me 'Do you see any objection to a bald simple declaration of that kind in a federal statute", I would say no. I cannot for the life of me see any harm in it; but I would like to say this, particularly in respect of freedom of speech and/or press. I think generally they are understood to mean freedom from prior censorship coupled with a pretty wide right of criticism. I think that is accurate enough. Now, I think it is proper to ask the question: how does federal law stand on that subject? I think we have a pretty good record.

We have had individual examples where the statute did perhaps restrain freedom of speech. I am thinking of the provision in the Customs Tariff that used to permit the man at the border or somebody else to say a book is obscene or seditious and cannot be brought in. There were provisions in the Post Office Act which could bar the use of the mails to persons circulating obscene literature.

I am not concerned here with describing the details of the amendments that have been made to those statutes in recent years; but I do think it is significant that parliament did pass amendments to those acts which are designed at least to give to the court or to a competent tribunal the power to pass on the question as to whether or not the book is obscene.

So we find these examples where a certain degree of infringement of speech is cured by the ordinary process of amendment. There is one other significant example. I am back to the same proposition I stated before, that in the long run I think we should rely on parliament to see that freedom of speech is protected, and if parliament from time to time fails to do so, then in due course we could hope that parliament will repeal the offending law.

Of course, most people say we cannot wait for that; we have to have the courts decide whether the act of parliament abridges freedom of speech. I think this example of mine is relevant. You will recall that in 1919, thanks to the Winnipeg general strike when feeling was running high, we passed section 98 which made subversive organizations illegal and made membership in them illegal. I hope that is a fair summary. We had that until 1936, and I think one or two people went to jail. Parliament repealed that in 1956, and we have never had such a provision since. We still have provisions in the code making sedition a crime, but nothing as stringent as the old section 98.

I think I can probably make a comparison to the United States. They have protection there against infringement of free speech. What have they done on this very subject? At the time we were passing section 98 most of the states passed laws of this kind because they have their own power over criminal law. In 1940, Congress passed a similar act of which I think you know. It is called the Smith act and the famous case was that of the twelve communists. The twelve communists argued they could not be convicted under this act because it infringes their freedom of speech, of expressing their views. The Supreme Court said the act is valid; it does not infringe freedom of speech.

So the position today is this: that without any constitutional protection of the freedom of speech, we have a pretty good provision in our code on this subject. We do not have any Smith Act, and they do, across the line. This comparison is not at all deprecating the American position.

Now, there is one other significant legal development which we have had on this subject of the freedom of speech in relation to criticism, and that is the case of Boucher vs. the King. That was the case in which, you will recall, a Jehovah's witness was charged with sedition for circulating a very scurrilous pamphlet.

The Supreme Court said that the circulating of this pamphlet was not sedition. In 1800 it would have been sedition of the worst kind; but the Supreme Court said it is not enough to make even dirty and vicious attacks on institutions; it does not become sedition until you advocate their overthrow; and this the pamphlet did not do at all.

That judgment, in my opinion, is an important and significant safeguard of the freedom of speech; and that is one that was really made by our judges. I do not think we should overlook these facts when we are considering whether we need further safeguards.

The last major point I wish to make has to do with the last sub-clause of the last clause, which says that anything done under the War Measures Act is not an infringement of the bill. If I were to approve of this bill generally, I still would criticize that provision.

I am not implying that a person is entitled to the same protection of fundamental rights in wartime that he is in peacetime. That would be fatuous, and it would just be leading to national suicide.

He will not suppose that a country permits its people the same freedom in wartime that it does in peacetime. At the same time I would think that fundamental rights need not be overthrown entirely. And speaking to the subject of our regulations in World War II under the War Measures Act, I would not take those regulations and condemn them. I am sure that interning provisions are justifiable and that many people think so. I think that interning people for vigorously campaigning against recruiting is justifiable. But one thing that bothers me is that, if my impression is correct—and it may be that I should only speak for myself—I do not think we have concerned ourselves enough since the war with the question of what we did by way of regulations under the War Measures Act in World War II, and whether, with the benefit of hindsight, we could not safeguard ourselves against doing the same things in another war.

I have a very strong opinion that perhaps most of us do not even know the number who were interned during World War II. It may be that members of parliament, with the benefit of hindsight know whether there were gross injustices or not. I think we should be concerning ourselves about these things.

One of the main events that people refer to when they criticize the federal government is, of course, the espionage case. Many people say that the rules of fairness in criminal procedure was broken there.

I have never been able to bring myself to condemn the federal government out of hand for those proceedings, because the situation was a very grave one, and the circumstances were very exceptional.

But at the same time I wonder if we should not ask ourselves how far we should go even in wartime in refusing to give a man counsel, holding him incommunicado, and making him answer questions?

Another example of something the federal government did in wartime that I think should be reviewed, was its treatment of the Japanese—and I do not mean moving them off the coast. I think maybe in the light of events as we knew them then, it was justified. I do think however that we have not always shown as much concern for our Japanese citizens when we moved them hither and yon, in strange places, uncertain as to what their future would be, nor that we have shed as many tears for them as we still do for Acadians.

Maybe I am wrong, but I think we should ask ourselves whether we would do the same thing again. And another example that has always concerned me, and one which I think is relevant here—because after all we are concerned about the safeguarding of human rights—was that the Japanese-Canadians, both by birth or by naturalization, owned real property.

I understand that the acquiring of property means as much to them as it does to us, if not more. It indicates that they have roots. Long after they were moved off the coast, that property was sold. They brought action for a declaration that the sale was invalid, but they lost their action. I have never been able to see any basis in national security for selling their land. The only reason I mention it is because this bill is concerned with these things, as I think we all are.

I have finished the main points I intended to make. But may I say a word in conclusion: this is by way of repetition, perhaps, but the basis of my opinion is that a bill of this kind is not as satisfactory as ordinary legislation directed to a specific subject.

I think that the process of securing rights is best left to parliament and not to courts, in the course of trying to find the meaning and scope of broad generalities, such as we have in this bill.

The phrase "without due process of law" in the United States is a safeguard in respect to their criminal proceedings. But their efforts to provide a minimum wage law were held up for a long time, because they deprived the employer of due process of law when he employed labour on a contract at ten cents an hour for 16 hours a day. That is not due process of law in my conception of it; however, it does illustrate how elastic the phrase is. I think the direct way of leaving these things largely in the hands of parliament is better than this.

I would like to give this one example in concluding. Let us imagine that parliament wants to pass an act, and it is a pretty stringent act, and parliament is afraid it will violate these rights; according to clause 3—this is an amendment that was made in the new bill—it is possible to put in the act words of this kind: "notwithstanding the bill of rights, anybody who criticizes the government is guilty of a crime". I have taken a facetious example.

Mr. MARTIN (*Essex East*): Not with the present.

Mr. BOWKER: That sort of thing is permitted under this clause. I am not very much attracted by a statute like this on our statute books, when accompanied by the fact that parliament can say, notwithstanding this, we are going to go ahead and pass an act in violation of this one.

Sir, that concludes my remarks.

Mr. RAPP: Mr. Chairman, the professor has said that in respect of clause 6, the War Measures Act as it is now is not much different from what it was before. Before this bill of rights was proposed, under the provisions of the War Measures Act the governor in council could change it, but at the present time this could only be changed by parliament, after it has been laid before parliament.

Mr. BOWKER: Yes.

Mr. RAPP: So that in itself is a big change.

Mr. BOWKER: Oh, yes, I am sorry, sir. I was not ignoring the first subsections of the proposed subsection 6. This is my understanding; that when wartime comes and a proper declaration or proclamation has been made under section 6, then the powers of parliament are just as wide now as they ever were. That is my understanding.

Mr. MARTIN (*Essex East*): I wonder if the witness has understood Mr. Rapp's question? Are you satisfied that he did?

Mr. RAPP: No. In my opinion clause 6 of this human rights bill gives more power to parliament. Previously the governor in council had the right to act. During the last war the rights of people were infringed upon, but I do not think this would have gone as far as it did last time, because the governor in council had the right.

Mr. BOWKER: Oh, I see. Your point is that these first five subsections of section 6 are in themselves some kind of a safeguard against extreme regulations?

Mr. RAPP: Yes.

Mr. BOWKER: But I am right in this, I hope; when a proclamation is made, the governor general in council can still make orders in council if they come before parliament.

Mr. MARTIN (*Essex East*): The act provides that after the governor in council has issued a proclamation under this law, the order in council must be laid before parliament within a prescribed period. That is what Mr. Rapp meant.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): The effect surely is the same. Parliament in any event can now, and could at all times, change the War Measures Act. Parliament is always supreme.

Mr. RAPP: Yes.

Mr. MARTIN (*Essex East*): The only change in this act is that the order in council must be submitted to parliament within a prescribed period.

Mr. KORCHINSKI: Professor Bowker, in one of his final statements mentioned something to the effect that he was not satisfied that parliament at some time in the future would not introduce some act with wording something like this: notwithstanding the bill of rights, and then go on to provide some restrictions.

Mr. BOWKER: Yes.

Mr. KORCHINSKI: I wonder how you justify that type of statement in light of the fact that clause 4 provides that the minister shall consider at all times any proposed legislation, and shall examine this proposed legislation? I am sure that the Minister of Justice would see the conflict between the proposed legislation and the bill of rights. I wonder if you could comment in that regard?

Mr. BOWKER: I am sure he would. I have made no comment about clause 4, although other people have criticized that.

Mr. KORCHINSKI: That is not my point. My point is that you suggested parliament at some future date might introduce, or could very conceivably introduce, another act in conflict to this.

Mr. BOWKER: Yes. I say that because of the phrase in clause 3 which reads —I will leave out the irrelevant portions: all acts of parliament enacted before or after the commencement of this part that are subject to be repealed, abolished or altered by the parliament of Canada—this is the phrase to which I referred—unless it is otherwise expressly stated in any act of the parliament of Canada hereafter enacted shall be so construed, etc. Now, those words that I emphasized were put in the new bill. They were not in the original one. It is those words that seem to contemplate that possibility; it was not my idea. The very bill contemplates that such acts may be passed.

Mr. MARTIN (*Essex East*): I have a number of questions that I would like to ask Mr. Bowker.

Professor Bowker, you contributed an article to the Canadian bar review of March, 1959.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): That was after a legal report on the American bill of rights.

Mr. BOWKER: No, that was Mr. Able's. Mine was, Basic Rights and Freedoms; What Are They?

Mr. MARTIN (*Essex East*): Yes. I just wanted to identify it in my own mind.

One of the first points you made was that the Alberta case settled judicially the question of freedom of the press, and that this act would not confer anything that had not already been settled by that case. That is right, is it not?

Mr. BOWKER: I think that was professor Laskin's statement.

Mr. MARTIN (*Essex East*): Yes, but I am saying that is what you said. I am dealing with your evidence today.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): You said that at the beginning.

Mr. BOWKER: Oh, yes.

Mr. MARTIN (*Essex East*): You assumed, first of all, that the established freedom of the press was outside the competence of the provincial government, is that not right?

Mr. BOWKER: What I intended to say, sir, was that many people have taken that to be so, and it was a starting point for a number of other cases.

Mr. MARTIN (*Essex East*): I am not disputing that statement, I just want to lay the foundation for my questions.

There is no doubt that the Alberta case does establish the fact that freedom of the press is ultra vires of the provincial legislature, that is a fact, is it not?

Mr. BOWKER: Most people seem to think so. I have always thought it was a dictum, sir.

Mr. MARTIN (*Essex East*): Mr. Justice Abbott's statement, as to the powers of the federal government, is a dictum?

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): But the courts were all agreed that this was a matter outside the competence of provincial legislation.

Mr. BOWKER: I think it was Mr. Justice Davies and Mr. Justice Cannon who agreed with him. Most people agree with your way of stating it, sir—that it is now a doctrine.

Mr. MARTIN (*Essex East*): I would be interested to know if you think it is not yet settled jurisprudence.

Mr. BOWKER: I do not think it is settled jurisprudence yet.

Mr. MARTIN (*Essex East*): If that is the case, why do you say, as you did say at the beginning, there is not any doubt that the question of freedom of the press is something that comes within the competence of the federal parliament? I am just asking this for clarification, because I was interested in what you said.

Mr. BOWKER: I am sorry if I was unclear, sir. The position I take is this, and maybe I did not put it this way: many people seem to think, and there seems to be an increasing number in the Supreme Court, that the statement of Chief Justice Duff is an accurate statement of the law, and assuming that, then a provision in the act of this kind is repeating what is already law.

Mr. MARTIN (*Essex East*): Yes. That was the point I was seeking to establish. Your point of view is, that if that is the case, then this act does not in any way alter what is now fundamental law?

Mr. BOWKER: Yes, sir.

Mr. MARTIN (*Essex East*): Yes, and the same would apply, I take it, to freedom of assembly and freedom of religion. You mentioned the Boucher case and the Roncarelli case, and so on.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): All these freedoms, you now say, are part of the fundamental law of the land, and this bill does not in any way change that situation?

Mr. BOWKER: Yes, and putting it in my own words, I would prefer to say that the trend is toward settling the law in the sense that you say.

Mr. MARTIN (*Essex East*): Yes. In other words you think, in your own private view, notwithstanding what may be the popular view of the lawyers and the like, there is not yet sufficient jurisprudence, in your mind, really to settle the point, is that right?

Mr. BOWKER: Yes, sir.

Mr. MARTIN (*Essex East*): I see. You would not agree that the only vacuum was whether the federal parliament had the right itself to change any of these freedoms? And I am thinking of Mr. Justice Abbott's statement?

Mr. BOWKER: Yes, I agree with you, sir, that that is a vacuum, but I think there is a bit more vacuum.

Mr. MARTIN (*Essex East*): Then you said that you are opposed to a constitutional amendment. If I understood you correctly, from the analogy you took with the American bill of rights, a bill of rights in itself does not really alter the situation, and that can only be done, you think preferably, by parliament, or by the courts, as they can do it?

Mr. BOWKER: Particularly in the realm of discrimination.

Mr. MARTIN (*Essex East*): Particularly in the realm of discrimination. You would prefer that, instead of proceeding by way of a bill of rights? You would go ahead and amend the specific statutes?

Mr. BOWKER: Yes, sir.

Mr. MARTIN (*Essex East*): Now, do you, as dean of law and a man who is a student of law, in the event that this act is passed in its present form—some of us hope that it will not, but we want a bill of rights for other reasons,

and want to make it air tight to meet some of the objections that you have mentioned, and maybe all of us before the sittings are over—

Mr. MANDZIUK: That is wishful thinking.

Mr. MARTIN (*Essex East*): I take it we are trying to do a complete job here. Would you say that the courts in interpreting a specific statute now in existence will give that statute greater application than this bill of rights, as it is in this form?

Mr. BOWKER: I do not like to be a fence-sitter; but I really think I cannot say. I find it impossible to predict what the courts will do with a bill like this. McWhinney, in his article, pointed out that they can contract it or expand it. Sometimes, as I know you know, sir, the courts take what might be called a pro civil liberties stand; sometimes they do not. I find it impossible to predict what the courts will do with a bill of this kind, except that I think in freedom of speech, the Supreme Court might give a great deal of content to it.

Mr. MARTIN (*Essex East*): Have you had an opportunity of listing the statutes which you think should be amended, rather than to proceed by way of this general declaration that is in the form of this particular bill of rights?

Mr. BOWKER: No, I have not, sir.

Mr. MARTIN (*Essex East*): Well, you mentioned the Immigration Act.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): You would amend the Immigration Act to cover any of the points mentioned particularly in clause 3?

Mr. BOWKER: Yes. I do not feel competent to give an informed criticism of the Immigration Act, because I have listened to the debates of the Canadian bar association, and I just do not—

Mr. MARTIN (*Essex East*): But there is no question: you would do it by way of amending a particular statute?

Mr BOWKER: Yes.

Mr. MARTIN (*Essex East*): Would you agree that the Interpretation Act should be amended?

Mr. BOWKER: Along the lines of—

Mr. MARTIN (*Essex East*): Well, this bill provides, in clause 3, for certain things—the right of counsel, and so on.

To the extent that it seeks, in a general way, to make provisions, you would cover the existing statutes by way of a specific amendment of those statutes?

Mr. BOWKER: Yes. It would be in the code, not the Interpretation Act.

Mr. MARTIN (*Essex East*): But the Interpretation Act, I would suggest would be a basic act that would have to be amended in order to bring our existing statute law in conformity with the general declarations of the bill of rights.

Mr. STEWART: You would not need amendments to the individual statutes, if you did that to the Interpretation Act.

Mr. MARTIN (*Essex East*): I think you would, on some points. I think the interpretation statutes will take you a long way; but I do not know whether, or not it could touch the code.

In any event, you do not want to comment on the interpretation of statutes amendment. Then, would you agree that in order to make this measure fully effective, the code will have to be amended in specific points, some of which you mentioned—and that that is the way you would prefer to proceed?

Mr. BOWKER: Yes, sir.

Mr. MARTIN (*Essex East*): Have you given, for instance, consideration as to the effect of the Lord's Day Act under this bill of rights?

Mr. BOWKER: No. I am aware of Professor Laskin's comments; but I have not.

Mr. MARTIN (*Essex East*): You came to clause 2; then you went to clause 3; and then you came back several times. In my questions I may have to do that, because my notes are in accordance with your own initiative.

I would like to ask you: do you agree with the statement made in clause 2, which says these rights have always existed?

Mr. BOWKER: No.

Mr. MARTIN (*Essex East*): You do not agree with that, as a statement of fact?

Mr. BOWKER: No.

Mr. MARTIN (*Essex East*): Then, what did you mean when you said, with regard to clause 2, that there was no sanction in the section?

Mr. BOWKER: I meant that it is a bare declaration, and a bare declaration does not have sanctions. That is the best I can do.

Mr. MARTIN (*Essex East*): There is no way of giving effect to the wording of clause 2; that is what you are saying?

Mr. BOWKER: I think that is particularly true in the case of discrimination and due process.

Mr. MARTIN (*Essex East*): Yes.

Mr. BOWKER: I am not so sure about freedom of speech and religion. It may be that a bald declaration would have some efficacy.

Mr. MARTIN (*Essex-East*): I think it does, there. Do you want to comment on the argument that clause 2 is an invasion, because of its ambiguity, on provincial rights?

Mr. BOWKER: I would express the offhand opinion that it is not an invasion of provincial rights.

Mr. MARTIN (*Essex East*): I direct your attention to clause 2:

> It is hereby recognized and declared that in Canada there have always existed—

You said that is not the fact:

> —and shall continue to exist the following human rights.

Does the federal parliament have the power, altogether apart from our desire, to say that these rights shall exist in Canada; or are we confined only to saying that it is hereby recognized and declared that in those parts of Canada where the federal government has jurisdiction, the following human rights and fundamental freedoms, et cetera?

Mr. BOWKER: I am quite confident that it means the latter.

Mr. MARTIN (*Essex East*): There is no doubt what the intention was. There is no doubt, from the debates of the House of Commons. Every one of us in this committee, members of the government, members of the opposition, intend it only to deal with something that comes within the authority of the provinces—there is no doubt about that.

The CHAIRMAN: Not the authority of the provinces, Mr. Martin.

Mr. MARTIN (*Essex East*): Of the federal government; thank you, Mr. Chairman. But what I am pointing out to you is, that if the courts come to interpret this, they are not going to look at what any individual member of

parliament said, because they cannot look at the debates of the House of Commons: they are going to look at the language of the statute. And I suggest to you that there is at least grave doubt—if you do not fully agree with me—that "Canada" there has a geographic application, and not a jurisdictional application.

Mr. BOWKER: Yes. May I make this comment? Taking the opening words of clause 2 by themselves, I agree that they could be interpreted as applying to provincial legislation. My opinion was based on reading the act as a whole.

Mr. MARTIN (*Essex East*): I want to be fair. Then you would say that when anyone looks at this statute, they will read it with clause 3?

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): You think that clause 3 does clearly indicate that?

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): Have you read Professor Louis Pigeon's article?

Mr. BOWKER: Yes, I did.

Mr. MARTIN (*Essex East*): You do not agree with him?

Mr. BOWKER: No, I do not, sir.

Mr. MARTIN (*Essex East*): Then there is no sense pursuing that, if you are of an opposite view. Are you satisfied that the use of the phrase "due process" there is clear enough? Do you know whether that means "due process according to law" or "due process according to natural justice"?

Mr. BOWKER: I do not know, because the phrase "due process of law" certainly, as it has been defined and applied in the United States, takes various forms, and it would be a pretty bold person who would attempt to define it precisely.

Mr. MARTIN (*Essex East*): Would you think that if we were to define it to say "not to be deprived thereof except by law", it would be just as effective as saying "by due process of law"?

Mr. BOWKER: Except this, sir: I think the phrase "due process", although it is not precise, is designed to carry the notion of fairness, and that might be lost by cutting it out. Of course, Magna Carta said "judgment by his peers, or the law of the land".

Mr. MARTIN (*Essex East*): You yourself pointed out that the first reference to "due process" was in one of the acts of King Edward.

Mr. BOWKER: Yes, King Edward III.

Mr. MARTIN (*Essex East*): And it is not very often used in our legal jargon of jurisprudence, is it?

Mr. BOWKER: No.

Mr. MARTIN (*Essex East*): The remark that you made with regard to "Canada", I take it would also apply to the word "property" in the ninth line; that that is clearly meant to be property that comes within the exclusive authority of the federal government, because of clause 3?

Mr. BOWKER: Yes. I was working off a newspaper account, sir.

Mr. MARTIN (*Essex East*): In clause 2(a) they speak of "person and enjoyment of property".

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): You do not think there is any danger there of that being regarded as an invasion of property and civil rights?

Mr. BOWKER: I agree it is arguable that it could be construed as including property and civil rights. But—

Mr. MARTIN (*Essex East*): But in your judgment, in fairness to you, it does not, because of the language of clause 3?

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): And you think that the courts, by their rules of interpretation, having in mind what clause 2 is—it is declaration: it is not an operable clause; and clause 3 is operable—you think, nevertheless, that under the judicial rules of interpretation clause 3 would govern the meaning of clause 2?

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): Mr. Chairman, I have a lot of questions; but if there are others who want to intervene, I do not mind.

The CHAIRMAN: I would think, Mr. Martin, if your questions are on one phase of Professor Bowker's presentation—

Mr. MARTIN (*Essex East*): They are all on his presentation.

The CHAIRMAN: Yes, I know. But if they are on one particular phase of it, I think we might clear up that phase at one time, and then you can go on to the next phase. That might be a more orderly way of dealing with it.

Mr. MARTIN (*Essex East*): All right. I am now coming back to clause 2, because that is the way you did it. You spoke of the question of enjoyment of property, and you took that as an example of the desirability of proceeding by way of an amendment of a statute, and not by way of a bill of rights. You took as your example the Narcotics Act, where property may be confiscated without due process. You would say that the way to do that is not by mere general declaration; but by a specific amendment to that act?

Mr. BOWKER: Yes, sir.

Mr. MARTIN (*Essex East*): And a specific amendment to other like acts; and you mentioned, in answer to an observation of mine, the Excise Tax Act, and other acts where confiscation may take place?

I do not have too much time for this sort of thing, but I have now listed some 48 statutes that I think have got to be amended in order to make this act effective. It would save an awful lot of time if you could tell me whether you have had an opportunity of doing that.

Mr. BOWKER: I have not done it, sir. I have always been interested in the subject, and if I had foreseen earlier than 48 hours ago that I would have the privilege of coming down here, I would have been glad to do it.

Mr. MARTIN (*Essex East*): I have one more question on clause 2, before coming to clause 3; and then I will let somebody else ask you questions.

After you had been talking about administrative tribunals, you came back to clause 2 and you said that it does not take us any further than protection against discrimination in a general way. Then you mentioned again the desirability of proceeding by way of specific amendment.

Mr. BOWKER: Yes.

Mr. MARTIN (*Essex East*): Are you aware that at the present time, coloured Canadian citizens—six that I know of, in four different cities—have been denied the opportunity of taking advantage of the central mortgage and housing legislation because of colour? You are not aware of that?

Mr. BOWKER: No.

Mr. MARTIN (*Essex East*): Well, assuming that that is the fact, as it is—

Mr. BOWKER: I think I read it in the paper, sir.

Mr. MARTIN (*Essex East*): —how would you deal with that discrimination?

Mr. BOWKER: This is my spontaneous answer, sir—I have not reflected on it; but I think I would be prepared to stand by this. I would put into the statute —I do not know enough about it to say how—a safeguard that the monies should be distributed without racial discrimination.

Mr. MARTIN (*Essex East*): It is suggested that very often the application is one that is addressed to a lending institution and that the only authority which has any power of dealing with that is the province. As property and civil rights come under the provinces, that would seem to be a sound reply; but that does not remove the discrimination I am suggesting to you now, that that being the case, and since the federal government guarantees I think 75 per cent of the loan, something ought to be done by the federal government to protect that particular individual. Have you any suggestion to make as to how this could be done? In other words, can you suggest how we can deal with this thing so as to bring it within the authority of the federal parliament.

Mr. BOWKER: No. Anything I could say off-hand I do not think would be very helpful, sir. If it is not irrelevant, I can think of a parallel point to this situation. Let us assume that the federal government grants liquor licences in the Northwest Territories. I do not know their liquor laws; but assuming they are similar to a typical provincial law and that a person who had a licence for a cocktail lounge would not serve negroes. I would think it would be possible to provide that licences could be revoked for such discrimination, but I am not clear on the means of applying a similar principle to central mortgage and housing.

The CHAIRMAN: Professor, I tried to follow your presentation with a good deal of care and thought, and I have listened with a good deal of interest to your further comments as a result of the questions asked by Mr. Martin. I must say that I remain unconvinced that you are correct when you suggest we should first amend the statutes before passing this bill of rights. Am I correct that that is what you have indicated?

Mr. BOWKER: Not quite. My basic position is this: if in a given area on a given subject matter the law is not deficient by way of safeguarding human rights, just leave it as it is. If it is deficient, then remedy the deficiency by a statute on the original subject rather than this one. I think that is a little different from your understanding.

The CHAIRMAN: What do you see wrong with proceeding as this bill contemplates we should proced? I am inclined to feel this is the way in which we should proceed by this bill, in setting forth, as we do in clause 2, broad principles of human rights and fundamental freedoms, and then in clause 3 provide what I think is remedial legislation and also substantive legislation by saying to the courts "When you construe or apply a federal statute"—which of course simply is giving judgment in relation to that federal statute—"you shall not construe or apply it so as to abridge these freedoms". Does that not require the court to vary or amend what its judgment otherwise would be on the matter before it, if it were not for the passing of this bill, and that it must amend the judgment so that it does not offend against these rights declared in the bill?

Mr. BOWKER: My objection, Mr. Chairman, is that the course you have described is one that results in greater uncertainty as to what the law will turn out to be. If I might use one example from criminal procedure—from the criminal law—we are thinking of this subject of fairness, due process of law. Let us imagine there is nothing in the code on the subject. I will take the subject of blood tests. Assume there is nothing in the code on blood tests, although I know there is in connection with drunken and impaired driving. While the man is unconscious the police take a few drops from

a pool of blood and have it analyzed and a high degree of alcohol is shown. He may argue when he is charged—he may be charged with manslaughter, as it may turn out that someone is killed—that the submitting of that evidence does not meet the requirements of due process. I would think it more satisfactory either to leave the subject where it is, in the light of the cases we have on it—and we do have some—or provide in the code whether or not that should be admitted.

The CHAIRMAN: I follow your reasoning, but I cannot say that I agree with it. Would it not be preferable, as indicated by this bill, to declare these principles in the interpretation of the statutes and in the applicaion of the statutes, and leave it then for the courts to decide in the case you have mentioned whether or not there has been in the Criminal Code a violation of one of these principles. It at least points up the situation, whether the court gives effect to it or whether it does not. As a result of that we will have pointed out to us the areas in which it is quite possible that the legislation does offend—that is the legislation as it now stands on the statute books—does offend against some of these declared principles. Because I think if we were to do it in the way in which you suggest, it would be a very very long time before we ever got to the point of the desired situation in respect of all the statute law of the country.

Mr. BOWKER: I think, sir, in the realm of criminal procedure we are in a pretty satisfactory position now. Might I give one example to show what I consider to be a difficulty of the method in the bill. Our Criminal Code, exactly as it is now provides for corporal punishment. Now, suppose this bill is passed and a man is sentenced to whipping. Then, he appeals on the ground that that is a cruel and unusual punishment. I do not think I have to give an opinion as to whether it is or is not. It is most unlikely that a court would say it is; but I think it conceivable, even though unlikely, that a court could say it is a cruel and unusual punishment. If I am right in that then I would feel that if whipping is to be abolished it should be taken out of the code rather than done through this medium. That is my position, sir.

The CHAIRMAN: Do you not think that a court, after hearing counsel in a case, is going to come up with a judicial decision which would be indicative, or reliable shall we say, as to whether or not it is inhuman or—

Mr. BOWKER: Cruel or degrading treatment.

The CHAIRMAN: Yes—whether it falls within that category.

Mr. BOWKER: I would have thought it is for parliament to decide.

The CHAIRMAN: Parliament has decided that whipping shall exist.

Mr. MARTIN: (*Essex East*): That is his point.

The CHAIRMAN: If that is a violation of the declared principle of no one being subjected to inhuman treatment, who better can decide that than the courts?

Mr. MARTIN: (*Essex East*): I think he has put his finger on the real dilemma.

The CHAIRMAN: Do you agree or do you not agree that it is better to leave it to the courts to decide?

Mr. BOWKER: I do not agree with your suggestion. I would have hoped that my position on that was clear by this time.

The CHAIRMAN: Would you agree that there is an area for disagreement on that subject?

Mr. BOWKER: I agree that our judges have done a great deal to give substance to fairness of procedure; but I think where we have statutes on a subject it is not then desirable to pass another statute of broad generalizations that judges may use for the purposes of modifying the specific one.

The CHAIRMAN: I notice also that you have disagreed with the words in clause 1 "it is hereby recognized and declared—

Mr. MARTIN (*Essex East*): Are you going on to another point now?

The CHAIRMAN: Yes—"that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms—" and you rather indicated that they have not existed. Is there not a difference between something that exists as a right which is denied to a person and something that exists and is being given to a person. You have mentioned the Boucher case as the enunciation of a principle that is not founded upon any statute. Is it not a fact that these things have existed but they have not been granted? they have been violated; and what we are doing now is saying they have existed, that they still exist, and from now on they are going to be granted to everyone.

Mr. MARTIN (*Essex East*): No. He mentioned the Winnipeg strike. It did not exist at that time. I could mention a whole series of others. He simply says it is not fair to say it always existed. He agrees with Professor Scott who says as a matter of fact that is not true.

The CHAIRMAN: I suggest what has happened is that the rights have been denied to people, and not that they have not existed.

Mr. MARTIN (*Essex East*): The charges in the Winnipeg strike were based upon section 98 in the Criminal Code. That was a right that was denied them under the Criminal Code, and it was only when the Criminal Code was amended in 1936 that that right came into existence. That is the evidence that he has given, and I think it is correct historically.

The CHAIRMAN: That is because the court has given effect to section 98 which violated some of these fundamental rights.

Mr. MARTIN (*Essex East*): No, it is not, because parliament repealed section 98.

Mr. BOWKER: Sir, might I give one example to illustrate a right that is considered basic in this act that did not exist. One of the basic rights is the protection of the law without discrimination by reason of sex. I will just take that example. There was a time, long after 1867, when women could not vote either in provincial or federal elections. Take it either way you want. I would think it would be correct to say that that particular right, that is enjoyed today, did not exist. Nor did the right for women to sit on the Senate exist.

The CHAIRMAN: Is the whole matter not an academic discussion? It has been mentioned many times that clause 2 is only declaratory, so that it is really purely an academic discussion. It does not do any harm, does it?

Mr. MARTIN (*Essex East*): He has said that. He has said clause 2 is merely declaratory of the existing law, but that is not the claim, as to the purpose, as given to this clause by those who oppose it.

The CHAIRMAN: Let us get down to specific words. Would you change this, and if so, how?

Mr. BOWKER: Speaking in regard to clause 2, a declaration by itself, I did not intend to take the position that it, taken by itself, was positively harmful. I did not mean to say that.

Mr. MARTIN (*Essex East*): Nor has anyone else at any time, to my knowledge.

Mr. BOWKER: I was speaking rather of its affirmative value.

Mr. MARTIN (*Essex East*): I have another question I would like to ask, but I know Mr. Mandziuk has been waiting to ask a question.

Mr. MANDZIUK: Professor, I think you gave us a fairly academic analysis of this bill. You appear to be disturbed about the violation of human rights under certain laws that we already have, such as the Narcotics Act, the Excise Act, and the War Measures Act, and you could perhaps even include section 98 of the Criminal Code, which has been repealed. Might it not be argued that, if parliament sees fit to provide a penalty for a breach of certain provisions of the law, anyone, although deprived of his property and deprived of his liberty, is legally deprived of these things, and that is the due process of the law? Might it not be argued that anything we have done under the War Measures Act, supposing we changed it or left it as it is, and war broke out and the act is applied again, that it is due process of law? This bill specifically states that one cannot be deprived of this, and this, without due process of law. Might that not be argued?

Mr. BOWKER: I think it might be, sir. I think, however, the general understanding of "due process of law" means, certain fundamental fairness. In regard to your alternate suggestion, in respect of its being arguable, I just do not think that has been the understanding.

Mr. MANDZIUK: Yes, but I believe we should stick to the legal understanding, especially you, being an eminent jurist, lawyer and dean of law.

I have another question, professor. Do you not think that the dean of the Manitoba law school would disagree with your opinion?

Mr. BOWKER: Well, I happen to know him quite well and have talked to him, but I would prefer, not even by inference, to attempt to quote his opinions. In all fairness, I would prefer not to do that, sir.

Mr. MANDZIUK: Are you familiar with the brief presented by the Canadian bar association?

Mr. BOWKER: I am in the sense that I took part in many events that led up to it. I read in the Edmonton *Journal* a summary of Mr. McInnes' statement, but I do not think I ever saw the final paper.

Mr. MANDZIUK: I would suggest that if you read it you will realize that this brief does not go along with your argument.

Mr. MARTIN (*Essex East*): Well, I cannot agree with that statement. That can be argued.

Mr. MANDZIUK: You have made a lot of long speeches, and I am not—

Mr. MARTIN (*Essex East*): I am not objecting to you making a speech. I have made long speeches, but they led to questions.

Mr. MANDZIUK: I have dealt with it sooner than you have come to the question.

Mr. MARTIN (*Essex East*): I would suggest that you ask your question.

Mr. MANDZIUK: I have asked questions.

The CHAIRMAN: Perhaps you could simply phrase your question a little differently.

Mr. MANDZIUK: My one final question is: are you quite emphatic in your opinion that this bill is useless, worthless and unnecessary, or did you just try to give us that impression?

The CHAIRMAN: I do not think he said that, but you can ask him if that is his opinion.

Mr. MANDZIUK: Why did you go into an analysis of this bill then?

Mr. BOWKER: I thought that was why I was invited here, sir.

I would like to answer your first question. I do not think at any time I said that, to use your own words, it was utterly useless.

Mr. MANDZIUK: You did.

Mr. BOWKER: Pardon me?

Mr. MANDZIUK: You did.

Mr. BOWKER: No. I would even say this, and I think I omitted it in my remarks, and I do not apologize for that; that the psychological value of a bill of this kind, or of any manifesto, or declaration of faith in what we believe is good, may have some value, but it is hard to appraise. I do not deprecate the possibility that it may have some value from that standpoint. The position I took was that this method was not as effective as the method I suggested.

Mr. MANDZIUK: Your method, professor, if I understood your suggestion correctly, would be to make amendments, as Mr. Martin mentioned, to 48 or perhaps 148 statutes, and that would be a better method?

Mr. BOWKER: Yes.

Mr. MANDZIUK: Do you not think that a codification of human rights and freedoms to a new Canadian, who comes into this country, would be more understandable to him than having to go to a solicitor to make a search for his rights in 50 or 60 statutes?

Mr. BOWKER: I agree that it may have some psychological value to the new Canadian, but as far as understanding it better and knowing what it means, I cannot agree, because I do not think anybody knows in advance the scope that will be given to these provisions.

Mr. MANDZIUK: I would disagree with you, professor. Anyone who can read English and understand English can see the meaning of this bill.

Mr. BATTEN: Mr. Chairman, I have one or two questions I would like to ask the professor.

Sir, do you think that freedom and fundamental rights in Canada will be significantly improved by the passing of this bill?

Mr. BOWKER: No.

Mr. BATTEN: My second question, Mr. Chairman, is this: do you think that those statutes, which are affected by this bill, if the bill were to pass, should be amended, or should be left to the courts to administer in the light of the bill of rights?

Mr. BOWKER: I will have to ask you to repeat your question again, sir.

Mr. BATTEN: Assuming that this bill is passed.

Mr. BOWKER: Yes.

Mr. BATTEN: It has been said that a number of acts already on the statute books would, in some way, interfere with the operation of the bill of rights.

Mr. BOWKER: Yes.

Mr. BATTEN: Now, do you think these acts should be amended after the bill of rights has been passed, or should they be left to the courts to interpret in the light of the bill of rights?

Mr. BOWKER: I would favour the first alternative. I realize the chairman is in favour of the x second. At least I assume that.

Mr. BATTEN: My third question, Mr. Chairman, is this: many people, in discussions in the House of Commons, and some of the witnesses we have had here, have referred to this bill as "a first step" toward Canadians' freedom and fundamental rights. What would be your opinion in that regard?

Mr. BOWKER: I do not share that view. I think those people feel that the later step would be a constitutional bill. I think I am right in that. Many of those people think that it is a step toward a constitutional bill. I do not favour a constitutional bill, putting limits on the power of parliaments. I think parliament should be entitled to make its own mistakes. This is a democratic country and I take the position that safeguarding, through a constitutional bill of rights, in some measure anyway, shows a lack of confidence in parliament that I do not share.

Mr. BATTEN: Thank you, professor.

May I continue, Mr. Chairman.

The CHAIRMAN: Yes.

Mr. BATTEN: Could you give us any examples in constitutional history where other countries' bills of rights have been amended?

Mr. BOWKER: The American bill of rights has been amended.

Mr. BATTEN: Yes.

Mr. BOWKER: The bill of rights was the first ten amendments in the first place, and then after the civil war there were 13, 14 and 15.

Mr. RAPP: Mr. Chairman, I have a question.

The CHAIRMAN: Just a minute until I see if Mr. Batten is finished.

Mr. BATTEN: I am not quite finished yet. I have one or two more questions.

In respect to the wording of this bill, professor, do you think that clause 2 is effective as a memorable declaration?

Mr. BOWKER: I think it should have some effect as a declaration but I do not think I would use the adjective "memorable". I do not put it on as high a plane as some people do.

Mr. BATTEN: Do you think that a preamble is important to such a bill as this?

Mr. BOWKER: Yes, I do, and I am thinking of the Ontario Fair Accommodation Act. I think there is some advantage to a preamble, if we are to have a declaration.

Mr. BATTEN: Having had this bill of rights discussed in the House of Commons, and having had it discussed across the country at various bar association meetings, and other places, do you think that freedom in Canada would be fundamentally weakened if this bill were not to pass?

Mr. BOWKER: No. I hope we got the negatives right there. I hope there is no doubt about my answer. I think they would not be in jeopardy.

Mr. BATTEN: Do you think this bill can be characterized by its clarity, or are there various places where it is ambiguous?

Mr. BOWKER: I am not strictly interested in matters of detail. I think there are one or two where it is inept, such as the public trial provision, and the right of a witness, as distinct from an accused, to counsel. But I have not come 2,400 miles just to pick what I thought were little holes in it.

On the larger question, I do not think I complain about the phraseology. I certainly would not want to try to do any better, to carry out the policy of this bill. My criticism, I think, is a deeper one, that I am apprehensive about the general nature of most of the provisions, and the fact that it really gives judges the power to say what many statutes should mean.

Mr. BATTEN: I have just one more question. Before I ask it, I want to draw to the professor's attention that I recognize that he did not come 2,400 miles to pick small holes in this bill. What I am trying to get to is this: this bill is not only going to affect me, as a member of parliament; it is not only going to affect you, as a dean of law; but it is going to affect the ordinary man on the street, who is going to ask me questions which may be important to him. They may be small holes in the law to you, but they may be very important to him.

After all, this bill of rights is not only going to affect me, as a member of parliament, and you as a dean of law; but it is also going to affect the man on the street—and if we are going to forget him, it is not going to be worth very much.

I am going to ask you questions that I am likely to be asked, and I would like to get answers from a man of your understanding.

My final question is this: do you think there will be some people who will be encouraged to take their cases to a court of law, because of the bill of rights, when perhaps they could be advised beforehand that they are going to lose the case anyway? I am thinking about the waste of time, money, and all this sort of thing. Some people may misconstrue this bill of rights and take cases to the courts which they would lose anyway.

Mr. BOWKER: I do think this, that the bill will give to counsel, on many occasions, an opening for attacking an act or, perhaps, a judgment of an administrative board, that was not there before; and it may cause delays and uncertainty. But some people might say that to some extent that is a good thing.

Mr. BATTEN: But do you think there will be some confusion in courts because of this bill of rights?

Mr. BOWKER: My view is that there would be, sir.

Mr. BATTEN: Thank you very much, sir.

Mr. MANDZIUK: Mr. Chairman, may I ask a question. Is that not the case with every statute? We always watch and see how the courts interpret it, to see whether it requires any changes or not. This is applicable to this bill also.

Mr. BOWKER: To some extent.

Mr. MANDZIUK: To all extents. This applies to almost everything. We have had our B.N.A. act interpreted by the courts.

Mr. BOWKER: Yes. My point is this. Let us imagine that we think there is a provision in the code that is unfair, and parliament amends it. Everybody knows that amendment may be uncertain in its application in borderline cases, as long as we are human. I have a lot of sympathy for the draftsmen; but that is true. I think that uncertainty is multiplied when we have to consider the effect of this bill on the statute.

Mr. STEWART: Mr. Chairman, I have listened to the professor's interpretation and analysis of this bill of rights with a great deal of interest, and I am going to put a general proposition to you, Professor Bowker.

With regard to the human rights and fundamental freedoms that we are talking about today, they have developed out of the English common law and the interpretation of our statute law by benevolent judges; you will agree with that?

Mr. BOWKER: In large measure.

Mr. STEWART: Does that same thing not apply to the interpretation of this bill of rights? The bill of rights will be interpreted by the judges under circumstances existing at the time of the interpretation and as our knowledge of fundamental rights develops?

Mr. BOWKER: I follow your point, that if the judges have done a good job in the common law and in interpretation of existing statutes, we should be able to trust them to do a similarly good job here.

Mr. STEWART: Keeping in mind that the rule is that judges do not make the law, but that they only interpret it. As you know, as history has developed, it has shown that is not true; judges have added to the statute law and—

Mr. BOWKER: By putting more flesh on the bones?

Mr. STEWART: Yes, that is right.

Mr. BOWKER: Yes, definitely.

Mr. STEWART: That is what I had in mind, in viewing this statute: should the same thing not apply—will it not apply?

Mr. BOWKER: That is, of course, historically true; but at other times judges have not taken such a charitable view of legislation and have tended to restrict it, even sometimes to emasculate it.

Mr. STEWART: And then parliament comes along and makes the amendment.

Mr. BOWKER: Yes.

Mr. STEWART: Correcting the erroneous judge, if necessary.

Mr. BOWKER: I think there is a distinction between the traditional role of judges in playing a part in building up our freedoms, and the role of judges who are applying a constitutional bill of rights, or even a bill like this, which is not constitutional—it is not a constitutional limitation, but it has some of the overriding qualities of one.

I make this suggestion—and I know it is debatable—that the judges will not do as good a job in that function as they have in the traditional function. I would have to take my examples from the Supreme Court of the United States—and you can find examples there for everything.

There have been times when the judges have nullified fine social legislation in the name of the bill of rights. But I realize you have a point. I hope I do not sound condescending in putting it that way.

Mr. RAPP: Mr. Chairman, the question about a preamble was asked by Mr. Batten, and so I am not going to ask that question again. But, Professor, you said that actually the bill of rights does not mean very much. You are aware, of course, that one-third of the people in this country are immigrants who came here, and what is stated here in clause 2, paragraphs (*a*), (*b*), (c), down to (*f*)—the reason some of these people came to this country is because they were deprived of the liberties mentioned in those paragraphs.

Do you not think it would means anything to them, after they learn the language? As I said, one-third of our population is composed of people of foreign origin. Do you not think it would mean anything if they read, as it says here, "the right of the individual to life, liberty" and so on; or if they read "freedom of assembly and association"?

I know you have legal training—and, of course, as one of our members said, "I am of British stock, and this bill means a bag of bones to me"; but as far as I am concerned, I know what it means to some people. Do you not think it is a good thing?

Mr. BOWKER: Sir, I do not think anything I have said today, or at any other time, deprecates that point, and in my article in the Bar Review I did make that point that you just made. I did it by way of concession, because it was the greatest good I could see in the bill. But I never deprecated that, and I do not now. I think that is probably its greatest value.

I do say this, sir—and this is a matter of opinion, and you may not agree—that I doubt that immigrants, or new Canadians, would be influenced so

much by this document, or a constitutional bill of rights, as by what they find in fact. Every dictatorship in the world has got a more impressive looking bill of rights than this. I might have to except one or two dictatorships; but I think we all know that is so.

I do not take a cynical position about these things at all. I never came into this committee to say, "Some dictatorships"—that we could all name—"have a bill of rights; therefore, they are waste paper." I never suggested that, and I do not now—and I think we have reason to be proud.

Perhaps I underestimate the value of that argument; but I do not think a country like Britain or Canada need take a back seat when they are being asked: how do you stand on this?—just because they do not have a short bill to point to. I do not disagree with your point, though.

The CHAIRMAN: Professor, I am very much troubled about this. I certainly do not want to keep you any longer than necessary; but this bill unanimously received second reading. Therefore, I think those of us on this committee are in agreement on the general principle of a bill of rights. If this bill of rights is deficient, I feel that the committee would like to make it as effective as possible.

You have indicated that this bill, as it is worded now, would seem to have rather negligible value. I will accept that for the time being. But in clause 3 we see that all acts of the Parliament of Canada enacted before the passing of this act, as well as those that will be enacted hereafter, shall be so construed and applied—

Mr. BOWKER: Yes.

The CHAIRMAN: If this is enacted, is it not an elementary principle of construction of statutes that this is being superimposed upon all the statute law that we have at the present time?

Mr. BOWKER: Yes.

The CHAIRMAN: You would agree with that?

Mr. BOWKER: Yes; but I am not clear, for example, whether it would give an Indian the vote.

The CHAIRMAN: Oh, well—

Mr. BOWKER: And that is precisely the sort of thing—

Mr. MANDZIUK: This parliament has already given the Indian the vote.

Mr. BOWKER: I am aware of that.

The CHAIRMAN: Would you let me continue.

Mr. MANDZIUK: On that point, Mr. Chairman: supposing we had not given the Indian the vote; that the due process of the law said he did not have the vote. I still say that there would be no breach of this bill, because the due process of law is what the law says. The law may deprive me of my property. of my liberty, of anything, if parliament of Canada passes it and you so admit that the parliament of Canada is the highest court in the land or the highest organ we have.

The CHAIRMAN: Let me continue. Professor, may I direct you to paragraph 3(c). Do you believe that if this act is passed—even as it stands now—that hereafter a person arrested or detained is not going to be informed promptly of the reason for his arrest or detention?

Mr. BOWKER: He has to be now under the code.

The CHAIRMAN: Under what section?

Mr. BOWKER: The new section that was put in to embody the rule in Leachinski versus Christie.

The CHAIRMAN: Does it say "promptly"?

Mr. BOWKER: I would have to have the code here. It was put in the new code, sir; it was not in the old one. I would like to have it before me before I firmly state it covers the same ground, but I am quite sure it does.

The CHAIRMAN: Do you not think that people today are being detained without being promptly informed of the reason for their detention

Mr. BOWKER: I cannot say, but under the Criminal Code they should not be.

The CHAIRMAN: How about the right to retain and instruct counsel without delay? Is that preserved by any provision in the Criminal Code?

Mr. BOWKER: Yes. The right to counsel is in the code.

The CHAIRMAN: Yes, you have a right to counsel in your defence; but I am speaking about "without delay". Those are the words I am using. Do you think those things in any event are not going to be denied after this act is passed, if it is?

Mr. BOWKER: Well, I would have to come back to my first position that I would think the place where this kind of provision belongs is in the Criminal Code, and, of course, there are other statutes to which the code applies.

The CHAIRMAN: Do you not think also cases come before the courts in which the courts have protested against the severity of the statute law which they have to apply? I have heard magistrates say many many times that if they had their option in the matter they would not apply and would not give effect to the statute. Do you not think that this bill of rights does further arm the courts to so interpret the statutory law so as not to violate any of these principles of freedom? It must have some effect.

Mr. BOWKER: I think my difference is that I believe it should be left to parliament.

The CHAIRMAN: Apart from spelling it out in the individual statutes—which of course you have recommended—in the absence of that how would we put greater sanctions into this bill? Are you able to suggest any?

Mr. BOWKER: No, because I really did not think of the bill in terms of strengthening it; but my position is that it would be more satisfactory for the benefit of the subject to have it in definite form in definite statutes. I am only repeating what I said before. I certainly am not indifferent to strengthening the security of human rights; far from it.

Mr. BADANAI: The dean has been critical of the bill and has suggested that it lacks teeth—power. What about clause 4? Would a parliamentary committee doing something similar be more effective; say a parliamentary committee of the Senate which would listen to a grievance of a petitioner in the event of a Canadian citizen thinking he is being deprived of some rights. I think in the government of New Zealand they have such a committee. When a citizen feels he is deprived of some civil rights he appeals to this particular committee. Clause 4 gives certain powers to the Minister of Justice. In your opinion would a committee be more effective?

Mr. BOWKER: I do not think I have any firm opinion on that. I really do not. I do not think whether I would say yes or no would have much weight, because I do not see any basis for saying that one would be better than the other. Perhaps one would be, but I do not feel qualified to express that opinion.

Mr. BADANAI: Then you would not want to express an opinion on the marriage of a parliamentary committee with perhaps a Senate committee.

Mr. BOWKER: I doubt very much that I know enough about parliamentary procedure. I think I would have had the opinion that whenever any bill comes forward that the members collectively would give these things scrutiny. I do not even know to what extent you use committees.

Mr. BADANAI: What I am thinking about is a petition committee which listens to petitions. I might say that Australia has a commissioner who listens to petitions. If a citizen feels he is being wrongfully or unjustly accused of something, this commissioner listens to the petition and advises the minister of justice accordingly.

Mr. BOWKER: I am just not familiar with that, but I would say this; if such a committee provides the man in the street a channel to the powers that be, it would seem to me to be a good thing. I know that in some places in the realm of discrimination the legislature sets up what they call an anti-discrimination committee. It is not usually a committee of the house; it is a secretariat in the public. Quite a few of the states have that. Perhaps some of the departments of government have it; I do not know.

Mr. BADANAI: That is the point I wanted to make. Thank you.

Mr. BATTEN: Would the citizen prefer to trust his own rights to the Minister of Justice and his officials rather than to a committee of parliament? I use the phrase "committee of parliament" to include members of the Senate.

Mr. BOWKER: What is your question, please?

Mr. BATTEN: Would you prefer to have your rights in the trust of the Minister of Justice and his officials or in this particular committee?

Mr. BOWKER: I think I would feel confident in the hands of either.

The CHAIRMAN: Gentlemen, are there any further questions? If not, I would like, on behalf of the committee, professor, to convey to you our thanks and appreciation for appearing before us and giving us the benefit of your views on this legislation, and particularly for coming on comparatively short notice.

Mr. BOWKER: It was an honour to be asked, sir.

The CHAIRMAN: Thank you.

We stand adjourned until 9.30 tomorrow morning. I understand tomorrow morning we will hear from a representative of the Christian Science church, and in the afternoon we hope to have representatives from the Canadian labour congress.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 3

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TUESDAY, JULY 19, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESSES:

Mr. Irving Himel, Q.C., Executive Secretary, Association of Civil Liberties; Mr. Claude Jodoin, President, Canadian Labour Congress; and Mr. Stanley Knowles, Executive Vice-President; Dr. Eugene Forsey, Research Director; and Mr. Kalmen Kaplansky, Director, Department of International Affairs; and Mr. F. P. Varcoe, Q.C., former Deputy Attorney General for Canada and former Deputy Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23560-6—1

STANDING COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

and Messrs.

Argue,	Jung,	Nasserden,
Badanai,	Korchinski,	Rapp,
Batten,	Mandziuk,	Roberge,
Deschatelets,	Martin (*Essex-East*),	Stefanson,
[1]Jorgenson,	[2]Martini,	Stewart.

J. E. O'Connor,
Clerk of the Committee.

[1] Replaced by Mr. Aiken on Tuesday, July 19, 1960.
[2] Replaced by Mr. Winkler on Tuesday, July 19, 1960.

ORDER OF REFERENCE

TUESDAY, July 19, 1960.

Ordered,—That the names of Messrs. Aiken and Winkler be substituted for those of Messrs. Jorgenson and Martini on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

Attest.

L. J. RAYMOND,
Clerk of the House.

23560-6—1½

MINUTES OF PROCEEDINGS

TUESDAY, July 19, 1960.
(8)

The Special Committee on Human Rights and Fundamental Freedoms met at 3.25 p.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Argue, Badanai, Batten, Deschatelets, Korchinski, Mandziuk, Rapp, Spencer, Stewart and Winkler—(11).

In attendance: The Honourable E. D. Fulton, Minister of Justice. *From the Association of Civil Liberties:* Dr. E. A. Corbett, President; Mr. Irving Himel, Q.C., Executive Secretary. *From the Canadian Labour Congress:* Messrs. Claude Jodoin, President; Stanley Knowles, Executive Vice-President; Dr. Eugene Forsey, Research Director; Mr. Kalmen Kaplansky, Director, Department of International Affairs; and Mr. A. Andras, Director of Legislation.

The Chairman introduced Messrs. Himel and Corbett, and Mr. Himel on behalf of the Civil Liberties Association read a brief, copies of which were distributed to Members of the Committee.

Agreed,—That documents entitled "Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol" and "Human Rights in the United Nations—with Text of Draft Covenants" be printed as appendices to the record of this day's proceedings. (*See Appendices "A" and "B"*).

Agreed,—That a Draft Bill presented to the Committee be printed as Appendix "C" to this day's record.

Following Mr. Himel's questioning, he was thanked by the Chairman and retired.

Messrs. Jodoin, Knowles, Forsey, Kaplansky and Andras were introduced, and Mr. Jodoin on behalf of the Canadian Labour Congress read a memorandum and supplementary statement.

Mr. Jodoin's questioning continuing, Mr. Winkler moved, seconded by Mr. Mandziuk, that the Committee do now adjourn to meet again at 8.00 p.m. this evening. The motion was resolved in the affirmative.

At 5.45 p.m. the Committee adjourned to meet again later this day.

EVENING SITTING

(9)

At 8.00 p.m. the Committee reconvened. The Chairman, Mr. Spencer, again presided.

Members present: Messrs. Aiken, Badanai, Batten, Deschatelets, Mandziuk, Martin (*Essex East*), Rapp, Spencer, Stewart and Winkler—(10).

In attendance: Mr. E. D. Fulton, Minister of Justice; *from the Canadian Labour Congress:* Messrs. Claude Jodoin, President; Stanley Knowles, Executive Vice-President; Dr. Eugene Forsey, Research Director; and Mr. Kalmen Kap-

lansky, Director, Department of International Affairs; and Mr. F. P. Varcoe, Q.C., former Deputy Attorney General for Canada and former Deputy Minister of Justice.

The Chairman observed the presence of quorum and the Committee continued consideration of the brief presented by representatives of the Canadian Labour Congress.

Following the questioning of Messrs. Jodoin, Knowles, Forsey and Kaplansky, they were thanked and retired.

Mr. Varcoe was introduced and after making observations on the contents of Bill C-79, was questioned.

Mr. Varcoe was thanked and retired.

The Chairman presented the following report from the Subcommittee on Agenda and Procedure:

The Subcommittee on Agenda and Procedure met at 4.30 p.m. on Monday, July 18, 1960. The following Members were present: Messrs. Badanai, Spencer and Stewart.

Your Subcommittee recommends as follows:

1. That requests received for appearances before the Committee be referred to the Subcommittee for decision and recommendation.

2. That written submissions from The Canadian Chamber of Commerce, The Waterloo Chamber of Commerce, The Canadian Construction Association, Professor C. P. Wright, Q.C. of Ottawa, and a letter to the Right Honourable The Prime Minister from Mr. J. J. Robinette on behalf of the Canadian Daily Newspapers Publishers Association, be taken as read, copies distributed to Members and be printed in the record of this day's proceedings.

3. In view of the request by Mr. A. N. Carter, Q.C., Saint John, New Brunswick, that pages 259 to 262 of Volume 37 of the Canadian Bar Review be referred to the Committee, the article referred to, be taken as read, printed in the Committee's proceedings, and copies distributed to members.

4. That a letter received from Mr. Frank O'Hearn be filed with the Committee.

5. That the Committee hear the following witnesses this week at the following times:

Wednesday—2.00 p.m.—Professor A. R. Lower, Queens University—Representatives of the Christian Science Church;

Thursday—9.30 a.m.—Professor O. E. Lang, College of Law, University of Saskatchewan,

2.00 p.m.—G. Eamon Park of Toronto;

8.00 p.m.—Professor Maxwell Cohen, McGill University.

On motion of Mr. Stewart, seconded by Mr. Batten, the said report was adopted.

At 10.30 p.m. the Committee adjourned to meet again at 2.00 p.m., Wednesday, July 20, 1960.

EVIDENCE

TUESDAY, July 19, 1960.

The CHAIRMAN: Order, gentlemen. We have with us today Dr. E. A. Corbett, President, and Mr. Irving Himel, Q.C., executive secretary of the Association for Civil Liberties. These gentlemen are prepared to present a brief and suggested amendments to the bill. So without further words from me I shall now ask Mr. Himel to proceed with his presentation.

Mr. Irving HIMEL, Q.C. (*Executive Secretary, Association for Civil Liberties*): Mr. Chairman and gentlemen of the committee, on behalf of Dr. Corbett and myself I wish to thank you for this opportunity to present our brief to you.

For those of you who do not know Dr. Corbett, might I say that he is one of the most distinguished educationists in Canada. He has served for many years as head of the Canadian association for adult education.

Now I would like to read the brief, which I trust you all have before you.

This brief is presented by the association for civil liberties. This association has since 1947 consistently urged the enactment of a bill of rights to cover the whole of Canada. In 1948 it did so by organizing the Canadian committee for a bill of rights which had the support of a large number of prominent Canadians and made representation to the then federal government. This was to be followed by representations which the association made in 1950 to the senate committee on human rights and fundamental freedoms, whose chairman was Senator Arthur W. Roebuck. That senate committee, as many of you may recall, heard evidence from a large number of representative Canadian organizations and individuals and with the unanimous support of the senate as a whole, it recommended the adoption of a national bill of rights in the constitution of Canada at the earliest opportune time.

Following this, representations continued to be made to the federal government for action on a bill of rights and this culminated in a national delegation comprising over 50 representative Canadian organizations which the association helped organize, that appeared in 1951 before the then Prime Minister, the Right Honourable Louis St. Laurent.

Since that time the association has continued to make representations to the federal government in office on the subject of a bill of rights. The last occasion was in April of last year when it organized and acted as spokesman for some 35 representative Canadian organizations in presenting a brief to the Prime Minister, the Right Honourable John G. Diefenbaker outlining alternative proposals to bill C-60 introduced by the Prime Minister in the house of commons in 1958.

I may say that among the organizations which appeared at that time were the Anglican church, the Canadian federation of agriculture, the Catholic immigration bureau of Toronto, and the Canadian labour congress.

The Canadian authors association supported the brief, as did the Canadian Polish congress, the Canadian Jewish congress, the Chinese community centres association of Ontario, the Canadian council of churches, department of social relations, the association of interprovincial farm union councils, the Negro citizenship ssociation, the national council of women, the Presbyterian church, the United church, and other organizations.

It is unfortunate that due to the short notice, it has not been possible to obtain the views of these organizations on bill C-79 and have them associate with us in the presentation. However, the differences between bill C-60 and bill C-79 are so minor that we feel that what these organizations had to say in their brief applies with equal force to bill C-79 and that, had it been possible, they would have been here with us today.

It is and always has been our position and that of all the organizations with whom we have been associated through the years, that if you really want to protect the human rights and fundamental freedoms of the people of Canada, the proper, the most effective, the internationally recognized way to do it,—is to incorporate, to enshrine the bill of rights in the constitution. The reasons are so obvious and have been put on record before so that we need not dwell on them here.

It is recognized however, that there are difficulties that stand in the way of a constitutional amendment. These difficulties can and should be overcome. To the government that takes the leadership and succeeds in overcoming the constitutional obstacles the Canadian people will be permanently thankful and indebted. We venture to say that future Canadian historians will accord such a government a proud place in the forefront of our nation's history.

If we must resign ourselves to the fact that a constitutional bill of rights is not obtainable at this time, then as an interim measure only, we favour the adoption of an ordinary statutory form of bill of rights, provided the statute is a decided improvement over what Canadians already have. It should be the best possible statute that parliament can produce for one of parliament's highest functions is to do everything within its power to promote and protect the human rights and fundamental freedoms of our people.

With this standard in mind, in our respectful submission your committee should recommend the following changes in bill C-79:

1. The basic philosophy of bill C-79 is inadequate. Its aim is to protect the individual from encroachments upon his basic human rights fundamental freedoms emanating from all acts of the parliament of Canada, all orders, rules and regulations thereunder and all laws under federal jurisdiction.

While it is a matter of considerable uncertainty that it provides such protection, it is obvious that it does not provide much, if any protection, for the individual against the arbitrary use of power by a government official, department, committee or tribunal. Of their power, Mr. Justice Angers of the Exchequer Court of Canada, in the celebrated case of Bellau v Minister of National Health and Welfare had this to say: "There are in my judgment too many encroachments by ministers, deputy ministers and functionaries in the judicial as well as the legislative field; if they are not curtailed, the country may in a not too remote future be ruled by a dictatorial government."

It provides little, if any, protection for the individual against the arbitrary use of power by a private person, organization, corporation or authority, employer or trade union.

"I have a right to nothing," said Thomas Jefferson, "which another has a right to take away." This is the philosophy we must incorporate in the Canadian bill of rights. It is not enough to cover acts of the parliament of Canada, all orders, rules and regulations thereunder and all laws in Canada that come under federal jurisdiction. The individual should be entitled to claim and assert the human rights and fundamental freedoms recognized by the Canadian bill of rights as a curb, not only

on the legislature, the parliament of Canada, but on all executive agencies and officials, on the courts, on private persons and groups; in short, on all sources of power in the federal field.

What is needed therefore is to extend the scope of bill C-79 from its present confinements and have it provide that every person within the jurisdiction of the parliament of Canada is entitled to the human rights and fundamental freedoms recognized by the Canadian bill of rights and to protection against their violation from any source in the federal domain.

2. There is no remedy provided in bill C-79 for an individual whose rights or freedoms have been infringed. As the brief which was submitted to the Prime Minister in April, 1959 by over 35 representative Canadian organizations points out—"if the Act is to be truly effective it must provide legal protection for the individual in cases where his rights or freedoms are violated. The very nature of a right or freedom contemplates that to exist it must be respected and therefore enforced. An act which did not provide any remedy to a person whose rights or freedoms were attacked would serve little purpose and be of little practical value."

Accordingly we would urge your committee to recommend that a remedial clause be included in bill C-79, similar to the one proposed by the Prime Minister in the resolution which he introduced in the House of Commons during the 1955 session.

3. The language of the bill in our humble judgment, is wanting. It is our conviction that a Canadian bill of rights should contain an inspiring statement of the basic rights and liberties which are part of our inheritance and to which every person in Canada is entitled. It should be expressed in simple clear and impressive language, albeit legal in form; language that will be understood and will make a lasting impression on our children in the schools, on new immigrants, on all Canadians when they hear it at meetings; in court, at worship, over the radio or on television, or read it in the press or in books. This does not mean that it has to be poetic in form. It only need follow the modern examples of the United Nations draft covenant and declaration on human rights and fundamental freedoms; the council of Europe convention on human rights and fundamental freedoms of 1950, to which Great Britain, France and 13 other western democracies are parties.

I have brought with me a copy of the convention referred to in this brief, and I am pleased to leave it with you, in the hope it might be of some value.

Mr. RAPP: If it is not too lengthy, might it not be put in as an appendix to today's proceedings.

The CHAIRMAN: It is not extremely lengthy. There are quite a number of articles in the convention.

I would suggest that somebody move that it be made an appendix to today's proceedings.

Mr. RAPP: I will so move.

Mr. BATTEN: I will second the motion.

Motion agreed to.

(See appendix "A".)

Mr. HIMEL: Also, we have the original draft covenant which was submitted to the United Nations.

I rather think, since this draft covenant was introduced, there have been many efforts, extending over perhaps more than 100 meetings of the committee studying it, to find a language that all the nations will agree upon.

I do feel it would be of some possible value to this committee to have the draft covenant on human rights which was considered and is being considered by the United Nations before you, in case you may find some assistance there.

The CHAIRMAN: Is that the one that is in the process of being considered at the present time?

Mr. HIMEL: This one is being deliberated upon. It has not been finalized at all. The original one should be of some help because it is the one that has been the foundation for the discussions which have been taking place at the United Nations on the subject of a covenant on human rights and fundamental freedoms.

The CHAIRMAN: If the committee so desires, that could also be made an appendix.

Mr. HIMEL: If you wish it. I merely brought it here.

Mr. BATTEN: I so move.

The CHAIRMAN: Is everyone agreed?

Some hon. MEMBERS: Agreed.

(See appendix "B")

Mr. HIMEL:

4. Left out of Bill C-79 for no apparent reason are these other human rights which we submit are of fundamental importance to the individual:

(*a*) the right to equality before the law;
(*b*) the right to be presumed innocent until proved guilty according to law;
(c) the right to reasonable bail, unless there be just cause to refuse it;
(*d*) the right to privacy, home and correspondence without arbitrary or unlawful interference;
(*e*) the right not to be put in jeopardy or required to stand trial twice for the same offence;
(*f*) the right, if legally entitled to reside in Canada, to freedom of movement within the country and the right to leave and return to Canada;
(*g*) the right, if charged with a criminal offence, to examine and to have examined witnesses against the accused and to obtain the attendance and examination of witnesses on behalf of the accused.

5. In our respectful view section 4 of Bill C-79 should be strengthened.

6. It is our considered judgment that section 6 of Bill C-79 which amends section 6 of the War Measures Act should not be included in a Canadian bill of rights. It properly should be dealt with as a separate Act to amend the War Measures Act. We do however feel that this is not the only safeguard which should be provided to prevent unwarranted abuses under the War Measures Act.

To protect the rights and freedoms of the individual a provision, we submit, should be included in Bill C-79 that if the War Measures Act is brought into force by proclamation of the governor in council none of the human rights and fundamental freedoms contained in the Canadian bill of rights shall be abrogated, abridged or infringed by any order or regulation made under the authority of the War Measures Act, unless such order or regulation is submitted to the parliament of Canada within 60 days after the day upon which the order or regulation was made and is thereafter ratified by parliament. Also, we would prevail upon your committee

to recommend that a special committee of parliament be set up to consider the revision of the War Measures Act with a view to providing under that act, proper safeguards for the human rights and fundamental freedoms of the individual consistent with national security.

This committee has an important task to perform; to recommend a bill that will be as effective as it is possible for the committee to make it and one that will stand the test of time. We have offered our suggestions and hope they may be of some positive help to you. We have also for submission to you a draft bill in which we have attempted to revise Bill C-79 to overcome what appears to us to be its principal shortcomings. We invite your questions on this draft bill, and trust it may have your favourable consideration.

Mr. Chairman and members of the committee, that concludes our brief.

We would welcome your perusal of this draft bill which we have to present to you. We invite any questions that you may care to ask us and that we are able to answer.

The CHAIRMAN: I think the draft bill also should be an appendix to today's proceedings inasmuch as some questions may be asked related to this draft bill.

Will someone move that this bill be made an appendix to today's proceedings?

Mr. KORCHINSKY: I so move.

Mr. RAPP: I second the motion.

Motion agreed to.

(See appendix "C")

The CHAIRMAN: Have you any other statements to make, Mr. Himel, or would you like to have some questions asked?

Mr. HIMEL: Well, I think we are prepared for questions, although I do not know if it is fair to the committee members, as they just have had this bill presented to them.

The CHAIRMAN: I think they have had it long enough.

Have you a question, Mr. Stewart?

Mr. STEWART: In paragraph 4 you have mentioned certain fundamental weaknesses, as you suggest, in Bill C-79.

Would you suggest that all those are not now provided under the provisions of the code?

Mr. HIMEL: It is appreciated that most of the freedoms and rights—and I should say almost all of them, if not all of them—that are set forth in Bill C-79 are part of our law today. I do not think that the fact that some of them are covered in the code reduces the validity of including in a Canadian bill of rights certain rights which most Canadians would consider basic human rights. I fail to see how we can have a proper Canadian bill of rights and leave out the rights of equality before the law. I just cannot see how a right such as that can be left out.

Mr. STEWART: In what respect is there not equality before the law at the present time?

Mr. HIMEL: I do not say that there is not equality; but I do feel—

Mr. STEWART: That is what I am referring to: is there any necessity for it being in bill C-79, if it is covered by the Criminal Code? This is not an amendment to the Criminal Code.

Mr. HIMEL: No.

Mr. STEWART: This is a codification of certain fundamental freedoms. It does not attempt to supersede the Criminal Code, nor amend it. That is why I

asked why you think that this is a weakness in this bill, that it does not set out things already provided under the code?

Mr. HIMEL: I think, if you are going to argue what we have and what we do not have: it is recognized that we have freedom of speech in this country; it is recognized that we have freedom of press; that we have freedom of assembly. On that particular argument, why include them in the bill of rights, because we already have them?

It seems to me that the function of a bill of rights is to set forth the basic human rights and fundamental freedoms which parliament recognizes should be the entitlement of every Canadian citizen and every person living in this country.

Mr. STEWART: Under bill C-79 those things are set out in clause 2(b): they are set out in the draft bill.

Mr. HIMEL: Which ones?

Mr. STEWART: In clause 2(b):

> The right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex.

Mr. HIMEL: That is true.

Mr. STEWART: Does that not make equality?

Mr. HIMEL: I think there is a difference, with all due respect, between the right to equality before the law and the right of the individual to protection of the law without discrimination. I think there is an important difference. And it is recognized in most, if not all, the constitutional documents that have been prepared. The draft covenant of the United Nations recognizes it; the declaration recognizes it; the convention recognizes it—which I referred to in this brief. It is recognized in most of the constitutional documents which include a bill of rights—the right to equality before the law.

Mr. STEWART: Will you give me one example in Canada where we do not have equality before the law?

Mr. HIMEL: I am not trying to say that we do not have equality before the law; I am trying to say that, if you are going to have a bill of rights, it seems to me fundamental that you should include the provision that everyone should enjoy these rights, and the right to equality before the law.

Mr. WINKLER: It states, "without discrimination".

Mr. HIMEL: Yes; and also the right to equality before the law. If I may just refer to the covenant, as an illustration, the provision in the United Nations covenant:

> All persons shall be equal before the courts or tribunals.

and then it goes on and has another clause about discrimination.

In the convention—I cannot see it; but there is a similar clause. In the declaration of human rights there is a similar clause.

It is true that there may be, in some cases, a fine line between the meaning of the right to equality before the law and the right to these rights without discrimination; but there is, I think, an important distinction.

Mr. STEWART: Well, I cannot agree with you.

Mr. DESCHATELETS: Mr. Chairman, Mr. Himel, in the first page of your brief, in the first paragraph, your association has urged that the bill of rights should cover the whole of Canada.

Mr. HIMEL: Yes.

Mr. DESCHATELETS: Are you aware that the provisions of this bill C-79 will apply only within the federal jurisdiction?

Mr. HIMEL: Of course.

Mr. DESCHATELETS: If I may refer you now to page 2, the second paragraph: there you say:

> If we must resign ourselves to the fact that a constitutional bill of rights is not obtainable at this time—

Since we will have, in 10 days from now, here in Ottawa, a federal-provincial conference, do you not think that this bill, C-79 in its present form should be submitted to the premiers of the provinces, to have their views?

Mr. HIMEL: I think we attempt to cover that question in the first paragraph, where we say that the difficulties in the way of a constitutional amendment can and should be overcome:

> To the government that the leadership and succeeds in overcoming the constitutional obstacles, the Canadian people will be permanently thankful and indebted.

We intend to indicate by that that we feel that every effort should be expended to make it possible for a Canadian bill of rights to be incorporated into the British North America Act, or whatever form of constitution Canada has or will have.

Mr. DESCHATELETS: In its present form, Mr. Himel, is your association not concerned with certain uncertainties arising out of the fact that most of these rights mentioned in this bill could be exercised by both jurisdictions, provincial as well as federal?

Mr. HIMEL: We recognize that a federal statute can only do so much to protect human rights and fundamental freedoms; but I think it is important also to recognize that sometimes you have to make progress in certain fields step by step. If we can get a sound bill of rights that is in statutory form, enacted by the parliament of Canada, I think that would be a most important first step in the effort which ultimately we hope will culminate in the incorporation of a bill of rights in our constitution.

Mr. DESCHATELETS: Mr. Himel, will you please tell us if at any time during your previous communication with the government of the day—and especially in 1958—you were suggesting that the government should try and come to an agreement with the provincial legislatures so as to have a bill of rights which would apply to the whole Canadian territory?

Mr. HIMEL: We have always urged, ever since we have had anything to say in this field, that the right way to deal with a bill of rights is to place it in the constitution of the country. We have felt that it was for the government who believed in the significance, in the importance of a bill of rights, to take such steps as were necessary to make such a thing possible.

The CHAIRMAN: Perhaps a supplementary question to that asked by Mr. Deschatelets: I notice from your brief that you have been consistently urging a bill of rights for the past 13 years.

Would your association be content that this bill be abandoned and that you wait until you obtain a constitutional amendment acceptable to the provinces?

Mr. HIMEL: Of course, I think, to answer that question, that we must take into consideration that the bill which parliament adopts as a statute should be as strong as parliament is able to make it. It seems to me that is only appropriate to the circumstances. If parliament believes that the Canadian people under the jurisdiction of the parliament of Canada should have a bill of rights, then I think it owes it to the people to give them the best possible bill. If the bill is the best possible one, it seems to me that until a constitutional amendment is possible that it would be an important advance

in the whole area of safeguarding the human rights and fundamental freedoms of the Canadian people.

I do feel that bill C-79 as set out in this brief needs to be strengthened. We have attempted to outline how it needs to be strengthened and why it needs to be strengthened. We have offered you a draft bill which I may say has been considered by several lawyers and also prepared by them in the hope that this bill will be as strong as possible in meeting the objections which have been brought before this committee and in parliament.

We appreciate that this perhaps is further than parliament need go. In other words the language is not necessarily language that need be adopted by this committee. We have taken this language from precedents which we feel are good precedents—the covenant language, the convention language, the American bill of rights, the language used in the Indian constitution, the declaration of human rights, and language that is original and which we feel is appropriate in the circumstances.

Mr. RAPP: Mr. Chairman, the gentleman has expressed an opinion when he said that if you really want to protect the human rights and fundamental freedoms of Canada that the bill should be in the constitution. Would you say that the bill as we have it at the present time has no teeth, would have no effect whatsoever, since it is not at the present time enshrined in the constitution.

Mr. HIMEL: I do not think we want to give that impression at all.

Mr. RAPP: But you state it pretty strongly here—if you want to protect the human rights and fundamental freedoms it should be incorporated.

Mr. HIMEL: It is true I think that most people will agree that the most effective way to protect human rights and fundamental freedoms is to put it in the constitution where it is not easy to get at and where it would cover the country as a whole in all its various jurisdictions, federal, provincial and municipal.

However, we are realistic enough to know and to recognize that a constitutional amendment is not a simple thing to bring about. We do recognize and have attempted to state, that an important advance could be made by parliament in enacting a statutory form of bill of rights, but we do feel that that bill should be as strong as it is possible to make it.

Mr. RAPP: Would you say then that bill C-79, section 2, is not strong enough when it says:

> —there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely—

And then it mentions (*a*), (*b*), (*c*), (*d*), and so on as the freedoms. Do you think this is inadequate, as you state on your second page that the basic philosophy of bill C-79 is inadequate.

Mr. HIMEL: If I had to choose—and this is true of our association—between what is said in that bill or the wording "It is hereby recognized and declared that every person under the jurisdiction of the parliament of Canada is entitled to the following human rights and fundamental freedoms, and is entitled to protection against their violation," I would say without any hesitation that in respect to the language I have just read, I do not think there is any doubt that the average person in the street, the judge on the bench, or anyone, would understand this language and be moved by it; whereas I question the extent to which they would be moved by this language in the present bill.

Mr. RAPP: In other words you would like to see every paragraph much stronger or in many more words than it is at the present time. For instance, under clause 2(*c*), freedom of religion, what else would you like to have

incorporated in this paragraph, or in (*d*), freedom of speech, or (*e*), freedom of assembly and so on.

Mr. HIMEL: In our draft bill, in clause 3(*c*), we have freedom of thought, and so on. Just to compare the two, the language we have used is a language that has attained national acceptance both in the declaration of the United Nations and in general agreement on these particular clauses between the nations which constitute the United Nations in their discussions of a covenant. We feel that they have spent a lot of time considering this and that they have attempted also to fuse the different opinions that have to be considered when you are drafting a bill of rights. We feel that this language is an improvement. We are not married to this language. I think the statement "Freedom of religion" by itself is perhaps a little brief. We want to include thought and conscience. I cannot see any harm in saying thought and conscience. We certainly believe that in this country a person should have freedom of religion, thought and conscience, and why not say so.

Mr. RAPP: There have been other organizations here which have presented briefs before you presented your brief today. Some of them have expressed the desire to have it as short as it could be and to the point, so that they could hang it up in schools or Sunday school classes, and so on. Here you present one that is about three pages long. Do you think a school pupil would be bothered reading three or four pages of a bill of rights?

Mr. HIMEL: In answer to that question, I think this bill is smaller than the declaration of human rights of the United Nations. I doubt if there has been any document in history that in the short space of time that the declaration has been in existence has had a greater impact on the promotion of human rights and fundamental freedoms than has the declaration of the United Nations. It seems to me if that is true, then we should not be frightened by the fact that the bill may be three pages long and not one page.

Mr. RAPP: The Ten Commandments are very short.

Mr. HIMEL: They sure are, but since then we have gone through a lot of history. You even have to spell out the Ten Commandments because there are exceptions even to the Ten Commandments.

The CHAIRMAN: We have a short form to the Ten Commandments too.

Mr. BATTEN: On page 1 in paragraph 4 you say:

> It is and always has been our position—to enshrine the bill of rights in the constitution.

With this principle I agree, but let us go on again on page 3 where it says:

> In short, on all sources of power in the federal field.

When you use that phrase "federal field" are you referring there only to this present bill? I recognize that your comment at the bottom of page 2 is in regard to bill C-79.

Mr. HIMEL: You have to read that statement in conjunction with the fact that there is an earlier statement, that if we cannot at this time have a constitutional bill of rights, as an interim measure, we favour the adoption of an ordinary statutory form of bill of rights.

Mr. BATTEN: Yes.

Mr. HIMEL: That, of course, means, a statute passed by the parliament of Canada. If parliament, as it is suggested by this draft bill that this committee is considering, intends to pass a bill, then we feel that that bill should be broad enough to cover all sources of power in the federal field, and not merely the power represented by acts of the parliament of Canada. By "acts" I mean statutes, rules and regulations, passed under acts, and laws within the federal

field. There is a very great area that is not covered by those four frames of reference. We feel that it should cover all areas in the federal domain.

Mr. BATTEN: Then, sir, take your last word on page 2, the word "legislature"; you use this word as referring to the parliament of Canada?

Mr. HIMEL: Yes, that is right.

Mr. BATTEN: You use it referring to the parliament of Canada only?

Mr. HIMEL: Yes.

Mr. BATTEN: Thank you.

Mr. WINKLER: Mr. Chairman, the thought I had in mind has been covered, but I would like to say that this witness has mentioned in the brief, and referred to it briefly, the importance of providing a constitutional amendment. I am wondering if the witness, or his colleagues, have considered the amount of thought that the government has given to the recognition of provincial rights in preparing the statute in this way, and the possibilities of the provinces losing some of their rights in due course through a constitutional amendment? Also, that the furtherance of this particular statute could be carried on at some time in the future? I think the government should be commended because of the fact that they have taken into consideration the rights of the provinces, which they justifiably and jealously, guard. Therefore I feel that the bill, as it is, is an excellent bill at this particular time. Even the words which the witness would prefer to have in the preamble have already been explained to us, but I think the fact that the rights of the provinces have been guarded in this bill is a compliment to the government. I am wondering if your colleagues have considered this in this light?

Mr. HIMEL: This draft bill, which we have presented to you, has been prepared having in mind that only those things should be contained therein that are within federal jurisdiction. It is possible that we have perhaps covered some rights that may flow over into provincial jurisdiction, but those rights exist in those cases where you may have reference both federally and provincially. Certainly, if they do exist in both domains as, for example the right to his privacy, his home and his correspondence without arbitrary or unlawful interference, then this draft bill that we have presented to you makes it clear that the act only covers persons under the jurisdiction of the parliament of Canada. If you are going to take the attitude that the right of free speech exists both provincially and federally, and, therefore, if it transcends provincially you are going to leave it out, it seems to me you would get nowhere. Because, most of these rights have federal aspects, and provincial aspects, and all that this parliament of Canada can do is cover the federal aspects. We have endeavoured, in this draft bill, to cover those rights that we feel are basic, and to cover them, of course, only in so far as they pertain to the federal jurisdiction.

Mr. MANDZIUK: Mr. Chairman, I had more than one question to ask, but some of them have been covered by my colleagues.

I wish to draw the witness' attention to page 2 of the brief, the second last paragraph. I would like a little clarification in this regard. Your organization says that the bill provides little, if any, protection, for the individual against the arbitrary use of power by a private person, organization, corporation or authority, employer or trade union.

Mr. HIMEL: Yes.

Mr. MANDZIUK: What danger do you see from private persons, employers and trade unions? Would you just elaborate on that a bit?

Mr. HIMEL: I would be glad to.

In our modern world, sources of power go far beyond the power of the government to pass laws and to interfere with life, human rights, and fundamental freedoms of the individual person. We know of many cases where employers, and indeed trade unions, have invaded human rights and fundamental freedoms of the individual person. For example, it is conceivable, and I have known of a case, where a person has been denied a fair hearing by a trade union. We feel that if every person is to have a fair hearing, that that fair hearing should be extended to him by anyone who may deny it to him. I may say that, in my experience, the occasions when a person has been denied a fair hearing by a trade union are few and far between, but that is not the point. The point is this: the individual today is shrinking in regard to the protection and security he has against all the forces arrayed against him. If we intend to pass a bill of rights that is going to mean anything, it should assert first and foremost that the individual is supreme in the area of the bill of rights, and that his rights should be protected against everyone that would encroach on them within the jurisdiction of the parliament of Canada, if it intends to legislate on the matter.

Mr. KORCHINSKI: I would like to follow that up. In what way does your proposed draft bill cover that point?

Mr. HIMEL: The way it attempts to cover it is by asserting in clause 3:

> It is hereby recognized and declared that every person under the jurisdiction of the parliament of Canada is entitled to the following human rights and fundamental freedoms:

Then it lists them.

The government bill merely states that it is recognized and declared that in Canada these rights exist. It does not state that every person has these rights. Maybe it was intended. However, I do not think that sort of thing should be left to implication, or guesswords. It should be stated in clear and unequivocal language, that these rights are the rights of every person who comes within the jurisdiction of the parliament of Canada.

Mr. STEWART: Is that not a matter of terminology?

Mr. HIMEL: It is terminology and rights. I think it is a matter of rights also because in clause 6 we go on to say:

> Any person, any of whose human rights or fundamental freedoms set out in section 3 has been violated shall have an effective remedy by reason thereof and may apply for appropriate relief by way of mandamus, injuction, direction, damages or otherwise on notice of motion to the Supreme or Superior Court of the province in which the violation occurred.

I might say that clause is an elaboration of a similar clause which the Prime Minister introduced in the House of Commons in a resolution which he asked the House of Commons to adopt in 1955. The two are the same for remedy. They provide for relief on notice of motion.

Mr. STEWART: We have those rights under our law now.

Mr. HIMEL: Some we may have; and some we may not.

Mr. STEWART: There is no question about that.

Mr. HIMEL: I do not think all those rights we have. Most of them, I would certainly concede, we do have.

Mr. MANDZIUK: Pinpoint the rights we have not. This is a codification of the rights we have, which have been in the book since Magna Charta.

Mr. HIMEL: I would agree with that, by and large.

Mr. MANDZIUK: Good.

Mr. HIMEL: I do not suggest this bill of right is intended to create new rights. It is intended to codify our rights and also to give them some validity—at least, that is what I think should be the case.

Mr. KORCHINSKI: On the same paragraph, I am concerned with your quotation there from Mr. Justice Angers, in which you mention:

> There are in my judgment too many encroachments by minister, deputy ministers and functionaries in the judicial as well as the legislative field; if they are not curtailed, the country may in a not too remote future be ruled by a dictatorial government.

Is it not the fact that there is a statement in clause 2 to this effect:

> —(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

Is that not in itself a curtailment upon ministers, deputy ministers or any other individuals you seem to be concerned with?

Mr. HIMEL: With respect, my view is—and I have sounded out several lawyers on this—that clause 2(a) can only be invoked by a court in relation to all acts of the parliament of Canada, all orders, rules and regulations thereunder and all laws under federal jurisdiction. There is a very wide field of administrative action and decision which would not be covered, in my submission, by anything which is contained in this statute. It seems to me we are all conscious of the fact that our liberties can be invaded not only by statutes but by administrative acts of executive agencies and individuals. It is important in this modern day to provide protection for the individual against such encroachments as well as encroachments by the legislature.

Mr. KORCHINSKI: The impression I get is that you feel this bill only covers legislative action and any bills that may be passed in parliament. Surely, I think you will agree, it covers all individuals in our society, does it not?

Mr. HIMEL: If you are suggesting it covers all people in all areas of activity within the federal domain, in my respectful submission I do not think the bill does so.

The CHAIRMAN: I throw out the suggestion, gentlemen. We have here, now, with us the representatives from the Canadian congress of labour. Perhaps we could terminate our questioning in a reasonable period of time.

Mr. DESCHATELETS: Mr. Himel, your brief is suggesting many amendments and changes to this bill; the most important ones, in my view, being the incorporation of this bill into the constitution, and that the same rights as the ones enumerated here should apply in peace time as well as under the War Measures Act, if I understand your brief well.

Suppose the government would politely put your brief on a shelf and forget about it, do you believe that at this time there is urgency to go ahead with this bill, C-79, in its incomplete form?

Mr. HIMEL: I think that the Canadian people have sought for a long time to have parliament pass a bill of rights. I think that is demonstrated by some remarks that the Prime Minister made when he introduced this bill. I also feel that this committee has a task to perform, and that is to review this bill and make it as strong as it is possible for this committee to make it. I think, with every respect, that it is up to this committee to strengthen the bill. We hope that we have made some representations to you which have indicated some of its weaknesses, to strengthen it so the Canadian people have a bill of rights, but one that will stand up and stand the test of time, and one which I think would read well and be unequivocal in matters which I think, at the moment, are obscure.

Mr. DESCHATELETS: Just one supplementary question. Would you agree, sir, with Dr. Scott in his testimony here last Thursday, that it would be better not to have any bill of rights at the present time, instead of going ahead and passing this bill C-79 in its present form?

Mr. HIMEL: I think that is a very difficult question to answer. One has to weight in the balance the positive features of this bill C-79 against its weaknesses. I must confess that we have attempted to lay before your committee some of its weaknesses, and I think that they are important weaknesses, not trivial ones. We would not be here if they were trivial. We would be delighted to have the bill in its strongest form go through parliament; but, in our humble submission, they are significant and important weaknesses of the bill. We feel, if those holes could be plugged, that the Canadian people would welcome this bill. We feel, more importantly, that you would be doing a great service to strengthen the human rights and fundamental freedoms of the people throughout Canada.

Mr. BATTEN: Mr. Chairman, it has been suggested that this bill is the first step towards a more comprehensive bill of rights. Now, how many steps would be required to reach that bill of rights that would be acceptable to all Canadians we do not know, of course; it may be two, three, four or five. But it has been suggested in this committee that the second step in this direction may be extremely difficult. Would you consider that statement to be true?

Mr. HIMEL: I am no expert on dominion-provincial relations and the machinery which is to be used to obtain a constitutional amendment. But it seems to me that all you can ask any government is to use its best efforts, if it believes in a constitutional bill of rights, to bring it about.

It seems to me at this stage that if the parliament of Canada can adopt a strong bill of rights we should go on to call upon the government to initiate meetings and discussions with the provinces with a view to getting dominion-provincial agreement on a bill of rights, that that is a task which faces us, and one which should be embarked upon.

Mr. BATTEN: Thank you.

Mr. AIKEN: May I ask a question? When you were speaking a few moments ago I gathered the impression that you felt that it might be too cumbersome in the present wording of the bill to go to court in every case where a question of fundamental freedoms and human rights was raised. Did I understand you correctly?

Mr. HIMEL: I think so. It is true that we have the enunciation of a rule of construction, where it might be in order. But the bill does not seem to provide any answer. It may be that there is an answer that you could infer, but I do not know.

However I see no reason why it should be necessary to infer an answer. If we want to use this as an educational medium for the people of Canada, then why not say what remedy you have if your rights are infringed upon?

It seems to me only common sense. The remedy that we propose, I think, may be implied by some lawyers but not by others. However I see no reason to leave it in the air. Let us state the remedy in language that everyone will understand. It therefore would strengthen the feeling of the individual to know that if his rights were violated, he would have some recourse to the courts for relief.

Mr. AIKEN: That is the point I was getting at. Are you suggesting that there is no other way by which those rights can be decided except in court?

Mr. HIMEL: At the moment, no; there is no testing, of course not.

The CHAIRMAN: Mr. Himel, is not clause 3 a plain direction to the court to give effect to the rights declared in clause 2?

Mr. HIMEL: It is a rule of construction; I mean, if a case were before a court, I think there would be an obligation on the court to give effect to it. But I think it is one thing to use the heart and soul of this act as a rule of construction, and it is another thing to provide a clear-cut remedy in the form of an application for relief to the Supreme Court or to the Superior Court, if your rights are violated; and may I say that it is not if your rights are violated only by acts of parliament, and rules and regulations made thereunder, and laws under federal jurisdiction; it is for anything which may happen in the federal field.

Mr. AIKEN: May I just finish my thought: I would like to advance in connection with the detailed rights that you suggest the thought that you may, in limiting specific instances, be overlooking some generalities which are completely lost.

I am a lawyer, in common with some of the others here; and all of us have seen wills drawn by a testator himself, in which he spends three or four pages in giving away items of furniture, jewellery, and so on, and comes to the end of the will, forgetting to dispose of the residue of his estate. Everybody has come across this.

So I wonder if that thought might not be affected, if you start to limit too specifically items that are freedoms, and overlook the fundamental generalities in the broad terms.

Mr. HIMEL: I must admit that I find it a little difficult to follow how in a practical way your observation applies to our presentation.

Mr. AIKEN: I am saying that you have in paragraph 3 specifically enlarged the fundamental freedoms and human rights set out in the bill, and you have put in there subsections (*a*) to (*p*); and in subsection (*p*) you have further broken it down into eight further subsections, listing specifically other items which I take it you feel are more advisable than using the general terms which are in the present bill.

Mr. HIMEL: Well, some of them are not contained in the bill. But what we have kept in mind in setting out the rights is the experience of, let us say, the United Nations with these rights, and the experience of the 15 democracies that have adopted the council of Europe convention on human rights and fundamental freedoms.

We feel there is a wealth of experience there by people all over the world who have resolved that we come up with words that attempt to meet the situation. I am not suggesting for one moment that you need to incorporate all these rights, or that the language need be set forth in our draft bill.

We, perhaps, in the interests of being as complete as we possibly can, have set down what we feel might be a good guide to your committee. But it is most important of course to cover the rights in language which will stand up in court, and which will stand the test of time.

Mr. AIKEN: I think you have done an excellent job. But this was the thing which perturbed me, about the details being too specific, as you have them here. Thank you.

The CHAIRMAN: I think, gentlemen, we have perused this matter about as far as we can at this stage.

Hon. E. D. FULTON (*Minister of Justice*): Mr. Chairman, I really am not a member of this committee. But this is the first occasion I have had an opportunity to come to one of your meetings. I apologize for it, because I have more than a passing interest in the bill; but I have been engaged in the banking and commerce committee.

I wonder if I might have the opportunity to ask Mr. Himel some questions?

Agreed.

Mr. FULTON: Thank you very much. Mr. Himel, may I start by expressing appreciation, of your interest as shown in your further submission as well as the earlier submission you made, and which I assure you was considered very seriously.

I do not want to take up too much time of the committee, so I will direct myself to only a few of your points.

First I refer to the second paragraph on page 2 of your brief where you say:

> If we must resign ourselves to the fact that a constitutional bill of rights is not obtainable at this time, then as an interim measure only, we favour the adoption of an ordinary statutory form of bill of rights . . .

May I ask you whether you would agree that, when enacted, this bill would become part of the constitution of Canada?

Mr. HIMEL: I think, by and large, every statute is part of the constitution; and it is very likely that it will assume the form of prestige which will make it difficult in future for the government to interfere with it.

I think that is one of the merits, at least, of having a statute. But if we are going to do that, it seems to me that the drafting of modern statutes is quite different from the best draftsmanship of statutes, and that we should attempt to make the statute as strong as possible.

Mr. FULTON: I quite agree with your point there. Although we recognize it will not be a part of the British North America Act. I think you will agree the constitution of Canada is not confined to the British North America Act and its amendments. My point is, would you agree this bill would become one of the parts of the constitution of Canada in the same way as the Supreme Court Act is, and various acts such as the Northwest Territories Act, the Yukon Act, and so on, are part of the constitution of Canada?

Mr. HIMEL: I think I should explain our intention, when we refer to the constitution. It is to indicate that it should go into some such document as the British North America Act, because the purpose is to bind both the federal and the provincial governments, when that is possible. At the present time it certainly is valid to say it becomes part of our general constitution, because I think all statutes are part of our constitution—at least, I have understood that, even though in modern phraseology, we contemplate, at least in Canada, that by the constitution, we have particular reference to the British North America Act.

Mr. FULTON: Well, that is one part of the constitution, but do I take it you do not agree that there are other statutes which are in the proper and peculiar sense of the word part of the constitution? I was thinking you might draw a distinction between the Supreme Court Act and the Income Tax Act, and say one is a constitutional statute and the other is not. Would you agree this would become a constitutional statute, because it does describe limitations upon the rights of the executive and upon, indeed, the rights of parliament, unless parliament itself overrides it by a subsequent act?

Mr. HIMEL: I must say that the practical meaning of constitution, as I have used it, and as the association has used it, is a constitution that would bind both the federal and provincial governments. It seems to me the Supreme Court Act is an act which the federal parliament can amend at its pleasure.

Mr. FULTON: You say then only those statutes which bind both federal and provincial parliaments are constitutional statutes?

Mr. HIMEL: Well, I know, for the purpose of this bill of rights, what we mean is that the most effective way to protect human rights and fundamental freedoms is to put it in a statute, if you wish, that will bind both the provincial and the federal governments. Now, the only one that I know of at the moment

that would be applicable is the British North America Act, which I think is considered to be the heart of our constitution.

Mr. FULTON: I do not think you have answered my question, but I have no right to press you on the point. Your view is quite clear. Your view is that you would sooner see this as an amendment to the British North America Act?

Mr. HIMEL: Yes.

Mr. FULTON: Within those limits I suggest you have not answered my question. However, I will proceed to another point.

You say on page 2, the second paragraph under No. 1:

> While it is a matter of considerable uncertainty that it provides such protection, it is obvious that it does not provide much, if any protection, for the individual against the arbitrary use of power by a government official, department, committee or tribunal.

May I direct your attention particularly to section 3 of the bill, which says:

> All the acts of the parliament of Canada enacted before or after the commencement of this part, all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this part that are subject to be repealed, abolished or altered by the parliament of Canada, shall be so construed and applied as not to abrogate, abridge or infringe—

and then the things which are not to be abridged are specified.

You made the point that this only covers legislation or orders in council—legislation enacted by parliament or orders in council, rules and regulations made thereunder. And, if I understood you, you say this means that administrative boards, tribunals, ministers and deputy ministers themselves, and their decisions, are not subject to the bill of rights as drawn.

Mr. HIMEL: I never intended to convey that. What I do say is this: that within the area that they operate, that is covered by acts of parliament, orders, rules and regulations made under such acts, and laws enforced in Canada, but outside that area they are not covered. Now, I think there is a pretty big area outside that field, and that is the point we are attempting to draw attention to.

Mr. FULTON: Would it not be the case that no board, tribunal, minister or deputy minister, or officer of the federal government has authority, except under an act of parliament or a regulation or order made under that act? And if under the Bill of Rights the acts or the orders or regulations made thereunder must be so construed as not to abrogate or abridge the rights and freedoms enunciated then, surely, an action of an official whose authority derives from those acts or regulations, and which action would deprive an individual of his rights and freedoms, would be contrary to the act or regulation, as this bill instructs the court to interpret it.

Therefore, would it not be possible for any individual who felt he had his rights abridged by an action or decision of a minister or official to go to the court and say: here, this official purports to be acting under such and such a statute or regulation which gives him authority, and he is acting in a way which deprives me of my rights—and this bill of rights says the act or regulation which gave him authority shall not be so construed as to give him the authority actually to deprive me of my rights, so I appeal to the court to make an order restoring my rights to me. Surely every action of such an official must have its authority somewhere, and therefore be subject to review under this bill.

Mr. HIMEL: Now, to begin with the first part of that illustration, I think we should make it clear, in no uncertain terms, that the individual can go to

the court and say: here, my rights have been infringed. Certainly, it is true that you may read that into the section, because you provided for a rule of construction but, with respect, I think it should be stated in no uncertain terms that if the rights set forth in this bill are violated, the individual has the right to apply, on notice of motion, to a court.

Mr. FULTON: There you are coming to another part of your brief. I was directing your attention to the area which you said is not covered.

You said there was a wide area in which federal officials can act, where their actions would not be covered under a bill of rights. I was trying to find out on what basis you made that statement. When it comes to the question of actual enforcement there is, perhaps, another area of discussion.

Mr. HIMEL: To go to the other aspect, I believe that there is a wide field of executive action that is not covered—however, I may be wrong—by acts or orders, rules and regulations, made under acts and laws enforced in Canada. Now, it is the things that happen from day to day—whatever those things are—and I have considerable doubt in my mind; and this has been recognized by other lawyers with whom I have talked—how far this act goes to bring within its scope all manifestations of executive action, as well as all legislative action. I do not think there should be any doubt about it. If you, sir, feel that the point is recognized and that the intention is to give effect to that area of executive action, with respect, I believe that there should be some language which makes it clear—and what we have attempted to do, in this draft of ours, is to make it clear by indicating that every person has these rights, rather than to phrase it as it has been phrased, in which the person seems to have been sidetracked by a statement of principles.

Mr. FULTON: Surely it is not a statement of principles, but a statement of human rights and fundamental freedoms that exist, and I am not able to see how they exist unless they attach to persons.

Mr. HIMEL: Then I do not question that that is the full intention. But would it not be very much better to say:

> It is hereby recognized and declared that every person under the jurisdiction of the parliament of Canada is entitled to the following human rights and fundamental freedoms?

Mr. FULTON: I think it might be argued that that is another way of saying the same thing. And then you would simply have the question as to which is the better legal language in which to state it.

But with respect to the matter of scope and coverage of federal officials, I must come back to the point that I made. I am not aware of any action of any federal official, if it is to have validity and is therefore to be effective against an individual, that must not find its authority in some act of Parliament, or order or regulation made under that act. Because, if a federal official took some action and then could not point to the statute, regulation or other authority under which he took the action, his decision would be of no effect at all. I do not think you have pointed to any area in which a federal official, minister or otherwise—or civil servant—can act, or purport to act, without resting his action on some statutory authority, or authority derived from some statute or regulation.

There may be abuses. There are occasions when we may attempt to go beyond the authority given us by that statute or legislation. That is where the bill of rights becomes operative. The moment we cannot point to that authority and say, "This is my authority for doing precisely what I have done", then the courts would say, "The bill of rights says that no such act or regulation shall be interpreted so as to give this individual the power to do what he is trying to do".

Mr. HIMEL: Perhaps, sir, I may add to what I have said. It is my understanding, as a lawyer, that the crown, in the right of Her Majesty's government of Canada and every board, commission or other authority established under any act of the parliament of Canada, is not bound unless there are express words in the statutes so binding it. I may be wrong.

I do not claim to be the final word on this; but I have always understood that Her Majesty, in the right of Her Majesty's government of Canada and every board, commission or other authority established under any act, is not bound by another statute unless there are express words so binding the crown. If that is so, it seems to me there is a flaw somewhere.

Mr. FULTON: I think it would be arguable that the bill of rights, in the broad, sweeping terms in which it is drawn, in which it says:

> All the acts of the parliament of Canada enacted before or after the commencement of this part, all orders, rules and regulations thereunder—

and so on—I would think that those broad words and the clear intent of parliament would be interpreted by the courts as giving direction to the courts to construe all statutes, even those setting up federal authority, as meaning that you do not have the right to abrogate freedoms that are set out in the bill of rights.

Mr. HIMEL: Mr. Fulton, if you can say that it is arguable, would you not also consider that it should be made beyond argument, and that language should be used which will make it clear that Her Majesty, in the right of the dominion and every board, commission or other authority established under any act of the parliament of Canada, is subject to the act?

Mr. FULTON: Well, Mr. Himel, we think we have accomplished that. A great deal of consideration was given to it. I suppose it boils down to the question whether the Interpretation Act is affected by the bill of rights. I would think it is subject to the bill of rights. If at any time the courts felt it was not, then we would certainly, it seems to me, be required to make an amendment. But it is clear view that the bill of rights would apply to federal officials and ministers, as well as to others.

I do not want to take too much time. I do think however, that I should come to paragraph 4 on page 3 of your brief, where you say:

> Left out of bill C-79 for no apparent reason are these other human rights which we submit are of fundamental importance to the individual.

I wonder if I could take you through these paragraph by paragraph. It should not take very long. You say that amongst those omitted is:

> (a) the right to equality before the law.

This has been touched upon, and I direct you to subclause (b) of clause 2 of the bill:

> The right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex.

It seems to me that the individual's right to equality before the law is being protected, here so that he may claim equally, with all others, the protection of the law, especially with respect to the enforcement of his rights. So I would ask you to perhaps reconsider your stand there, to reconsider whether in fact there is any difference between "the right to equality before the law", as you have expressed it, and the expression "the right of the individual to protection of the law without discrimination".

Mr. HIMEL: If I may answer that point: the clause that is used in the declaration of human rights and the draft covenant, and which is to be found

in the convention on human rights of the council of Europe, includes both "equality before the law" and "the right of the individual to protection of the law without discrimination".

I do think—at the moment I have not been able to find the distinction with any great clarity—there is an important difference between "the right to equality before the law" and "the right of the individual to protection of the law without discrimination".

It is possible that you can treat a person—I think this is so—without equality, and not discriminate against him.

Since most of the recognized documents that deal with bills of rights in modern times, incorporate both, we feel that both should be incorporated in this bill.

Mr. FULTON: Well there may be a difference of opinion between us that may not be reconciliable. It is true, as was pointed out by one of the members, that one of our attempts was brevity, without fundamental error or omission. But we feel that in the clause:

> The right of the individual to protection of the law without discrimination...

we have covered also all that is intended to be covered in the expression "equality before the law". There is, perhaps a simple difference of opinion there.

May I come to your principle (b):

> The right to be presumed innocent until proved guilty according to law.

This is a presumption of our law at the present time, and in addition I direct your attention to clause 2(a) of the bill:

> The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

We considered very carefully all that is involved in the words "due process of law", and came to the conclusion that this phrase, which is well understood in the United States—it is true that their precedents would not be binding on us but I think our courts would look to them for a guide because they have been applied there for many years—this expression would be a sufficient protection and guarantee of these inherent but unwritten parts of our Criminal Code. So that the presumption of innocence until proof of guilt would be covered by the words "due process of law"; and any trial of an individual which proceeded on any other basis would be held to be a trial not having been carried out according to the due process of law.

Would you concede any validity to that point?

Mr. HIMEL: I must confess that I am not familiar with the judicial interpretations of the United States Supreme Court in relation to the application of "due process of law" to the presumption of innocence.

I do feel that the presumption is so important that we should not leave it out; that we should state it in clear terms. I am also conscious of the fact that in the Criminal Code and elsewhere certain presumptions arise that offset the presumption; but that does not render the original right any the less valid.

The fact is that every person, without exception, when he comes before the court, until something is proven against him should stand innocent—and that is the principle that we want. When they prove something against him—whatever that may be; whether it is stolen property, possession of explosives, or possession of narcotics, then the onus shifts. That may be. But I see no reason why this right should not be stated. It is stated in the covenant; it is stated

in the convention. It seems to me that Great Britain felt prepared to include it in the convention, to which it is a party; and, also, most of the countries have not objected to this clause in the covenant. It seems to me we should be prepared to give effect to it in our bill of rights as well.

Mr. FULTON: We think we have this in the due process clause. As I say, I am satisfied that any trial in which the accused had been proceeded against and found guilty without having been proven guilty after being given the benefit of the presumption of innocence, would not be held to have been a trial in accordance with the due process of law. Our courts automatically would apply the due process of law clause if the case went to review.

Then your brief says we have omitted: "The right to reasonable bail, unless there be just cause to refuse it". It seems to me that bail is an attribute of detention and that refusal of bail would be covered by our bill. Would you not agree it might well be covered by 3(a) "authorize or effect the arbitrary detention, imprisonment or exile of any person"? Would not the arbitrary refusal of bail be arbitrary detention?

Mr. HIMEL: I think a judge might come to that conclusion. On the other hand it seems to me we run no risk when we affirm that everyone should have the right to reasonable bail unless there is just cause to refuse it. It is merely a statement of our law.

Mr. FULTON: Would that not be another way of stating the same thing that is in 3(a)?

Mr. HIMEL: Again the precedents we have available to look at—the declaration, the covenant and the convention—all seem to feel you should spell out the right to reasonable bail, and it seems to me it is an extension of arbitrary detention. Some judges might not feel that arbitrary detention necessarily implies that you have a right to bail, although I would think that would be the general point of view of most judges. However, I do feel that to state this right as we have attempted to do is a good thing and does not detract in any way from anything that we are already doing.

Mr. FULTON: No, no, I quite agree it will not do any harm. My question was directed to your assertion that these things are not covered in the present bill. It may not do any harm to strengthen or amplify them, but my question is directed at seeing whether or not you would agree that they are covered in the present bill. Take your (d), "The right to privacy, home and correspondence without arbitrary or unlawful interference". May I refer you to 2(a) of the Bill "The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". In this case I think our clause is longer than yours, but covers exactly the same field. "Security of the person" covers privacy, "Home",—that is property, "Correspondence" is also property. "Without arbitrary or unlawful interference" is the same as "the right not to be deprived thereof except by due process of law." Surely ours is as adequate as yours.

Mr. HIMEL: Again I would say that point of view is not accepted by the declaration of human rights, the covenant and the convention.

Mr. FULTON: So what you are saying is really that we have not adopted in every particular the words of the covenant and the declaration of rights. That may be true; but is it not therefore established that just because we have not accepted that language we have not covered the things that are covered therein.

Mr. HIMEL: I think it may well be that a judge will interpret these sections so as to include for example, as you have mentioned before, the right to reasonable bail so as to include the right to privacy, home and correspondence. It may well be that way; but I think we should remove any doubt about such

an interpretation and should make it clear that this is a right which every person who comes under the jurisdiction of the parliament of Canada may claim.

Mr. FULTON: Is it not true that the word "privacy" is going to be covered by the words "security of the person"? What does privacy mean? Does it mean that if I accost you on the street I do away with your privacy? You say we should write into the statute an interpretation which is enforceable by Canadian courts. We have endeavoured to do that in language which our courts understand and with which they are familiar. With due respect, I think while it may well be that the international documents are admirable documents as declarations of principles to be followed generally by nations, when you come to writing a statute or a bill to be applied and interpreted in Canadian courts it may be better to write them in language with which the courts are familiar.

Mr. HIMEL: As you will appreciate, the covenant is intended to be a legal document binding on all nations who will enter into it. The convention, as I understand it, is a legal agreement which fifteen western democracies already have entered into and have agreed to be bound by. I think their language was intended for legal purposes. At the same time in this draft bill we have something similar to clause 2(a) of bill C-70. I think the words "right to privacy" have acquired some sort of legal significance. It is not that we are attempting to argue in precise language. We are attempting to define areas of rights which I think are highly important.

Mr. FULTON: Yes. We are doing the same exercise together.

Mr. HIMEL: Yes.

Mr. FULTON: We looked at your submission when you made it to us last year and went over it very carefully to see whether or not we could satisfy ourselves that the things you were concerned to have covered were in fact covered in our bill. We have amended the first draft in one or two particulars, and came to the conclusion that, having done that in pursuance of our agreement to review the bill, although our language is not the same as yours the coverage is as broad.

Could I now direct your attention to your point (f): "the right, if legally entitled to reside in Canada, to freedom of movement within the country and the right to leave and return to Canada" and our words in clause 3(a) "shall not be so construed and applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person". If there is a right not to be arbitrarily detained, it seems to me you have the right to movement within the country and the right to leave and return to Canada. So, again, although they are not in the same language, but the intent of the words you use here are covered in our bill in the section I have cited, and elsewhere. I remind you that my point is not to establish that we have used the same words but rather to question your contention that the words used by you are not covered by the expressions contained in our bill of rights.

Mr. HIMEL: I am always mindful of the fact—and perhaps you are in a better position to judge—that most of the courts are most reluctant to take a generous interpretation of words. They expect you to spell it out for them if you expect them to give effect to it. If that principle applies generally speaking in our courts—and I think it does in large measure—then it seems to me that while one can interpret the words arbitrarily, depending on who you are, then in the case of a court the court is loath to read any more into those words than it has to because it feels its function is to interpret, and that it is parliament's function to legislate. If that contention has validity it seems to me that there is some duty to spell out these rights as clearly as we can.

Mr. FULTON: There might be a different point of view that I could express on the basis of recent decisions of the Supreme Court of Canada where some people felt they were going very far in expanding the meanings of words. I am referring to the recent decisions dealing with this point of human rights and fundamental freedoms.

I would simply say, in respect to paragraph (*g*) of your document, that, in my submission, if you look at subclause 3(*e*)of the Bill which says:

> deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations—

I do not think our courts would have any difficulty in holding that a trial at which an accused person was not afforded the right to examine witnesses against him was not a trial conducted in accordance with the principles of fundamental justice. Again I suggest to you that, on examination, there is room to agree that your point is in fact covered in our bill. Would you think I was going too far in saying that?

Mr. HIMEL: No, but I think the same argument applies; that you may be importing things that a court might well try to apply to cover these rights that we have attempted to spell out. I think it might just as likely, if not more likely, be the case that a court will be reluctant to give more than a narrow interpretation to the words, because they will feel that otherwise they are transcending the jurisdiction of the parliament of Canada.

Mr. FULTON: I do not want to get into a legal argument with you. I have taken up enough time, but I would just conclude this part, if I may, by reference again to the Interpretation Act which, I think in this context, directs that there shall be a liberal interpretation rather than a narrow interpretation of statutes of this sort, and of words used in statutes of this sort.

Thank you very much Mr. Chairman. I am sorry I have taken up so much time.

The CHAIRMAN: Thank you, Mr. Fulton.

I think that concludes this portion of the meeting.

Mr. Himel and Dr. Corbett, may I express on behalf of the members of this committee our appreciation for your having taken the time to appear before us and present this brief, and thank you as well for substantiating your ideas in the manner in which you have, and subjecting yourselves to the questioning that has taken place. We have appreciated it.

Now, gentlemen, may I introduce Mr. Claude Jodoin, president of the Canadian labour congress. With him is Mr. Stanley Knowles who, I think, certainly needs no introduction. He is the executive vice president of the Canadian labour congress. We also have Dr. Eugene Forsey, the research director of the Canadian labour congress, Mr. Kalmen Kaplansky, director of the Department of International Affairs of the Canadian labour congress, and Mr. A. Andras, the director of the legislation branch of the Canadian labour congress.

Gentlemen, we welcome you to this committee, and we are looking forward with great interest to your presentation.

Mr. CLAUDE JODOIN (*President, Canadian Labour Congress*): (French).

The CHAIRMAN: May I interrupt to inquire as to whether or not we have a French language reporter here?

Mr. P. M. OLLIVIER (*Law Clerk, House of Commons*): I think Mr. Jodoin is just excusing himself for not having the French translation of this brief.

Mr. JODOIN: I was just expressing, myself, Mr. Chairman, to the French speaking members of the committee, my regret for not having at my disposal

at the moment the French text of this document of ours. Maybe I should humbly submit that this is because of the lack of time. It is at the disposal of the Canadian labour congress, and we will have it at your request, if it is found necessary.

Mr. Chairman and Members of the Committee:

The Canadian labour congress, representing over one million Canadian workers, welcomes this opportunity of appearing before you. Labour is vitally interested in this question. It has reason to be. Individually and collectively, workers have suffered more from the deprivation of human rights and fundamental freedoms than any other section of the community. Unions came into existence to gain these rights and freedoms for workers. They remain in existence to protect what they have won and to gain more. Their burden will be considerably lightened if some of the more important rights and freedoms can be protected, by a fundamental law, against violation both by private persons and corporations, and by public authorities, national, provincial and municipal.

That is one obvious reason why Labour favours a bill of rights. But there is a more basic reason. Unions can flourish, and workers can progress, only in a genuinely free and democratic society, in which the rights of all citizens, not merely of union members or wage earners, are secure. Canadian labour not only abhors dictatorship, of any colour of stripe, by any class; it seeks for itself no special privileges, no rights, no freedoms, that it does not wish to see granted equally to all other law-abiding citizens and their democratic organizations.

The Canadian labour congress has, from its inception in 1956, consistently pressed for a bill of rights. Of its two predecessor congresses, the trades and labor congress of Canada, did likewise in every year from 1948 on, while the Canadian congress of labour began its representations on the subject in 1947.

In view of all this, it might perhaps be expected that the Canadian labour congress would welcome this bill unreservedly, at least in principle, and would confine its representations to this committee to matters of detail.

There are several reasons why the congress feels compelled to take a different line.

First and foremost, it feels that at this stage of a session of parliament the present bill cannot receive from this committee the careful and thorough consideration it ought to receive. Its subject matter is not only of the highest importance; it is also of the greatest complexity. Anyone who doubts it need only read the special issue which the *Canadian Bar Review*, in March 1959, devoted to the 1958 bill. True, the present bill is not identical with the 1958 bill; but the differences, though not insignificant, are certainly not great enough, or numerous enough, to invalidate more than a very small part of what the learned authors of the *Bar Review* articles said. Indeed you have had the views of the Canadian bar association placed before you once again in the past few days. Great issues, profound issues, issues of immense legal difficulty, are at stake. It is simply impossible for any individual, however learned, however eloquent, however long he has considered these questions, to present his views adequately upon a few days' notice. It is simply impossible for all the individuals who should be heard to make their views known to you within the compass of five or six days. And what is true of individuals is even truer of organizations, which, in the nature of things, need more time to prepare their submissions.

This is not the way to deal with questions of such import. It is not seemly. It does not give the people of Canada the chance they ought to have, and were led to expect they would have, to present their views with that coherence and order which so high a matter demands.

The congress therefore feels most strongly that parliament should not proceed further with this bill at this session, but that it should be reintroduced at the beginning of the next session, and immediately referred to a special committee which would have ample time to consider it "decently and in order".

The second reason why the congress cannot welcome this bill without reservation is that it is only an ordinary statute, and applies only to matters within domination jurisdiction. It does not provide any protection against violation of rights or freedoms by a future parliament or even by this parliament at its very next session. What parliament does today, parliament can undo tomorrow. What is more, and worse, this bill does not provide even momentary protection against violations of any rights or freedoms by provincial legislatures, or their creatures, municipal councils.

This latter point is of the utmost importance. For anyone who is at all acquainted with Canadian history over the last twenty-five years knows that it is from provinces and municipalities that some of the very worst threats to freedom have come. One need only mention the credit of Alberta Regulation Act, 1937; the Alberta Bank Employees' Civil Rights Act, 1937; the Alberta Judicature Act Amendment Act, 1937; the Alberta press bill, 1937; the Quebec Padlock Act, 1937; the Prince Edward Island Trade Union Act, 1948; the Newfoundland Trade Union (Emergency Provisions) Act, 1959; the Newfoundland Labour Relations Amendment Act, 1959; and certain by-laws in Quebec and in New Toronto. This list is merely by way of illustration; it is not the entire list.

It may be argued that the illustrations show that there is really little or nothing to worry about. The three Alberta acts mentioned were all disallowed by the governor general in council; the Alberta press bill was reserved by the lieutenant governor for the governor general's assent, which it never received, the Supreme Court of Canada having meanwhile given its opinion that the bill was *ultra vires;* the Quebec Padlock Act was declared *ultra vires* by the Supreme Court of Canada; so were various Quebec by-laws which violated religious freedom; the Prince Edward Island Trade Union Act of 1948 was almost completely repealed by the legislature itself in 1949. Surely the Supreme Court of Canada, and the lieutenant governors' powers of reservation, and the governor general's power of disallowance, provide adequate safeguards against provincial violations of fundamental rights and freedoms?

The answer is, no, they do not; and the decisive proof that they do not is to be found in the history of the two Newfoundland Acts of last year already cited. These are two of the most flagrant violations of fundamental rights and freedoms every perpetrated by a Canadian legislature. The governor in council could have instructed the lieutenant governor to reserve the bills; the Canadian labour congress specifically asked for this. Nothing happened. The governor in council could have disallowed the two Acts. The Canadian labour congress specifically asked for this, in two petitions, amply documented. Nothing happened.

The Supreme Court of Canada, and the governor in council, between them, could provide a very considerable degree of protection against provincial legislative violations of fundamental rights and freedoms, if the governor in council were prepared to use his constitutional powers to instruct lieutenant governors, and to disallow provincial acts, for the defence of those rights and freedoms. But it is perfectly evident, from the history of the Quebec Padlock Act, the Prince Edward Island Trade Union Act of 1948, and the two Newfoundland labour Acts of 1959, that in fact the government is, to put it mildly, most reluctant to use its powers, and that the powers certainly constitute no reliable safeguard against provincial outrages on freedom. As for the Supreme Court, it

is not yet clear how far it can or will go in using the preamble of the British North America Act or the exclusive power of parliament in criminal law to protect fundamental rights. Unquestionably, its ability to protect such rights would be much enhanced by a suitable amendment to the constitution.

Real protection for fundamental rights and freedoms involves putting them beyond the reach of parliament and provincial legislatures alike. This bill puts them beyond the reach of neither. It does not even profess to put them beyond the reach of provincial legislatures.

There are, of course, several answers to these points.

First, we are reminded that, for matters within its own jurisdiction, the parliament of Canada is now sovereign. Even if this bill were accorded the dignity of being called an amendment to the British North America Act, it would still be subject to amendment, alteration or repeal by parliament in exactly the same way as any other act of parliament. Simply making it an amendment to the British North America Act would not change the legal position in the slightest.

This is true. But there is nothing to prevent the parliament of Canada, by joint address of both houses, from asking the parliament of the United Kingdom to amend the British North America Act by writing into it provisions which would prohibit the parliament of Canada from legislating in any way that would invade fundamental rights and freedoms. This would not touch the provinces in any way, and accordingly would not call for their consent. It would merely be a request by the parliament of Canada to be deprived of certain powers which it now enjoys. This may seem a strange and undignified way of entrenching fundamental rights and freedoms against invasion by the parliament of Canada; but, until we succeed in agreeing on a method of amending our whole constitution within Canada, which we hope will soon be done, it is the only way we can do the job. It is, as a matter of sheer historical fact, the way we got every amendment but one (where the United Kingdom parliament acted simply on the request of the Canadian government, not the two houses) until the United Kingdom Act of 1949 gave our own parliament power to make certain amendments right here in Canada. It is a simple, convenient arrangement by which the United Kingdom parliament acts as our agent. Until we achieve a methed of amending our own constitution here in Canada there is nothing wrong in using the only method now available to us.

It may be argued, Mr. Chairman, that such an amendment, secured by a joint address, could be got rid of by a subsequent joint address, and hence that it provides no more substantial protection than an ordinary act of the parliament of Canada. Parliament can, so to speak, "repeal" a joint address just as easily as it can repeal an ordinary act. This, however, overlooks the fact that an ordinary act, such as the present bill will become if it is passed, can be repealed bit by bit by other ordinary acts: here a nibble, there a nibble. It may be just as easy to "repeal" a joint address as to repeal the Canadian bill of rights; but it is not as easy to "repeal" a joint address as it is to insert in a particular bill a clause reading, "Notwithstanding anything contained in the Canadian bill of rights" etc. As long as the proposed act of the United Kingdom parliament remained on the United Kingdom statute book, the parliament of Canada would be wholly debarred from inserting any such *non obstante* clause in any bill. If it wanted to get rid of any part of the bill of rights for any particular purpose, it would have to go to Westminster and ask for repeal of the whole thing. That would be a great deal more difficult.

Such a United Kingdom Act, applying only to this parliament, would, of course, be wholly ineffective against violations of fundamental rights and freedoms by provincial Legislatures. That is why we think the government

ought to have tried to get the provinces to agree to a request to the United Kingdom Parliament for an amendment to the British North America Act, making it impossible for either parliament or the provincial legislatures to invade fundamental rights and freedoms in any way. The answer, of course, is that the effort would have been vain; and the answer to that is that no one can know without trying. That is a further reason why we urge that this bill should be stood over till next session, to give time to ask the provinces whether they would consent to a real and effective amendment to the constitution .Incidentally, there is no legal or historical warrant for the theory that nothing can be done unless they all consent; that would be a twentieth century Canadian version of the *liberum veto* which was the ruin of the ancient Polish monarchy.

None the less, even if the government and parliament accept this theory, and even if all the provinces refused to look at such a proposal, it was open to the government and parliament to give a lead by asking the United Kingdom Parliament to pass an amendment to the British North America Act prohibiting the parliament of Canada from invading fundamental rights and freedoms and providing that any provincial Legislature could, by its own vote, bring itself under the same prohibition. This would not infringe upon any provincial rights, since no province would be affected in the smallest degree except by its own will. Why was this not tried? Why should it not still be tried? Why this despairing posture in the face of a supposed, unproven, even untested, refusal of the provinces to take any action to protect the fundamental rights of their own citizens?

To sum up this part of our submission: A bill of Rights, to be effective, must be part of our fundamental law. It must put the rights it seeks to protect beyond the power of both parliament and the provincial legislatures. It must subtract from the sovereignty of the legislative bodies to add to the sovereignty of the citizens. This bill does not do these things. It does not even profess to do them. That is why the congress cannot accept it as adequate, or anywheere near adequate.

Is this bill, then, any use at all? Yes, some. It is a good thing to have certain rights and freedoms proclaimed, though the list might well have been longer. It is a good thing to have what is, in effect, a special amendment to the Interpretation Act, instructing the judges to construe Dominion Acts, rules and regulations in the way this act does. It is worth something to have these things even in an ordinary act; and we agree that it is improbable that any parliament will repeal or seriously weaken this act. We are, unhappily, by no means sure that future Parliaments may not repeal it bit by bit, by a series of *non obstante* clauses in particular acts, until it becomes a legal Cheshire Act, with nothing left but the smile. That, not frank, outright repeal, is the real danger, and a very grave danger.

These apprehensions are strengthened by examination of section 6 of the bill, the section which amends the War Measures Act. This section is undoubtedly an improvement on the preseent section 6 of the War Measures Act. But it is only a small improvement. In the absence of a successful "prayer" from both houses revoking the proclamation, the War Measures Act, with all the immense powers it confers on the Governor-in-Council, stands; and this bill, by section 6 (5), expressly enacts that nothing done under the authority of the War Measures Act shall be deemed to be an abrogation, abridgement or infringement of any right or freedom recognized by the Canadian bill of rights, When the War Measures Act comes in the door, this bill, for whatever it is worth, goes out the window. The cabinet can then violate every one of the rights and freedoms listed in section 2 (with the notable exception of "the enjoyment of property, and the right not to be deprived thereof

except by due process of law", a right which is already carefully protected by section 7 of the War Measures Act itself). Indeed, the cabinet can set aside all the provisions of section 3 of the proposed bill of rights. It does not even require an act of parliament to do it: a simple order-in-council, or a series of orders-in-council, is enough.

This is the more serious for two reasons.

One is that it is precisely in time of war, invasion or insurrection that human rights and fundamental freedoms are most likely to be violated, and are therefore most in need of protection.

The second is that, once the War Measures Act comes into effect, the power of the dominion is vastly enlarged; a whole series of things that normally come within provincial jurisdiction abruptly pass to the federal authority. Dominion jurisdiction over the matters enumerated in section 2 is, even in peacetime, probably considerably greater than we used to think: the Supreme Court of Canada seems to be engaged in giving us a bill of rights via the preamble to the British North America Act and parliament's exclusive jurisdiction over criminal law. But, whatever the peacetime limits to the national jurisdiction over civil liberties, they virtually disappear with the proclamation of the War Measures Act; and rights which in peacetime parliament itself could not touch, because they fall within the jurisdiction of the provinces, in wartime lie at the mercy of the federal cabinet.

Of course there must be some restriction of normal rights and freedoms in wartime: *salus populi, suprema lex.* Everyone recognizes that. But the restriction should be only so large as is absolutely essential for the safety of the state. Specifically, we suggest, the war Measures Act should be amended, and amended by this bill, so that the cabinet would never be able, under that act, to deprive any Canadian citizen of his citizenship, or deport, exile or banish any Canadian citizen. Specifically also, we suggest that the War Measures Act should be amended, and amended by this bill, so that nobody could be detained, under that act, for more than a specified period, without a hearing before a superior court judge, and without the judge being satisfied that the detention was necessary.

It is idle to say that amendment of the War Measures Act is another question altogether, and not relevant to this bill. It could not be more relevant, especially since the bill itself proposes to amend the War Measures Act.

These are not the only specific changes which would improve the bill you have before you. There are several others.

First, the congress suggests that it would be more accurate, and would in no way detract from the force of the section, if, in the second line of section 2, the phrase "there have always existed" were replaced by "there shall be deemed always to have existed". The present wording, in the light of some of the historical facts we have cited, reads strangely, to say the least. A solemn declaration of rights and freedom ought not to be open to the charge that it does not jibe with the facts.

Second, in section 3 (*e*), it would seem advisable to replace the unusual phrase "fundamental justice" by the more usual "natural justice", hallowed by generations of judicial usage.

Third, the congress endorses the suggestion already made to this committee that section 4 might be amended to provide for a civil liberties section of the Department of Justice, charged with the task of watching over fundamental rights and freedoms in every part of Canada, reporting on invasions of such rights and freedoms, and so helping to educate the public to take action to protect itself by every legitimate means, legislative, judicial, political, constitutional, open to it. This is something we should need even if we had

as perfect a bill of rights as the mind of man could produce. A tradition of respect for individual freedom, of tolerance for dissent, of eternal vigilance, would still be indispensable. The defence of human rights and fundamental freedoms in the courts is costly, and most of the victims are poor. Unless public-spirited citizens whose own ox is not being gored are ready to fight and pay for the defence of other people's rights, even the rights of people they totally disagree with, then freedom will fall, be the legal safeguards what they may.

Canada has a civil liberties tradition. But it needs strengthening. A bill of rights, even an inadequate one, can help to strengthen it. A strong, active civil liberties section in the Department of Justice could also help, especially if the bill of rights is, as this one avowedly is, only a first step. The civil liberties section could help government, parliament, people, provinces, to take the further steps that are necessary. It could help make sure that citizens made full use of every right the bill gives them.

The congress recognizes the force of the argument that this bill is a first step. But the argument has force only if there is a firm resolve to take further steps just as far as possible. It would be fatal if government, parliament or people were to accept this bill as doing the whole job that needs to be done, or so much of it that there was no urgency about doing anything further. If that were the case, it would be better not to pass a bill in this form. The government should forthwith set to work to see how the Criminal Code could be amended to protect the rights enumerated in section 2 of this bill, and should, without delay, present to parliament for enactment whatever amendments then appear to be necessary and practicable. The government should also give a definite and solemn undertaking to review the whole question of the adequacy of this bill, and the amendments necessary to make it fully adequate, within the next five years at the outside. Nothing could provide a more impressive, and valuable, celebration of the centenary of confederation than a bill of rights, as comprehensive and effective as our legal draftsmen know how to make it, entrenching in our constitution, beyond the power of parliament, of provincial legislatures, of governments or officials, national, provincial and municipal, all those fundamental rights and freedoms which are at once the glory of western civilization and the indispensable condition of its survival.

Mr. Chairman, when we had completed this text we had a little more time, because of certain delays, and we had time to prepare a supplementary statement, which I would like to submit to you at this time. I think it will not take too much time.

There is a special problem which is probably as nearly Canadian in character as one will find.

It relates to the right of associations in the more remote parts of Canada, and for want of a better term those who have faced the problem describe it as a need to provide a "right of access".

There have been several situations where Canadians going about their legitimate business have been denied access to parts of Canada where no question of national security was involved—and apparently this right of access has been denied to Canadians by companies controlled outside of Canada.

Let us cite several examples.

For a long time the iron ore developments in Labrador and northeastern Quebec were areas in which Canadian citizens interested in forming a union were successfully denied access to that part of our nation by the United States corporate interests which were exploiting it.

The bunkhouses where miners lived, and many square miles around, were company controlled property and union representatives were quickly ejected when they appeared on the scene.

Control of transportation to these remote areas was in the corporation's hands and such transportation was denied if the person's business did not suit the corporation's taste.

The miners in this area eventually organized themselves into the union of their choice, but it took pressure by the labour movement in the United States on the parent corporation to win for these Canadian workers the basic right to the union of their choice.

This is not an isolated example.

A member of the legislative assembly of the province of Manitoba was for many months denied access to the Moak Lake district of his province. The only apparent reason was that the giant nickel firm exploiting the resources of the area disapproved of his association with his trade union organization—one, if you please, affiliated to our Congress.

At Kitimat in British Columbia union organizers had great difficulty in obtaining transportation to that area of Canada because their purposes were not acceptable to the Aluminum Company of Canada to whom control of the area had been granted by the province.

Other cases could be cited, such as Murdockville, Quebec, and Blind River, Ontario, where "right of access" was denied; but the instances above will suffice to establish that there is a situation worthy of concern.

Large areas in Canada, in some instances larger than whole nations in Europe, have been granted to corporations for mineral exploitation. It is not proper that they should become the fertile preserves of these corporations and that these corporations should be able to deny to Canadian citizens the right to go about their legitimate business in any part of Canada.

As mentioned above, in some instances it has been the active pressure of the labour movement in the United States on parent corporations in that country which has made it possible for Canadian workers to assert their right to join a union of their choice. This should not be necessary. This has happened in the case of organizations controlled in the United States. We now read in the financial pages of our papers of the possibility of the Wenner-Gren interests in Sweden, or the Krupp interests in Germany, acquiring the same kind of rights in certain areas in Canada.

Will the Canadian worker have to look to Swedish trade unionists or the west German labour movement to preserve his right to freedom of association in the union of his choice? Far better, in our view, that this right and the right of access of all Canadians engaged in legitimate business should be enshrined in Canadian law.

Its omission from a bill of rights—an enforceable bill of rights—is a weakness that must be pointed out.

Mr. Chairman, I humbly submit this in the name of the Canadian labour congress. It is duly signed by the executive officers of our organization.

You will realize, Mr. Chairman, that I am surrounded by very distinguished colleagues. In my person you have the weight; in them you have the brains.

Mr. AIKEN: Mr. Chairman, I imagine we are very close to adjournment. May I ask, on this supplementary statement, if the examples which you have given, Mr. Jodoin, are to a large extent provincial breaches of rights and freedoms.

Mr. JODOIN: I would say so, to a certain extent. That is why we say a bill of rights as such should cover even the activities of provincial legislatures.

Mr. WINKLER: Could I suggest we adjourn until 8 o'clock. I will make that as a motion.

The CHAIRMAN: I understand from Mr. Jodoin and Mr. Knowles that it is agreeable to them to return at 8 o'clock. We have a motion to adjourn until 8 o'clock.

Mr. WINKLER: Yes.

Mr. MANDZIUK: I second the motion.

Motion agreed to.

The CHAIRMAN: We will meet in this same room at 8 o'clock.

EVENING SESSION

TUESDAY, July 19, 1960.
8:00 p.m.

The CHAIRMAN: Gentlemen, if you will come to order, we will proceed with the meeting. Might I ask the minister to take a seat at the table. Mr. Fulton, would you care to take a seat at the table?

Mr. MARTIN (*Essex East*): Why not ask the minister to take a seat at the head table?

The CHAIRMAN: Exactly. I should mention that we expect later this evening—possibly in about an hour or so—to have with us Mr. Varcoe, the former deputy minister of justice.

Mr. MARTIN (*Essex East*): I think we ought to ask the minister to take his seat at the head table, as is generally done. I would not want him to feel that he was just one of us.

Mr. FULTON: I appreciate that very much. But in response to Mr. Martin's very kind suggestion it would be necessary to reorganize our seating arrangements tonight. So, with your permission, I shall sit here in the body of the audience, instead of at the head table. However, tomorrow if you wish to provide a space I should be honoured to sit at the head table.

The CHAIRMAN: Thank you, we shall. Very well, Mr. Deschatelets.

Mr. DESCHATELETS: At page 2 of the brief, I note that the congress is of the opinion that the present bill should not be proceeded with further at this time, but should be re-introduced at the next session; and it bases this statement on at least three particular instances, first, that at this stage of the session, the bill cannot receive thorough consideration; and secondly, that it applies to matters within the federal jurisdiction only; and thirdly, that it should be part of the constitution.

I would like to know if the congress would be strongly in favour that this bill in its present form should be put on the agenda of the next federal-provincial conference?

Mr. JODOIN: I think, Mr. Chairman, that that is clearly indicated in the brief itself. We have indicated that it is a step forward. There is no question about that. And I think we have indicated very clearly that in at least our estimation it is not what I might say completely adequate as far as the desires and aspirations, in that field, of the national labour centres are concerned; and if it is at all possible to make it perfect—because after all perfection does not exist in this world—but to be as close as possible to it, it might be preferable to do so.

If necessary, we indicate that we were sorry, amongst other things, that it came at the tail end of the session. My heart is bleeding for the members of parliament right now. I would hope we would be willing to give them a chance to organize their time and to have shorter hours during the summer

season, at their disposal, which they certainly well deserve, rather than to bring this in merely at the tail end of your session; because we feel that this matter is of such importance that it would be preferable to take it up next session.

Mr. WINKLER: May I say a word relevant to that particular point. The witness has mentioned this, and he outlined it in his brief. I mean the shortness of time.

Mr. JODOIN: Yes.

Mr. WINKLER: And yet I notice, about this point, that there is indicated the fact that the bill is very much unchanged from its original state, when it was introduced some two years ago. At that time the government heard many such presentations, and if the changes are so slight, then surely those same presentations must apply in the present circumstances.

Mr. JODOIN: Well, I would not know. I am under the impression that the congress as such did not have occasion to make an official presentation to the committee last year. I think it might have made a presentation upon quick notice with some other organization which did submit a brief. But I would submit to you, very humbly, that much as I agree completely with my colleagues about this document, nevertheless with a little more time at our disposal there might have been a more perfect document as far as we are concerned; and we have not made any official representations before.

That is why we state that; and it was said in the House of Commons that ample time would be given. That is why we were not very much in a hurry to prepare for it in advance. I do not have to quote the official documents here, *Hansard,* and so forth, when it was so indicated; but I was a little surprised when it came up this way.

This is only offered as constructive, and not destructive criticism, I assure you. We feel that it is very, very important.

Mr. MARTIN (*Essex East*): I would like to ask a question.

Mr. MANDZIUK: I had my hand up, Mr. Chairman.

The CHAIRMAN: Very well, Mr. Mandziuk.

Mr. MANDZIUK: We have heard some questions asked by our hon. friend here, but almost all of those who did make presentations asked whether this should not be taken up at a dominion-provincial conference. But you know that that conference is called for a different purpose altogether, is it not? It is called to consider a tax-sharing agreement.

Mr. JODOIN: Yes it is, but we suggest in the document here that the provinces should be consulted through the medium of a conference, or otherwise, for the same purpose. Let us find out which province might be opposed to such a bill of rights.

Mr. MANDZIUK: May I follow that up. You are aware, sir, that since 1947 representations were made to the federal government to pass just such a bill?

Mr. JODOIN: Yes. We made representations through the medium of former congresses, and elsewhere.

Mr. MANDZIUK: Do you attribute the failure of the prior administration to introduce such a bill, to their lack of interest, or to some other obstacle?

Mr. JODOIN: My only answer is that notwithstanding the denomination of the government in power, it should have been done a long time ago.

Mr. MANDZIUK: Do you realize it was impossible to get the consensus of the provinces, who jealously guard their exclusive rights under the British North America Act?

Mr. JODOIN: Were the provinces ever directly asked whether they would go for a bill?

Mr. MANDZIUK: Yes, and if that is the issue, might I be permitted to answer it?

The CHAIRMAN: Yes.

Mr. MANDZIUK: I rely on the authority of a former minister of justice, the hon. Stuart Garson, who wrote in the *Tribune* of recent date—I shall paraphrase it in order to save time—that he chaired a meeting of the attorneys general of the provinces, and that this matter came up, but the provinces would not cooperate.

My question is: do you know of any provinces today which would cooperate with a constitutional change such as you have in mind?

Mr. JODOIN: I think I might know of one which might be favourable to it; and I think many others would, in my opinion, if it were approached directly on this matter, not only through the Minister of Justice, but by the government itself, in the form of a conference. But let us debate it. You say you are going to debate the tax situation next week. Maybe it would be a good idea to have a nice debate on the matter. I would like to know which province would be opposed to such a bill of rights.

Mr. MANDZIUK: According to my information there was not a province which was in favour of it.

Mr. DESCHATELETS: Could our hon. friend tell us if this bill C-79 has ever been submitted to any premier, or to any province?

Mr. MANDZIUK: I think the Minister of Justice could answer that question better than I.

The CHAIRMAN: This matter will be dealt with at a later stage in our hearings when the Minister of Justice will be before the committee. I think it would be more appropriate to direct our questions to the witnesses at that time, and I think we should avoid asking questions between ourselves.

But might I go back again to the subject which was first broached by you, Mr. Deschatelets, and just clear up the matter for the purpose of the record.

You were referring to the article in the brief indicating that little time had been afforded to the study of this bill. I would like to get confirmation, if I might, Mr. Jodoin, because there has been some evidence put before the committee by Mr. Himel, who apparently appeared as one of a delegation to the Prime Minister on or about April 29, 1959; or at least he presented a brief to the Prime Minister dated April 29, 1959, in reference to bill C-60, which was introduced in September, 1958; so this was more than six months later.

At that time the Canadian labour congress was represented as being one of the organizations which supported this brief. Therefore, it is not correct to say that you did not have ample time to study it?

Mr. MARTIN (*Essex East*): Mr. Chairman, I think that the way to bring out this is by questions to Mr. Jodoin, because the point you raised does not address itself to the submission made in the sentence in the brief to which Mr. Deschatelets posed a question.

There is no doubt that the Canadian Congress of Labour and other bodies have made representations about the desirability of protecting human rights and fundamental freedoms, but the question which Mr. Deschatelets posed was whether or not the congress felt it had sufficient time to make a serious examination of the particular measure that was before this committee. I think the way to do that, if I may say so, with great respect, is by way of questions—and I would like to put a question.

The CHAIRMAN: I just asked Mr. Jodoin as to whether or not it was correctly reported to this committee that the Canadian labour congress supported this brief that was presented on April 29, 1959 in connection with Bill C-60.

Mr. JODOIN: If I might answer that, by the bill by the association of civil liberties, at which the congress was represented, for the purpose of asking the enactment of such legislation.

Mr. Knowles, executive vice president of our council was present, and maybe he would like to comment on this.

Mr. Stanley KNOWLES (*Executive Vice President, The Canadian Labour Congress*): If I might answer that question, Mr. Chairman, on the suggestion of our president, yes, this was a presentation made by the association of civil liberties to the Prime Minister and the Minister of Justice, at the request of the association. This was not a case of the bill having been referred to committee for study. This grew out of a request of that association to appear before the Prime Minister, the Minister of Justice and others to make representations; and we joined in those representations. Two or three of my friends and I were there representing the congress.

I think the point Mr. Jodoin is making in this brief is that, so far as committee study of an actual bill in the House of Commons is concerned, this is the first time this has happened. There has been no committee study of the bill of rights in this parliament until this committee got this bill last week.

The CHAIRMAN: Exactly; but the fact remains, does it not, Mr. Knowles, that when Bill C-60 was introduced by the Prime Minister, it was not proceeded with at that session, and all organizations and individuals were invited by the Prime Minister to make a study of that bill, and to make representations to the government in respect of it. Then, in consequence of that invitation, the association of civil liberties prepared a brief, and enlisted the support of some 30 odd organizations. More than six months after the introduction of the bill they prepared this brief, and submitted it to the Prime Minister.

That is the only fact I want to get confirmed—that the Canadian labour congress did join in the submission.

Mr. KNOWLES: Oh, quite; there is no denial of that. However, our point is this: it is one thing for bodies to study a bill and make representations, and it is another thing to take counsel together with a committee that actually has the bill before it. And it is this counsel together on this bill that we think is too short.

Mr. MARTIN (*Essex East*): First of all, may I say, since reference has been made to the constitutional conference referred to by Mr. Garson, there was nothing in that conference that had to do with a bill of rights.

Mr. MANDZIUK: Oh yes, there was.

Mr. MARTIN (*Essex East*): No; it had to do with the question as to whether or not ways and means could be found to provide within Canada for a procedure to amend our constitution, and that involved the consideration as to what, under sections 92 and 91 of the British North America Act, were problems of exclusive concern to either jurisdiction or what was of common interest to both. And the failure to agree at that conference was on that point leading up to the inability to get a formula for amending the constitution. However, there was no discussion per se on the question of whether or not there should be a bill of rights.

Now, I was at that conference, and that was the situation.

The CHAIRMAN: Could we get back to asking questions?

Mr. MARTIN (*Essex East*): Yes, but the point was made and, in accordance with the procedures of our committee, it is open to any member of the committee to dispute a statement that has been made.

The CHAIRMAN: Yes, but I think we should do that when we are together, and not when we have witnesses waiting.

Mr. MARTIN (*Essex East*): The time to make it is when the statement is made, and I am correcting it in the light of what I believe are the facts. When

were you notified that you would be asked to come before this committee and give your point of view?

The CHAIRMAN: I do not believe that is at all relevant to this matter.

Mr. MARTIN (*Essex East*): It certainly is.

The CHAIRMAN: I do not think we have these gentlemen here to tell us how much notice they have received, or anything of that kind, and I do not think we should question how much time they spent in preparation of their brief, and so on. We are here to find out what their views are in regard to the bill.

Mr. MARTIN (*Essex East*): Mr. Chairman, that is not a correct position for you to take.

These gentlemen say this bill is in their judgment, being put through too hurriedly, and that they have not had ample opportunity to give the consideration to this bill which it warrants. That is the statement made in this brief, and I am trying to ascertain whether or not that is a justifiable statement. Therefore, in pursuance of that, I am asking Mr. Jodoin when they were asked to come to this committee.

Mr. JODOIN: The first notification the congress had—if my memory serves me right, and I just asked my colleagues about it—was either Tuesday or Wednesday of last week.

Mr. MARTIN (*Essex East*): Tuesday or Wednesday of last week?

Mr. JODOIN: Yes.

Mr. MARTIN (*Essex East*): And would the officers of the congress in Ottawa have authority to draft a submission to this committe that could be regarded an official statement of the congress?

Mr. JODOIN: In line with the policy of the Canadian Labour Congress, yes; but it would have been preferable if we could have had time to call in the executive council. However, the executive officers have that authority, in accordance with the policy of the congress itself.

We had to call some people who were away on duty for the congress, and that is why we humbly submit this matter of time was a little difficult.

Mr. MARTIN (*Essex East*): I have one more question arising out of questions that have been asked since we began at 8 o'clock this evening.

It was suggested that the federal-provincial fiscal conference agenda has been already decided upon.

I point out to you, Mr. Beaudoin, that the Prime Minister said today the fixing of the agenda of the provincial—

Mr. KNOWLES: Mr. "Jodoin"; Mr. Martin, please!

Mr. MARTIN (*Essex East*): Mr. Jodoin. He looks so much like someone else that I was confused—and it is a name that Mr. Jodoin recalls.

The Prime Minister stated today that the fixing of the agenda of the conference was not a matter imposed by the federal government upon the provinces, but that the latter had a right to make suggestions as to the agenda of that conference. That being the case, would you think advantage should be taken by the provinces, if they wish to place on the agenda for discussion their willingness or unwillingness to collaborate in the formulation of a bill of rights which would have a national total effect?

Mr. JODOIN: Well, of course, sir, as we indicate in the document itself, we believe that this should be done—and the sooner the better. Whether the conference as slated for next week would have the time on its agenda, and so forth, is another thing; it is not up to me to decide.

We indicated in this document that we felt the provinces should have been consulted a long time ago on this subject matter to see what the possibilities

are of having an understanding to the extent of having an amendment to the British North America Act, or if there is a possibility of having that kind of consultation.

Our policy and suggestion is that it should be held.

Mr. RAPP: Mr. Chairman, I would like to ask a question of Mr. Jodoin, arising out of a statement he made, that the bill in itself is inadequate.

What section of the present bill, or what paragraphs of some of these sections, would you state are inadequate?

Mr. JODOIN: I will ask Dr. Forsey if he wishes to dwell on this matter. We have noted some, outside of the general principles, that we brought before you, Mr. Chairman and members. We also indicated a few places where some minor changes could be made. But I think Dr. Forsey could dwell on this matter in detail.

Dr. EUGENE FORSEY (*Research Director, Canadian Labour Congress*): Mr. Chairman, with your permission, I should be inclined to say not that any particular paragraph is inadequate, but that the bill as a whole is inadequate, notably because of the fact that it simply does not touch the legislative power of the provinces at all.

As we have put it here in one place on page 5:

> Real protection for fundamental rights and freedoms involves putting them beyond the reach of parliament and provincial legislatures alike. This bill puts them beyond the reach of neither.

We have explained we feel that this bill does not put those fundamental rights and freedoms beyond the reach of invasion by parliament, and it does not put them beyond the reach of invasion by provincial legislation. It is not a matter of details. We have some criticism of details; but it is not essentially a matter of details: it is a matter of the inadequacy of the bill as a whole.

Mr. STEWART: Do you suggest, Doctor, that one of the ways of doing this would be to ask the federal government to give up some of its sovereignty?

Dr. FORSEY: We have suggested that, precisely.

Mr. STEWART: In other words, you would ask the federal government to give up its right to amend its own constitution?

Dr. FORSEY: In this particular respect, yes—for reasons which we have explained.

Mr. STEWART: Then you would ask the federal government to impose on the provincial governments, by a joint address to the imperial parliament, certain restrictions?

Dr. FORSEY: No, we have not asked for that. If I may direct your attention to the bottom of page 5, Mr. Stewart:

> There is nothing to prevent the parliament of Canada, by joint address of both houses, from asking the parliament of the United Kingdom to amend the British North America Act by writing into it provisions which would prohibit the parliament of Canada from legislating in any way that would invade fundamental rights and freedoms.

That is the first part of the answer. The second part is to be found at the bottom of page 7:

> —it was open to the government and parliament to give a lead by asking the United Kingdom parliament to pass an amendment to the British North America Act prohibiting the parliament of Canada from invading fundamental rights and freedoms and providing that any provincial legislature could, by its own vote, bring itself under the same prohibition.

This would not infringe upon any provincial rights, since no province would be affected in the smallest degree except by its own will.

Mr. STEWART: Then your constitutional amendment would have no effect on your provincial legislatures as such?

Dr. FORSEY: Unless they chose to come under it.

Mr. STEWART: Then that would not overcome the difficulties that Mr. Jodoin mentioned about these?

Dr. FORSEY: It would not completely overcome them; but it would give a means of overcoming them, province by province, as any province saw fit to come under the thing.

Mr. STEWART: The provinces could do that now, if they wanted to.

Dr. FORSEY: The provinces could do what?

Mr. STEWART: Pass their own bill of rights.

Dr. FORSEY: They could not pass it as an amendment to the British North America Act.

Mr. STEWART: No; but within their own sphere, they could.

Dr. FORSEY: Yes; but it would not be a bill of rights in the sense that we are talking about now. The province of Saskatchewan has already passed a document called a bill of rights; but the legislature of Saskatchewan could repeal it tomorrow. We want something that would debar the province, by its own consent, from then on, from invading fundamental rights and freedoms.

Mr. STEWART: That is the second aspect of the situation, is it not?

Dr. FORSEY: Yes.

Mr. STEWART: Getting back to the federal level; you agree that there should be one bill of rights?

Dr. FORSEY: We have said so, most emphatically.

Mr. STEWART: And you will agree that bill C-79 does not attempt to encroach upon the provinces, as it is set up now?

Dr. FORSEY: Quite.

Mr. DESCHATELETS: What is the answer?

Dr. FORSEY: I agree that it does not invade provincial jurisdiction at all.

Mr. STEWART: It does not touch provincial matters at all?

Mr. JODOIN: That is what we are complaining about.

Mr. STEWART: That is just what I am getting at.

Mr. JODOIN: We suggest this procedure, until we succeed in agreeing on a method of amending our whole constitution within Canada, which we hope will soon be done.

Mr. STEWART: I quite agree; but I am trying to get across the first bridge, and I would suggest that bill C-79, with a few amendments, if necessary, be now passed; and that retains in Canada the right to amend, develop it, as the case may be.

Dr. FORSEY: And to repeal it.

Mr. STEWART: If you go the whole way, Doctor, you are going to take away from the Canadian people, then, the right to modify their own constitution.

Dr. FORSEY: No, not for the Canadian people.

Mr. STEWART: The Canadian parliament?

Dr. FORSEY: The right from the parliament of Canada to change its legislation—as we have suggested here, for example—piece by piece, by a series of *non obstante* clauses in bill after bill.

We have been careful to point out that if, after the parliament of Canada asked by joint address of both houses, for an amendment of this sort—

Mr. STEWART: By surrendering some of their own sovereignty?

Dr. FORSEY: It would always be open to it to ask by another joint address to have it given back; and we have tried to explain why we think that is preferable to a simple statute which could be repealed bit by bit every time an administration took it into its head that it would be desirable to have a *non obstante* clause thrown in.

Mr. STEWART: Do you not think that by asking for such an amendment you stop development in the bill of rights principle?

Dr. FORSEY: No.

Mr. STEWART: You tend to stereotype it?

Dr. FORSEY: I cannot see that. I just cannot see that at all.

Mr. JODOIN: Not in this case.

Mr. DORION: Mr. Jodoin, if I understand well the position of your group, it is that your group—you admit, first of all, that the matters affected under this bill of rights are within dominion jurisdiction?

Mr. JODOIN: Yes.

Mr. DORION: And the purpose, if I understand your position well, of asking to postpone discussion is that you would like to have a bill which would provide protection against certain abuses coming from provinces or municipalities?

Mr. JODOIN: Monsieur Dorion, it would bring an amendment to the British North America Act; that is what we mean. We would like the provinces to be consulted directly on this matter. I, for one, would like to know which provinces would be opposed to such a bill that would be comprehensive and understandable; and that is why we are stating our position, I think as clearly as possible, as far as that is concerned.

Mr. DORION: It is in order to extend the protection by a bill of rights?

Mr. JODOIN: Definitely—that it would not be obstructed by a decision of legislatures, as far as freedom of association, and things of that kind are concerned.

Mr. DORION: I believe there is a very important and strong objection to this. By the Confederation Act of 1867, every province has the right to amend its own constitution. That right does exist for the provinces—

Mr. MARTIN (*Essex East*): In so far as section 92 is concerned.

Mr. DORION: Yes. But they have that right. Do you believe that it would be possible to have a bill of rights which would be accepted by every province, even the province of Quebec, where our system of civil law is so different from the other provinces?

Mr. JODOIN: In a case like this we do not believe in the word "impossible". It is a bad word in the dictionary.

Mr. DORION: Do you not believe that the best process is to leave to every province the opportunity to have its own bill of rights, and, that step by step it would be possible to come to unanimity in order to have an amendment to the constitution?

Mr. JODOIN: Well, maybe you are speaking about procedure now; but as a Canadian, and nationally speaking, certainly, I would prefer a bill which would cover the whole of Canada and all of the provinces. I think that through the medium of convening meetings, discussions and conferences with the competent authorities of the different provinces and so forth you can arrive at that. I am positive of that.

Mr. DORION: I understand your position is this, that you do not like that procedure to the extent of the present bill of rights.

Mr. JODOIN: I do not think it goes far enough and that is why we say in general terms that in our estimation in order to be effective it is not adequate.

Mr. DORION: But I would like to note exactly on that point that the procedure and the extent of the form of this bill of rights was accepted by a vote at the second reading, and I do not believe that we have the privilege of going outside of that delegation of powers in the discussion of this bill.

Mr. JODOIN: If that is so, I will not question that. I have not, as you know, had experience myself in the House of Commons. If that is so, it is regrettable—it is regrettable. May I add that if it is so—and I will not question that—it gives a little more strength to the power of our request in saying there was not enough consultation.

Mr. DESCHATELETS: Did I understand correctly that a few minutes ago you expressed the opinion that this bill C-79, and especially the rights enumerated in clause 2, does not constitute an invasion of the provincial rights? Is that the opinion you expressed a few minutes ago, sir?

Dr. FORSEY: Are you asking me?

Mr. DESCHATELETS: Yes.

Dr. FORSEY: Well, sir, I am a layman—I am not a lawyer. I am under that serious disadvantage.

Mr. JODOIN: You are not the only one.

Dr. FORSEY: As I read the bill, it seems to me quite clear that the intent is that this should not invade provincial rights; that it is all expressed to operate only within the sphere of the jurisdiction of the parliament of Canada. It is possible that my friend the Minister of Justice and his officials have been bad draftsmen, but I am certainly not in a position to say that.

Mr. DESCHATELETS: With the permission of the chairman I would like to read a few lines of the brief of the Canadian bar association at page 4:

> To sum up, there is uncertainty whether parliament or the legislatures of the provinces may deal directly with human rights and fundamental freedoms, and if either or both may, the extent to which such power may be exercised.

My question is this: as the Canadian bar association has expressed its concern and uncertainty as to the mutual powers of the provinces and the federal government, does the congress not feel that the right thing to do at this time would be to refer this bill to the Supreme Court of Canada by way of a reference.

Dr. FORSEY: Well, my opinion on that would be that that would be one procedure which could be followed. It seems to me also, however, that it is quite possible the matter might be left to the ordinary processes of litigation after this has been passed. But I am speaking entirely as a layman and feel I am treading on very delicate ground here. I am also not a politician. I have been defeated four times for public office, so I am doubly disqualified.

Mr. MARTIN (*Essex East*): May I put a question to the counsel of this congress on this question.

Dr. FORSEY: We have no counsel.

Mr. MARTIN (*Essex East*): Is your counsel Mr. Knowles?

Mr. JODOIN: There is no member of your union here.

Dr. FORSEY: That firm has been dissolved since the 1957 election.

Mr. MARTIN (*Essex East*): May I ask this: even though you are not a lawyer, but recognizing your eminence as a constitutionalist, may I ask you if

you have given any consideration as to whether or not there is at least doubt as to whether or not in section 2 of the word "Canada" and the word "property" do raise grave doubt as to the constitutional competence of parliament.

Dr. FORSEY: Well, if you want my lay opinion, with great deference to all the learned counsel who are here, I would say the words "in Canada" here have the sense of "in Canada" insofar as it is within the jurisdiction of the parliament of Canada.

Mr. MARTIN (*Essex East*): Can you point to anything in clause 2 which says that is the case.

Dr. FORSEY: No; but it seems to me to be the only meaning. You cannot pass an act of parliament which applies validly to something outside the jurisdiction of parliament.

Mr. MARTIN (*Essex East*): Of course not, validly. There is no question about the intent. The intent is it shall not apply to anything outside the federal jurisdiction insofar as one can ascertain by government policy stated by the Prime Minister and the Minister of Justice particularly; but I am suggesting to you that the language of that section—

Mr. MANDZIUK: Mr. Chairman, I object. I suggest that Dr. Forsey has answered the question honestly and sincerely as he saw it. I do not think any suggestions or words should be thrown into his mouth. I do not think it is proper. You are not cross-examining Dr. Forsey.

Mr. MARTIN (*Essex East*): I thought that was what we were doing.

Mr. MANDZIUK: You are not. That is not why he is here.

Mr. MARTIN (*Essex East*): When you come to interpret the statute you look at the grammatical meaning of the words; their ordinary meaning. Debates of parliament are not admissible to the judges in order to ascertain the meaning of a word.

Dr. FORSEY: Even I know that.

Mr. MARTIN (*Essex East*): I ask you, do you not think that the use of the word "Canada" has, or could have, a geographical application and that the word "property" may be something which comes under property and civil rights in section 92 of the B.N.A. Act.

Dr. FORSEY: You have really asked me two questions. May I answer them in order? I do not know what you would put in there if you did not use the words "in Canada". If you struck out the words "in Canada" and said "it is hereby recognized and declared there have always existed and shall continue to exist—" the thing would be a *non sens*, if I may employ the other official language of the country. It would not mean anything.

Mr. MARTIN (*Essex East*): Do you not think you could qualify that by saying "it is hereby recognized and declared that in Canada in the sense of matters having to do with the federal parliament," and when you come to the word "property" a similar qualification, so that there would be no question in the statute that it refers only to matters which come within the competence of parliament?

Dr. FORSEY: With great respect it seems to me that that would be surplus verbiage. I do not see how the courts could possibly interpret this except to mean something within the jurisdiction of parliament. If it means anything else it is inoperative.

Mr. MARTIN (*Essex East*): Of course; but our job is to draft something that will be operative if we can; that is, in a language to make it clear that it refers to matters which come within the competence of parliament. But I take it you would rest your constitutional laurels on a book called "The Crown's Power of Dissolution of Parliament."

Dr. FORSEY: I would prefer to rest my constitutional laurels, if I have any, on matters about which I have more knowledge. I do not know what value there is in interrogating me on this particular point. I am quite prepared to go on, if necessary, but I am inclined to think that is a matter which should be left to judicial interpretation. As to the word "property" I think it is sometimes overlooked that the exclusive jurisdiction of the provincial legislatures on property and civil rights is subject to certain portions of property and civil rights which are carved out of section 91—for instance, bankruptcy and insolvency.

Mr. MARTIN (*Essex East*): And not the whole of Canada as in this section. This section refers to Canada as a whole and to anything in Canada.

Dr. FORSEY: This refers to Canada as a whole; but surely, insofar as it is within the jurisdiction of the enacting authority, which is the parliament of Canada, I do not see how they can refer to provinces. I do not see how a judge could hold otherwise. Of course I know that there is no way of predicting the decisions of judges any more than there is any way of predicting the decisions of the electorate. It is much like horse races. You know more about them after they are run, as Sir John said. My uninstructed lay guess would be that the courts would interpret this in the way I have suggested; but it may turn out that I have been talking through my hat.

Mr. DORION: On this particular point, Mr. Chairman, I would like to make a few observations.

First of all we had professor Scott appear before this committee. I examined him in regard to this particular point and his opinion is that Canada is not meant in the geographical sense; not really in the legal sense. In taking account of article 3 the bill refers only to the laws of parliament. Now, to be absolutely sure of this I discussed the particular point with Mr. Pigeon, who wrote an article in the *Canadian Bar Review*. I have a letter here from him telling me that he is not sure that Canada must be interpreted in a geographical sense or meaning, or in this legal meaning. The only objection in regard to this point is that we have to clarify it, and that is the reason why I suggested at the last meeting to add to the word "Canada", "in so far as it is within federal jurisdiction".

Mr. MARTIN (*Essex East*): Very good; that is the point I tried to make.

Dr. FORSEY: If I might venture to make a suggestion there, would it not be more exact to use the phrase, "in so far as it is within the jurisdiction of the parliament of Canada"?

Mr. MARTIN (*Essex East*): I suggest Mr. Dorion be regarded as our expert witness on this point.

Mr. DORION: I had the good fortune to have studied this particular point in a case I had before the Supreme Court. I lost my case precisely because the Supreme Court declared that freedom of speech and freedom of religion are within federal jurisdiction.

Mr. MARTIN (*Essex East*): May I ask Mr. Dorion one question? You were also making some reservation with regard to property. Would you make reservation in that way?

Mr. DORION: I believe there is confusion because in French we speak about libertés civiles, and this expression leads to confusion. In France they do not use that expression, they use the expression libertés publiques, to be sure.

I have an article written by a professor at La Sorbonne in regard to this particular point. I believe the confusion comes from the fact that we use the wrong expression to determine what is public liberties, because public liberties, in general, refer to the relations between citizens and the state, and civil rights affect relations between citizens with citizens.

Dr. FORSEY: May I suggest also, Mr. Chairman, that, in response to something Mr. Martin said just now, if you had a clarifying phrase there at the end of the first line in clause 2, as Mr. Dorion has suggested, it would hardly be necessary to insert that also in any of the paragraphs below. Would it not apply to all the paragraphs below?

Mr. MARTIN (*Essex East*): It would depend on the way you do it. I would suggest it be inserted to make sure we are only dealing with matters that come clearly within our competence; and Mr. Dorion has covered the point.

Mr. DESCHATELETS: Mr. Chairman, I would like to ask a question of Mr. Jodoin.

Somewhere in the brief I read the complaint that the bill is too limited in scope. Now, may I express my surprise that there is no mention in this brief from the Canadian labour congress in respect to economic rights. Should not the bill of rights cover at least certain economic rights? I would like Mr. Jodoin to elaborate on this aspect.

Mr. JODOIN: First of all, if I may, sir, I would say it would be rather automatic. This bill itself as suggested by us is perhaps narrow in effect. We had an addendum, which you have read, I am sure, which says that perhaps in trying to put all our minds together and arrive at a quick presentation we might have forgotten a few things. As a matter of fact, the addendum itself was most important, and it is in the light of what you are saying in respect to the opporunity for instance, of going into certain regions where we indicate that it was forbidden for union representatives to go, and so forth. It certainly would in our estimation include the one freedom of association, for instance.

As far as trade unionism is concerned, it, of course, is based on democracy, at least in our estimation. There seems to be a tendency at the moment in the legislative field to deny this. I am not referring to the House of Commons at this moment. This brings us into this kind of legislative fight with which we are involved at the moment.

Mr. DESCHATELETS: Would you permit me to ask another question on this point?

Mr. JODOIN: Certainly, sir.

Mr. DESCHATELETS: Does the Canadian congress not think or feel that the right to work should be considered as a fundamental right?

Mr. JODOIN: It all depends on what you mean by "the right to work," Mr. Deschatelets. If you are using that word in the sense of a union shop, or the Canadian bar, or some of our trade unions—I believe you are a member of the union yourself, sir—that is different. If you are referring to the fact that you want to destroy the principles of the democratic way of life which, whether you like it or not, whether we like it or not, or whether the gentlemen around this table like it or not, is the principle that majority rules, then I must disagree with you. If you are dealing with the matter of a right; sure, a right is a right. You have a bill of rights. I would say that you cannot deny to any government, that has a majority, the right to enact its own legislation even if the opposition or minority dislikes it. That is the principle. That is the same with the trade union movement. That is why the right to work is a very dangerous phrase. It all depends on what you interpret it to mean.

Mr. DESCHATELETS: Unfortunately, Mr. Chairman, I cannot answer the question. It would be out of order.

Mr. MARTIN (*Essex East*): May I ask a question at this point?

I was sorry I could not be here today because of matters in the House of Commons, but I have read the brief carefully.

Following Mr. Deschatelets' line of questioning in regard to economic rights, are you familiar with the declaration of Philadelphia?

Mr. JODOIN: Oh, yes.

Mr. MARTIN (*Essex East*): Yes. Do you see any reason why a bill of rights should not be made to incorporate the general declaration in so far as it has application to the competence of the federal government, and to make reference to that declaration?

Mr. JODOIN: I am referring to those types of legislation at the moment. I would have to refresh my memory by reading over the item of the declaration of Philadelphia as a whole. There are certainly many clauses, or portions of it that would certainly be relevant and pertinent to the matter itself. I would say the same in respect to the charter of the United Nations, for instance.

Mr. MARTIN (*Essex East*): Would you agree that section 25 of the declaration on human rights should, in so far as it comes within federal competence, be one of the terms included in a Canadian bill of rights?

Mr. JODOIN: Well, I will have to refresh my memory on what section 25 of the declaration of Philadelphia is.

Mr. MARTIN (*Essex East*): That is the section that deals with economic rights and the rights of people to social welfare legislation, and the like.

Mr. JODOIN: That would be all-embracing. We would like it the most perfect possible. But, again, on the matter of the declaration of Philadelphia, or even the charter of the United Nations, you would have to take a close look at the whole matter itself, to see what could be enacted within the law regarding the bill of rights.

Mr. MARTIN (*Essex East*): Let me put an all-embracing question to you. Do you feel a bill of rights is amiss completely, in this day and age, which does not cover economic and social rights which are basically recognized in this country?

Mr. JODOIN: Including the freedom of association, which is in here. It could be developed along the lines of the declaration of Philadelphia and the charter of the United Nations.

Mr. AIKEN: May I ask Mr. Jodoin a question?

The CHAIRMAN: Yes, Mr. Aiken?

Mr. AIKEN: You were here, I believe, this afternoon when the association of civil liberties gave their brief?

Mr. JODOIN: For part of it, Mr. Aiken. I was here in the questioning period.

Mr. AIKEN: I think you will recall they spent a good deal of their time in —I would hardly say "quibbling," but talking about the wording of these sections and how they should be extended, and so forth. I do not see anything in your brief, directly, regarding that, except two or three references. Is it your proposal that you have an objection to the wording of the sections?

Mr. JODOIN: In the amendments we have here, they are all-inclusive as far as the provincial legislatures, etcetera, are concerned, and in the amendment to the British North America Act. Certainly the wording would have to be different in many instances. During the period of the civil liberties association presentation, I was here at the time of the questioning by the honourable Minister of Justice. About that time I came in. What the remarks of the brief itself were I could not tell you.

Mr. AIKEN: I am merely trying to find out if, in basis, clause 2 is objectionable in any way, or whether, basically it is an acceptable expression?

Mr. JODOIN: On the referral to clause 2, in itself, I would like to refer this matter to Dr. Forsey, if I may.

Dr. FORSEY: Mr. Chairman and members of the committee, I must say that I was inclined to think that the answers Mr. Himel made to the questions of

the Minister of Justice were not very impressive. It seemed to me, if I may say so, that Mr. Himel was arguing rather from a non-common law tradition, and that he was taking too little account of the general traditions of the common law and the realm in which our courts apply it.

I was not frightfully impressed by the points he made there, and I thought the points the Minister of Justice made in reply were much more impressive; but perhaps I am a little prejudiced, I do not know.

Mr. AIKEN: Do you feel that, perhaps, in his extensive references to other documents, such as the United Nations charter, that he may have been referring to countries in different stages of political advancement?

Dr. FORSEY: And with different legal traditions. We have found, I think, in the international conference of the trade union movement—and my colleague, the director of the Department of International Affairs of the congress can speak more fully here, if necessary, and so can Mr. Knowles—but we have found in the international conference of the trade union movement a tendency for Europeans to express themselves at much greater length than we do and with a great deal of what seems to us to be surplus verbiage. I am not suggesting that by way of criticism or censure, but merely that it springs from a different tradition from ours in the Canadian trade union movement.

Similarly, I think these international declarations spring from a different legal tradition. As international declarations and legislation they may be perfectly appropriate. But it is equally possible, with the common law background we have on these particular matters—and I immediately recognize the fact there is the civil law in Quebec which, however, in these matters I think has to be considered in terms of what Mr. Dorion was saying a while ago about translation problems, "public liberties," and so forth—we, in the common law, use a different phraseology to achieve the same ends, and I think perhaps it is just as effective; and, perhaps, for the purposes of a statute in Canada is more effective.

Mr. JODOIN: The easiest and clearest way is what we want, so that it cannot be open to misinterpretation.

Mr. AIKEN: It was felt there was a necessity to spell out things such as that might spell out to the nations that were just getting this freedom, and not speaking in generalities that might be misinterpreted.

The CHAIRMAN: I was wondering, if the minister would care to ask questions of the witnesses; whether the committee would be willing to permit him to do so?

Mr. FULTON: I appreciate that, but I do not think I should ask any questions until the committee itself has concluded its questioning.

Mr. MARTIN (*Essex East*): Perhaps this question should be addressed to Dr. Forsey or Mr. Jodoin. I share the view that we should seek to enshrine the bill of rights in the constitution, so that it will have a different pedestal of its own, apart altogether from an ordinary statute. But I would like to interrogate you now on your statement, and this is not by way of criticism, but I am looking for clarification. I read from page 8, the second paragraph, the third sentence:

> It must put the rights it seeks to protect beyond the power of both parliament and the provincial legislature.

By that do you mean that the human rights and the fundamental freedoms so enshrined will never be capable of being touched; or do you mean by that that it must be put in the constitution in such a way that there could only be change by resorting to what one might call extraordinary procedures?

Dr. FORSEY: I suppose, in one sense, you can never put anything completely beyond the power of the collectivity of human beings in a nation to change. I

think what we were driving at was, we wanted to see this intrenched just as solidly and firmly as it can be. It is impossible to do so completely.

Mr. MARTIN *(Essex East)*: Do you have in mind something like the kind of provision they have in the constitution of the United States; namely, that there can be change, dependent only on a percentage of support by the states and the federal government?

Dr. FORSEY: Something of that sort. I do not think you can say to any human collectivity, "You never shall change this."

Mr. MARTIN *(Essex East)*: No, otherwise you would be interfering with the democratic process.

Dr. FORSEY: Yes, and you would simply be inviting revolution.

Mr. JODOIN: For instance, in the procedure we have in some of our affiliated organizations for constitutional amendments, you need two-thirds. It will be something of that sort. You cannot dilly-dally with it every day or every morning.

The CHAIRMAN: Do you think that such a constitutional set-up could be established here in Canada? Do you think the provinces would agree they would be bound by the decision of let us say, two-thirds of the provinces?

Mr. JODOIN: I would like to find that out on this question. I venture to say in others it would be difficult, but in matters of freedom and a bill of rights, I think the overwhelming majority of Canadian Citizens are in favour of it.

Mr. RAPP: I would like to ask a question of Dr. Forsey. Some briefs presented here by some organizations have stressed the importance of a preamble. Would you like to express an opinion on it, or a suggestion as to whether the Canadian Labour Congress would be in favour of having a preamble to the bill of rights?

Dr. FORSEY: I think that is a matter of policy on which the president should speak rather than I. I am quite prepared to give you my opinion if it is desired, but I think his would be more weighty.

Mr. JODOIN: According to physical weight, I would agree with Dr. Forsey. But I think we have a preamble, as far as the Canadian labour congress constitution, and we are very proud of it. Again, it is a matter of wording and I will humbly submit to you that I am not an expert in assessing this field. But it would not have to be ten pages long at all; it could be a short, precise one which would express the general view of the following document.

Mr. RAPP: So you would be in favour of a preamble to the bill of rights?

Mr. JODOIN: Yes.

Mr. DESCHATELETS: On page 10 of the brief there is a suggestion as to the application of this bill in relation to the War Measures Act. I do not get the views of the congress very clearly on this matter. Am I to understand that the congress would be in favour that the provisions of this bill should apply in peacetime as well as in wartime?

Dr. FORSEY: Our suggestion was, Mr. Deschatelets, that the War Measures Act should be amended, as we tried to say here, in certain particulars, in order to preserve a certain measure of those fundamental liberties even in wartime.

I think we all recognize that you cannot have precisely the same provisions in wartime that you have in peacetime; there are extraordinary situations, which have occurred, historically, in every country, and which have led to certain invasions of those freedoms for the over-riding purpose of preserving the security of the state. But we try to suggest that there are certain things which should not be done away with, even in time of war.

Mr. MARTIN (*Essex East*): Do you think that the War Measures Act should be in a bill of rights, or do you think that a clause saying that this shall not apply to the War Measures Act should be sufficient, and that we should deal with the War Measures Act altogether and apart?

Dr. FORSEY: The difficulty is that you could not be sure that you would later be dealing with the War Measures Act. I cite that as an abstract proposition. Whereas, if you want to make sure that certain fundamental freedoms which appear in part I of this bill are in a certain precise degree maintained, even when the war Measures Act has been proclaimed, it seems to me to be desirable to put it in here.

Mr. MARTIN (*Essex East*): You would not think that if we could deal with it while this committee is still sitting, that it would be sufficient to make sure that it was fully consistent with the traditional charter, such as the act of settlement, the Habeas Corpus Act, the Magna Carta and so on, and not have to deal with those measures in time of war? I would like to use the word "suggest", but I refrain from doing so because I would fear there would be a bit of criticism. But I do offer the opinion and invite comment, that the War Measures Act, which is a restrictive measure, should not be in a bill of rights which seeks to guarantee human rights and fundamental freedoms.

Dr. FORSEY: There are certain safeguards against what might happen under the War Measures Act which should be quite appropriate.

Mr. MARTIN (*Essex East*): I agree that we should take steps to deal with the War Measures Act, but we should do so separate from a bill of rights.

Dr. FORSEY: That is a distinction which is too subtle for me. You see, Magna Carta, and the English bill of rights of 1689 are part of our public law in Canada now, if I understand it correctly.

Mr. MARTIN (*Essex East*): That is right.

Dr. FORSEY: But during wartime things were dealt with differently; because in Great Britain it is just a matter of passing a simple statute of a sovereign parliament, while we are in a somewhat different position.

Mr. MARTIN: (*Essex East*): I suspect we disagree.

Dr. FORSEY: I do not know whether suspicions are any more respectable than suggestions.

Mr. KNOWLES: It is a relationship which should be investigated.

Mr. MANDZIUK: I have a question in connection with the same matter, on something which Mr. Martin missed bringing out. Is not your delegation here more satisfied with the fact, or happier about the fact that section 6 is repealed and rewritten to read that parliament would meet and the War Measures Act would be brought in for approval before parliament within at least 15 days after parliament meets? That is a further step in this act, as a safeguard to protect the individual, greater than it was previously.

Dr. FORSEY: We say so. This section is undoubtedly an improvement on the present section 6, but it is only a small improvement.

Mr. MANDZIUK: Parliament when it meets, under conditions of war—that would be the time; but do you not think there ought to be a separate measure rather than have it in part of this bill?

Dr. FORSEY: I do not see why, if you can put the present amendment to the War Measures Act in this bill, you cannot put in some further, substantive amendment to it. This is in a sense a procedural amendment, and I do not see why a substantive amendment should not be introduced as well. But if there

is any strong reason or principle why this should be dealt with in a different bill, I would have no objection.

Mr. BADANAI: I am rather intrigued by the second paragraph on page 11 of your statement which reads as follows:

> Third, the congress endorses the suggestion already made to this committee that clause 4 might be expanded to provide for a civil liberties section of the Department of Justice, charged with the task of watching over fundamental rights and freedoms in every part of Canada, reporting on invasions of such rights and freedoms, and so helping to educate the public to take action to protect itself by every legitimate means, legislative, judicial, political, constitutional, open to it.

Would that envisage the appointment of a committee, a parliamentary committee, as a court or body of appeal, to which anyone might come whose rights were infringed, and have that body deal with his case? What is your feeling, Dr. Forsey?

Dr. FORSEY: That is not suggested here in any way. The proposal here, I think I may safely say, is possibly a slight elaboration of something which Professor Scott put before this committee the other day, about the civil rights section. We are not contemplating here anything in the nature of a parliamentary committee or a board of appeal, or anything like that, but merely a section of the Department of Justice, made up of officials of the Department of Justice, to act in the way suggested here, purely as a reporting body.

Mr. KAPLANSKY: Mr. Chairman may I point out that this suggestion actually is based on existing practice in Canada? We have in Canada laws at the present moment which protect certain areas of human rights, namely, the Fair Employment Practices Act. And it is under the jurisdiction of the Minister of Labour that this procedure does exist.

The experience with civil rights, with human rights, has proven that it is not enough to have a hortatory declaration or statement, but it must go hand in hand with certain administrative measures which would enforce the declaration contained in the legislation. Otherwise the legislation is useless.

We have had experience both internationally and nationally with all sorts of declarations, including the declaration of Philadelphia, and the declaration of human rights; but unless it is accompanied by certain administrative measures separate and apart from the decisions of the judiciary, administrative measures which would deal with investigation of problems, attempts to adjudicate and conciliate problems before they reach the judiciary—and also with attempts to carry on educational work in order to make the provisions of certain legislation known to the public at large the legislation, in itself, worthy as it may be, perfect as it is, or perfectly worded as it may be, becomes useless. And, if you take into account that this sort of procedure already exists in a sector dealing with the protection of human rights in Canada, namely that of employment, through the Minister of Labour, we see no reason why it should not be extended to the larger field of human rights and fundamental freedoms.

Mr. BADANAI: May we have your opinion then on a committee such as they have in New Zealand? There, they have a parliamentary committee, acting in the form of a board of appeal, and any person who feels his rights have been infringed upon immediately appeals to this particular committee for redress.

Now, have you any opinion on such a committee as this?

Mr. KAPLANSKY: With all due respect, sir, these are two different and distinct problems. This committee, in its wisdom, might decide to recommend that such a committee be established as part of the work of this parliament, or any future parliament. However, this deals with a department or a section

of the Department of Justice. This is an administrative committee which will have, for its purpose, three things: one, to investigate complaints, whether they are valid or whether they are complaints sent in by mere cranks; two, to try to adjudicate certain complaints before they reach the stage of court procedure and, three, to carry on educational activities and an educational campaign of sorts. In other words, the two things are separate and distinct.

Mr. BADANAI: But, would you say it is a good thing?

Mr. JODOIN: It might, and it might not be.

It is a matter of procedure, Mr. Badanai. Certainly, in the point of view that has been covered, it may be, but in the matter of an appeal, it could be the Supreme Court—I do not know.

Mr. BADANAI: Well, the reason I brought it up is because instead of leaving the ultimate decision to the Minister of Justice, this would be dealt with by the committee.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I ask a question at this point, as I have to go into the house for a few minutes.

Are you familiar with the Inquiries and Tribunals Act in Britain, established two years ago?

Mr. KAPLANSKY: No.

Mr. MARTIN (*Essex East*): Are you famiilar with the procedure Mr. Badanai suggests which exists in Denmark?

Mr. KAPLANSKY: I have heard about it.

Mr. MARTIN (*Essex East*): But, do you feel you know sufficient about that to recommend its inclusion in this bill?

Mr. KAPLANSKY: I would think, to be on the safe side, it would not do any harm to the bill, or to the principles contained in this bill, if the rules of parliament would permit the establishment of what I would call, in lay language, a standing committee.

Mr. MARTIN (*Essex East*): In other words, what you are recommending in your own language, in section 4, is that this bill should have teeth in it?

Mr. KAPLANSKY: Yes, teeth, not in the sense of enforcement measures, but in the sense of investigative, procedural and educational powers.

The CHAIRMAN: That is not the same kind of teeth to which Mr. Martin is referring.

Mr. BATTEN: Could I ask if Mr. Kaplansky would prefer such a committee of this kind to a department of government doing the same work?

Mr. KAPLANSKY: I beg your pardon?

Mr. BATTEN: Would you prefer a parliamentary committee doing this type of work, to a department of government doing the same work?

Mr. KAPLANSKY: Well, frankly speaking, on the basis of a bitter experience over the last 25 years, both in the United States and Canada, I would prefer an administrative committee to a parliamentary committee, because, with an administrative committee, the final analysis is subject to the will and scrutiny of parliament.

Dr. FORSEY: And, the officials are full time. You gentlemen cannot possibly give your full time to a thing like this.

Mr. JODOIN: Well, they gradually are becoming full time.

Mr. BATTEN: Do you think if such a departmental committee were set up it might be construed by some people as a place where they could get legal advice on their fundamental rights?

Dr. FORSEY: Well, I should think the thing would have to be carefully devised, because you cannot set up a free legal aid bureau under the auspices

of my distinguished friend down there. On the other hand, in one sense they would be able, if this section did the kind of job they had in mind, by looking at material which had issued, to get a much better idea of their rights than they would have otherwise.

Mr. BADANAI: Would a committee of the Senate be preferable to a parliamentary committee?

Mr. JODOIN: You know the policy of the Canadian Labour Congress as far as this item is concerned.

Dr. FORSEY: I was under the impression that the Senate was a part of parliament.

Mr. JODOIN: And, I said that with all due respect.

Dr. FORSEY: I cannot comment on that New Zealand expedient at all, because I was not aware of it. As far as I am concerned, I would have to look into it before I could answer any question on it.

Mr. JODOIN: I would say, in this connection, that we would try the first one first, the Department of Justice; and then we would see.

Mr. AIKEN: Would an extension of section 4 of the act, which now gives the Minister of Justice certain duties—that is, to examine legislation, regulations and bills—not meet the suggestion by and large?

Dr. FORSEY: We used the word "expanded" rather than "extended" but, if you prefer "extended", I know none of us will object.

Mr. JODOIN: The answer on that would be yes.

The CHAIRMAN: Well, does that pretty well conclude the questioning by the members? If so, I understand the committee has agreed that the minister might ask now such questions as may have occurred to him as a result of the deliberations.

Mr. FULTON: I appreciate that, Mr. Chairman. I would not want to be put in the position of closing off the questioning.

I am afraid that some of my questions may take the form, or appear to take the form, of something which I have tried to avoid in the past, an exercise in semantics. However, I know that Dr. Forsey is better at that exercise than I am, so, I will certainly have to address my questions with some deference.

There are all sorts of interesting problems that arise from the discussion thus far, but I would like to address myself to the brief, itself, which contains some pretty harsh criticisms, if one takes them as read.

The first question I would like to ask either Mr. Jodoin, Dr. Forsey, or any of the witneses to address themselves to, and perhaps to reconsider, is the matter that has been touched on before, and that is the suggestion that somehow the congress and others have been caught by surprise by lack of time that has been allowed them to prepare their views in the presentation to the committee. Now, I do not base my question upon any suggestion that there has been plenty of time since this bill was introduced in the house and the committee hearings have commenced, but I rather base it upon the fact—and I would like a disagreement, if there is one—that the bill we are now considering in this committee is substantially the same as introduced in the house in 1958. And, indeed, I point out that the brief itself refers to the fact there was a similar bill in 1958, and I read from page 2:

> True, the present bill is not identical with the 1958 bill; but the differences, though not insignificant, are certainly not great enough, or numerous enough, to invalidate more than a very small part of what the learned authors of the bar review article said.

I take it from that that I am fair in suggesting that the congress has not been taken by surprise by the contents of the bill itself?

Dr. FORSEY: Well, Mr. Chairman, if I may answer that: first of all I should say that until this present bill was introduced we had no means of knowing how far it would differ from the previous bill. We could not, therefore, address ourselves to a criticism of this bill until it appeared.

Mr. FULTON: That is true; but you had made a careful examination of the previous bill, had you not?

Dr. FORSEY: We had made some examination of it; but I am afraid that we operate on a small budget and with such a small staff that things do not get full attention unless they have a deadline attached to them.

The consequence is that as a rule, if we merely hear that there is legislation coming and that it is going to be examined by a committee—and my recollection is that there was a considerable amount said about examination by a committee—we are rather inclined, because of the pressure of urgent work, to say, "Well, when we know what the legislation is, and when we are given notice"—and ordinarily in such cases we get notice of some weeks, shall we say, anyway—"then we shall set to work to do a thorough job on this".

In this particular case we really had not time to consult legal counsel whom I think we should have liked to consult. I do not wish to run down the capacities of the officers of my own organization, nor those of my colleagues, the heads of other departments; but the fact of the matter is that there is nobody around the place who is a lawyer.

We should have liked time to look at this thing rather carefully. I read through the whole issue of the Canadian bar review on the previous bill; I have some nodding acquaintance with constitutional law and I have spent some considerable time thinking about this bill. I drafted a long brief to the senate committee on human rights and fundamental freedoms some 10 years ago. But I confess that after reading that issue of the Canadian Bar Review my head swam, and I did not feel half as competent as I had thought I was to say anything on this.

I should like, therefore, to have had careful discussion with counsel, such as, for example, my friend Professor Scott, or our regular counsel to the congress, Maurice Wright, to see that we did not make some legal boners in this thing—and that time was simply not available to us.

Mr. FULTON: I do not disagree with you in connection with your summary as to how the congress operates, but I do suggest that it would be in order to differ with you, before this committee, when you suggest lack of thoroughness in your examination of anything that comes before you. I know you and Mr. Knowles well enough to know that you will not take offence when I offer the opinion to you that when a bill is presented to you and you consider it, you do not consider it by parts, or incompletely.

My point, really, is that the bill now before us does not differ in substance from the bill of 1958. Would you put it, on reconsideration, to be really fair criticism that you have not had time to formulate views and opinions on the legislation which is now before the committee for discussion?

Dr. FORSEY: Not adequately, in my judgment.

Mr. FULTON: Not since 1958?

Dr. FORSEY: No; because of the reasons I have stated—that the matter is extremely complex; it involves a great many legal points, on which none of us, I say again, is thoroughly competent. We cannot be; we have not had the legal training. And, with the urgent pressure of other work, it was impossible for us to undertake—

Mr. FULTON: If I were cross-examining,—which I am not—I would follow that with the next question: then do you say your present brief is ill-prepared and ill-considered? But I will not ask you that.

Dr. FORSEY: I shall answer that: in my opinion it is not as well prepared, or as well considered, as it would have been if we had had the length of time that I have suggested.

Mr. JODOIN: But it is still good.

Mr. FULTON: I am suggesting that you might modify some of the expressions you have used when you have had time to consider them in all their implications.

Mr. KNOWLES: Mr. Chairman, I wonder if Mr. Fulton would permit another comment in reply to this question?

I think the point that we are trying to make is missed a bit. If it is felt by the minister and by others that all we are doing is complaining because we have not had sufficient time to prepare our brief, our contention is that this matter is of such importance to the Canadian people—for generations to come, if you will—that there should have been a better opportunity for discussion of it by a committee of parliament than is provided by the few days allotted to this committee at the end of a session.

I well remember, at the end of the session last year—I have a telegram in front of me, which gives the date, so I can identify it—the Prime Minister, on July 18, last year, said that at this year's session the bill would be reintroduced and referred to a committee, so that the fullest possible opportunity for discussion and consideration would be permitted. We thought, "Well, that is good. Now this important matter of this bill of rights has been referred to a committee and there will be ample time for all those national organizations and others who are interested to come before that committee; and there will also be ample time for the committee to consider it".

We feel that even if the bill has been around in its present form for a couple of years, there still has not been permitted that opportunity for discussion, for counsel, in the form of a committee, that a bill of this kind merits.

Mr. FULTON: I am not a member of the committee, and I am not chairman of the committee, but I have not heard any suggestion that there is not going to be all the time that you may want to discuss the matter with the committee, or all the time that any member of the committee wants in order to put questions to you.

Mr. KNOWLES: When we were first told—maybe we are still conscious of the first information we got—on Tuesday of last week that the bill was being referred to committee, we were told it would be before the committee three days, Wednesday, Thursday and Friday, and we could pick out a time on Wednesday, Thursday or Friday morning, afternoon or night.

True, we objected. The president sent a telegram to the Prime Minister on July 13 objecting. On July 15 the president received a telegram back from the chairman of this committee, indicating that the telegram had been refered to him and that arrangements would be made for us to appear on a date at our convenience. So that original restriction to three days was removed; it has been extended to five or six days.

But I say again, Mr. Chairman, to Mr. Fulton, through you, that it is not just a complaint about our convenience; it is a feeling on our part that there is not being given the opportunity for that kind of discussion by a committee of parliament that it should have.

Mr. FULTON: I suppose—

The CHAIRMAN: Mr. Fulton, would you mind if I asked a question here? Mr. Knowles, I think you would not want to convey that only three meetings

were contemplated. I think the wire stated that the meetings presently scheduled were for Thursday, Friday and Saturday. There is nothing in the wire to indicate that they would not go on beyond those dates. I think that in fairness to the committee you would agree that all we indicated at the beginning was that we had already scheduled meetings for those three days, and inquired as to whether or not you were going to make representations.

I think you immediately contacted, I believe it was Mr. Andras, was it not, who contacted the committee, and it was indicated then that you would not be able to appear on those three days, and the indications were that you would be ready by Monday. Then I think that in the process of negotiation that was extended to Tuesday.

Mr. KNOWLES: We may have got the wrong impression and I am prepared to have that impression corrected. I still am unable to get across the point that we are not beefing about the lack of time to us. We got our brief ready, good, bad or indifferent. We are complaining about the lack of time for the public generally to discuss this very important question.

Mr. FULTON: I have based my questions on the fact that this bill is almost the same as the bill which was circulated to the country in 1958. That does seem to be adequate time for the formulation of views.

My next question refers to the matter of whether or not there should be consultation with the provinces and as to whether any efforts were made to have those consultations, or whether any indications were given as to the attitude of the provinces. I wonder, Mr. Jodoin, if you are familiar with the matter which was referred to by the Prime Minister in the house, namely, a resolution adopted by the legislative assembly of the province of Quebec in February of this year. Did you know of the contents of that resolution?

Mr. JODOIN: No. I regret to say I did not.

Mr. FULTON: Let me make it clear that I am not trying to exaggerate the effect of this resolution: it is the formal expression of only one province, but it is an expression in the most formal manner possible. This was a resolution in the legislative assembly. I do not recall whether or not it was concurred in by the upper chamber.

Mr. DESCHATELETS: It was the lower house.

Mr. FULTON: It is a unanimous resolution of the legislative assembly of the province of Quebec reading as follows:

> The legislative assembly of Quebec, aware that the parliament of Canada, during the current sessions, will be asked to consider a proposed law whose object is to acknowledge and protect human rights and fundamental liberties, wishes to reassert that this legislation must not in any way, neither directly nor indirectly, encroach upon the exclusive jurisdiction vested in the province under the sections 92, 93 and others of the British North America Act, 1867, and more especially as regards the rights of liberty, property and civil rights, liberty of religion, liberty of speech, of assembly and association, liberty of the press, administration of justice in the province, the civil and criminal procedure as laid down by the legislature in the exercise of its rights, and generally all matters of a purely local or private nature in the province.
>
> The legislative assembly of the province of Quebec reasserts that the rights of the province must not be restricted, diminished, amended or altered by an act of the parliament of Canada and without the consent of the provincial legislatures and prays the clerk of the legislative assembly to transmit a copy of this motion to the Right Honourable the Prime Minister of Canada.

Mr. JODOIN: I presume that was done. I was not aware of it. I might say I think it has been proven in the past that an individual like myself might not agree with others in the matter of the value of representation. I would still think there would be merit in convening a meeting to discuss the reasons why the Quebec legislature has done that, in order to discuss the counter opinions or to try to convince people. After all that is one power we all have in Canada. As a matter of fact we can disagree even with you and we will not be shot tomorrow morning. That is a great privilege so far as Canada is concerned. We cherish that. I still believe it would be advisable on the part of the federal government, in my estimation, to convene all the provinces in Canada on this subject matter. It is my home province. Maybe there are some intuitions or misinterpretations; I do not know. That can be discussed. That is why we still humbly suggest that such a conference should have been called, because after all the freedoms, rights, and so on certainly would affect the province of Quebec as well as all other provinces. We might come to an understanding on the general principles themselves, or on principles in a bill or legislation in which everyone could agree.

Mr. FULTON: With that objective I would not disagree for a moment, but I was addressing myself to page 7 of your brief where you say:

> That is why we think the government ought to have tried to get the provinces to agree to a request to the United Kingdom parliament for an amendment to the British North America Act, making it possible for either parliament or the provincial legislatures to invade fundamental rights and freedoms in any way. The answer, of course, is that the effort would have been in vain; and the answer to that is no one can know without trying.

It was in dealing with this that I referred to the resolution of the Quebec legislative assembly.

Dr. FORSEY: Before you leave that, did I hear correctly that in the resolution you quoted they wound up by saying something about action by the parliament of Canada without the consent of the provincial legislature?

Mr. FULTON: Yes.

Dr. FORSEY: Surely that is what we are suggesting.

Mr. FULTON: "The legislative assembly of the province of Quebec reasserts that the rights of the province must not be restricted, diminished, amended or altered by an act of parliament of Canada and without the consent of the provincial legislatures—".

Dr. FORSEY: The first, with respect, I think could not be done by act of the parliament of Canada and the second thing is precisely what we are suggesting! the consent of the province.

Mr. FULTON: In the light of this resolution and in the light of the fact that the proposal for a bill of rights has been before parliament since 1958 in concrete form, it is not reasonable to adopt the course we have, of putting our own house in order first and saying we will act in the federal field; and having done that, then to go back to the provinces and see whether they will consent to a constitutional amendment. Or alternatively, whether they will enact their own bills of rights so that we will have, by consent, a uniform and complete coverage in all jurisdictions of Canada.

Dr. FORSEY: I think we have answered that this bill does not put your own house in order because it remains an ordinary act of this parliament which can be repealed in whole or in part tomorrow.

Mr. FULTON: Just as you admit that a constitutional amendment could be altered or repealed.

Dr. FORSEY: Not piece by piece.

Mr. FULTON: No: it could be repealed, by a one-stage debate.

Dr. FORSEY: Yes; but we think that is a much less dangerous thing than this one of nibble, nibble, nibble.

Mr. FULTON: You would rather have it so that it could be done in one stage rather than bit by bit?

Dr. FORSEY: Yes.

Mr. KNOWLES: Do you admit that might happen?

Mr. FULTON: No. You have put forward the possibility.

Mr. JODOIN: I might submit on this that you might have suggested to the province of Quebec that an amendment to the B.N.A. Act might be considered. Let us consult on this.

Mr. DESCHATELETS: The government has changed since.

Mr. FULTON: The government has changed, but this was a unanimous resolution of all parties.

Mr. JODOIN: It might be a unanimous refusal, but let us consult on it.

Mr. FULTON: That door is not closed by any means.

Mr. JODOIN: We say that it should have been done a long time ago.

Mr. FULTON: That is a point of view which must be respected. But I suggest we start in our own field and then have consultation, when we have a bill of rights here. You say we could do the same thing in this field by having them join in a constitutional amendment first.

Mr. JODOIN: We disagree simply on procedure.

Mr. FULTON: That is an honourable disagreement.

Then your brief says, "Why this despairing posture in the face of a supposed, unproven, even untested, refusal of the provinces to take any action to protect the fundamental rights of their own citizens?" I ask you whether you really intend those words to apply to a solemn enactment of the parliament of Canada.

Dr. FORSEY: Yes. I think this is the proper description of it in the context, which explains what we mean by it.

Mr. FULTON: Possibly there is a misunderstanding, but it seems to me that what you are saying is that to proceed as we are doing, in our own field, with a solemn legislative enactment of the parliament of Canada, is a despairing posture.

Dr. FORSEY: It seems to us in fact that you are saying it is hopeless to try and get any kind of cooperation from the provinces at all, and that is what we call a despairing posture. You have not tried.

Mr. FULTON: I suggest to you now that there are other ways of going about this thing, and one is to do what we are doing, and then approach the provinces on that basis.

Dr. FORSEY: That is why we call it a despairing posture, because that is what it seems to us.

Mr. FULTON: You think that because we have felt this is a more practical approach, that that is a despairing posture?

Dr. FORSEY: In this context, yes, sir.

Mr. FULTON: Then what you are really saying is that the enactment of this bill of rights is a counsel of despair?

Dr. FORSEY: Yes.

Mr. FULTON: You are saying that?

Dr. FORSEY: In the context, yes.

Mr. FULTON: I do not appreciate the full import of your modification or qualification "in the context".

Dr. FORSEY: In the context of the question of two things; the limitation upon powers of the parliament of Canada, the prohibition of the parliament of Canada from invading fundamental freedoms; and the question of the provincial aspect. In regard to both of those, it seems to us that this is simply throwing up the sponge, as it were, and saying; the best we can do is a simple act of the parliament of Canada.

Mr. FULTON: "A simple act of the parliament of Canada". Is not every act of the parliament of Canada a simple act of the parliament of Canada?

Dr. FORSEY: Yes.

Mr. FULTON: Well, that is what we are doing.

Suppose we asked for a comprehensive amendment to the constitution, would that not be by a simple resolution being put before the parliament of Canada?

Dr. FORSEY: Yes, but that, as we have tried to explain, would not have the effect of allowing *non obstante* clauses in specific pieces of legislation, which may come up now, next year, the year after and so on.

Mr. FULTON: Yes, but that would not alter the fact that this would be a simple resolution?

Dr. FORSEY: No.

Mr. FULTON: It would simply be a simple resolution or a mere resolution?

Dr. FORSEY: Yes.

Mr. FULTON: It seems to me these words are words that require to be examined.

Dr. FORSEY: Yes, but a statute of the United Kingdom parliament, amending the British North America Acts, 1867 to 1949, would not be in the same category as an act of the parliament of Canada, which might be repealed tomorrow by the parliament of Canada.

Mr. FULTON: Yes. One is an act of the United Kingdom and the other is an act of the Canadian parliament. That is a very important difference.

Dr. FORSEY: Yes.

Mr. FULTON: Which you have also recognized in your brief.

Dr. FORSEY: Yes.

Mr. FULTON: I am trying to evaluate your assessment of the validity of the binding effect, and the importance, of a statute of this parliament.

Dr. FORSEY: It has no binding effect upon the present parliament.

Mr. FULTON: And could it have?

Dr. FORSEY: No, it could not have.

Mr. FULTON: And could an amendment to the British North America Act be enshrined in such a way that it could not be repealed, altered, or revoked?

Dr. FORSEY: No, but again the point is, that then you would have to go through the process of repealing the whole thing; whereas now, with this particular thing you would not. Look at the terms of clause 3 itself, right at the very top of the page, where it says:

> Unless it is otherwise expressly stated in any act of the parliament of Canada hereafter enacted—

That means that by a specific piece of legislation, tomorrow you could put in a *non obstante* clause and these things go by the board. With any piece of specific legislation in the future you can do exactly the same thing. You say: we are not repealing the bill of rights. Oh, no, we stand by the bill of rights, but this is a very exceptional case. You may get a series of exceptional cases,

so long, and so important, that eventually, as we have suggested, you will have nothing left except a sort of Cheshire cat.

Mr. FULTON: I agree that in what you say you are factually correct; but is not one of the objects of the bill of rights to put it in such a position that it cannot be repealed by an accident, by inadvertence, or in a sudden fit of passion or prejudice? Is that not one of the things which people, who are concerned with the bill of rights, want to see accomplished?

Dr. FORSEY: Yes, certainly.

Mr. FULTON: From that point of view, is it not better to put it in a position where it cannot be even altered except through a full stage debate which, under our procedure of statutory enactment would be a three stage debate, whereas in constitutional procedure, you would have a one stage debate, on a simple resolution? If you are going to protect against prejudice and passion, is it not better to do it this way, with the country having full knowledge derived from the fact that three debates are necessary? In which way will the country have better knowledge, where you have a three stage debate, or just a one stage debate?

Dr. FORSEY: I do not think the answer can be reduced to a matter of numbers at all.

Mr. FULTON: But you yourself did a moment ago, because you objected to the possibility that it might be done by a number of amendments.

Dr. FORSEY: That is quite a different context.

Quite seriously, I think this is a play on words, either by you, or by me, or by both of us. The point is, it seems to me that if you had an act of parliament of the United Kingdom, then the process of getting the general address through the two houses of parliament here, asking for a total repeal, or even a substantial amendment to it, would be a very solemn process. You would be bound, on the one stage, to have a thorough discussion of the whole principles involved. On the other hand, you come along, let us say, with a particular section of the criminal code, and you say: this is a particular place where we think there is a solid reason for departing from the terms of the bill of rights and, therefore, we are inserting that clause, which says that notwithstanding anything contained in chapter so and so of the statutes of 1960, it is hereby enacted, and so forth. It is true that you have three stages of debate in each house.

Mr. FULTON: I cannot agree with your premise that parliament would not be just as concerned about an isolated detraction from the bill of rights, and examine it just as carefully as it would a complete repeal of the bill of rights. You base your argument on the premise that parliament is not going to be concerned, because somehow or other, it will be cajoled by the government into believing that this is not a very important thing.

Dr. FORSEY: I did not use unpleasant terms like that.

Mr. FULTON: But you suggested that in what you said.

Dr. FORSEY: You must remember that this government may not always be in office.

Mr. FULTON: You mean we would be less skilful in cajoling parliament than some other government? If we are not in office we would be in opposition, and I do not think we would be cajoled. But that is getting down to personal views.

My point is that in my view you cannot enshrine a bill of rights which would be any more sacrosanct, by a constitutional amendment, or even an alteration to the B.N.A. act, than you can by what has been variously described as a simple statute, or a mere statute of the parliament of Canada.

Perhaps I am giving evidence there, so I will put this to you in the form of a question. Should members of parliament be asked to accept the principle that an address, asking the United Kingdom parliament to amend our constitution, is any less solemn an enactment that a statute of the parliament of Canada?

Dr. FORSEY: We suggest, in this case, that it is a more solemn procedure.

Mr. FULTON: If you are, I am not able to follow your point, because either one, it seems to me, has the same objective of giving us a Bill of Rights, and therefore the same degree of solemnity. I have said before that you would then have a constitutional document, just as much as an amendment to the B.N.A. act would be a constitutional document.

Dr. FORSEY: If you mean just as much as an amendment to the B.N.A. act by the parliament of Canada, I would agree. If you mean as much a part of our fundamental law as an enactment by the parliament of the United Kingdom, I think the answer is no; because, in fact, an amendment to the British North America Acts, 1867 to 1949, is a very different thing. In practice, these things have been pretty solidly entrenched, and I think, in practice, more solidly entrenched than the provisions in the United States constitution. If I could make a further suggestion, I would say, that we are suggesting this is a temporary thing, and what we are looking forward to, is procedure by which we have our own constitution domiciled in Canada completely. Then the thing we should like to see, as I suggested in regard to something Mr. Martin suggested some time ago, would be the entrenching of these provisions just as solemnly as we could get them entrenched.

Mr. FULTON: Yes, but we have not yet devised a method of doing that.

Dr. FORSEY: No.

Mr. FULTON: But I do suggest that an amendment to our constitution—if our constitution for purposes of this present discussion is said to be the B.N.A. act—is the thing that is achieved by a single-stage debate in the House and Senate. The fact of the matter is—

Mr. JODOIN: But less easy to change?

Mr. FULTON: No. It can be changed by a single-stage debate, by the same process by which it was enacted.

Dr. FORSEY: We simply get back to the same point, the fact that that would, in practice, be considerably more difficult than the insertion of a non-obstente clause. We think yes, and you say no. You have the advantage of being a member of parliament and a minister, and, presumably, you can speak with more authority than most of us here.

Mr. FULTON: On this point I am discussing it with you on the basis of principle, common sense and logic—at least, I am endeavouring to do so.

Mr. KNOWLES: I wonder if I might ask Mr. Fulton a question at this point?

The CHAIRMAN: I fear this is going a little afield.

Mr. FULTON: I will leave that point.

Mr. KNOWLES: I will ask him afterwards.

Mr. FULTON: I was concerned with your assertion of the fact that we are making, with respect to the War Measures Act, what you have described on page 9 of your brief as, "only a small improvement."

Well, now, the War Measures Act has not been amended, to my recollection, for a good many years. Now we are asking parliament to say that the very proclamation by which the government declares a state of war,

invasion or insurrection to exist—that that very declaration itself will be subject to review by parliament. Again, as I understand it, the philosophy upon which that amendment is suggested is that no government should be able surreptitiously or under false pretences to vitiate the bill of rights. It has been suggested that a government might be tempted to resort to a declaration of emergency when none exists and thus invoke the War Measures Act to set the bill of rights at nought.

Recognizing that fact, we have said that no government can do that, unchecked, because no government could invoke the War Measures Act after this Bill passes without having its declaration subject to review by parliament. This is the first time it has ever been done. The very decision of the government upon which the declaration of a state of war, invasion or insurrection is made is now subject to review by parliament, notwithstanding the fact you may have the full fury of an atomic or nuclear war wrought upon you. You say that is only a small improvement. I ask you whether, in the light of this, you would not care to qualify your words?

Dr. FORSEY: I think it is a small improvement in the context, in which we were discussing the protection of fundamental rights and freedoms, or such as can reasonably be protected, in wartime against encroachment. I think it is a very important improvement in certain other contexts and is altogether admirable. I think it is very important in the context of the rights of parliament as against the rights of the executive. But it still leaves the substance of the War Measures Act. Once parliament has agreed, that, in effect, there is a genuine state of war, invasion or insurrection it still leaves the substance of the War Measures Act absolutely what it was before, with the immense powers that confers on the executive; and that is our complaint.

Mr. FULTON: Well then there is simply a difference of opinion between us, which is not reconcilable.

Once you have a state of war, invasion or insurrection, with all the implications that has in the atomic age and in the struggle we are engaged in with communism, once parliament has sanctioned that declaration, do you say, really, the powers of the War Measures Act and the powers conferred on the executive then, to protect the welfare of the state, are not justified in being resorted to?

Dr. FORSEY: We think they are too sweeping in the particular respects we mention. After all, we had a very critical state of affairs in the fairly early days of the last war, after the phoney war was over. Some of us at the time wondered how long it would be before the Germans got over here. There was grave doubt about the capacity of the United Kingdom to resist. Various powers were resorted to in the course of that war and were exercised which we think now, a good many of us, were excessive. We do not think it was really necessary to detain some people who were detained and to make certain regulations that were made. What we have suggested here are three limitations upon the powers of the War Measures Act, which seem to me to be extremely moderate.

Mr. FULTON: Of course, we could indulge in a lengthy argument as to what particular changes should be made in the War Measures Act, which has not been amended for a long time. However, I was really concerning myself with the words you used, in the context in which you used them, that it is only a small improvement, when it preserves the right of parliament, or gives to parliament the right to question the very basis of the use of the powers the War Measures Act gives to the government. It is something parliament has never had before.

Dr. FORSEY: Yes, quite; and I think it is most desirable, highly admirable and excellent; but I think in this context, it leaves the executive with far too

sweeping powers. I think there is still the possibility of limited wars. It does not necessarily follow that every war that breaks out is going to be an all-out nuclear war. I am not very sanguine myself about the possibility of limiting them; but it is conceivable—or an insurrection, as my colleague here points out to me.

Mr. FULTON: You have said now it is important, and I forget exactly the words you used, but you modified it by saying in the context it really does not go far enough.

Dr. FORSEY: There are all sorts of things that are admirable which would have very little significance if inserted in this bill in this particular context.

Mr. FULTON: I was not quite sure that the context took preference over the words themselves, because the words themselves stand out like a sore thumb.

Mr. JODOIN: It is a step in the right direction.

Dr. FORSEY: I would never suspect you of taking words out of context.

Mr. FULTON: But there are others who would do so, and I wanted to get the words back into context, and you put them back for me. Those are all the questions I have to ask.

Mr. KNOWLES: Where are we—in the Oxford debating union?

Dr. FORSEY: There could be worse places.

Mr. DESCHATELETS: The brief mentions very good and important suggestions and modifications, and I wonder if Mr. Jodoin would not care to add one more important suggestion. Does Mr. Jodoin not feel that for the next provincial-federal conference, which will be held here in a few days, that the Minister of Justice should not take this golden opportunity to invite the attorney-general of each province to discuss with him the bill C-79 in its present form?

Mr. JODOIN: I indicated to you before what we felt, and we still feel it should have been done a long time ago. The only difference we have on the question of a discussion between the honourable minister and ourselves is just to reverse the time table. I would say, ask the provinces first and find out. That would not stop the national parliament enacting the legislation by itself, anyway, if they wanted to, under the procedure we have now. We felt that consultation was not held officially and in this fashion. Of course, the sooner the better. Whether it is the opportune time, at the conference next week, which initially convened for another purpose, I do not know.

If it is possible, that is fine, as far as we are concerned. These consultations between the provincial legislatures and houses of assembly, and the House of Commons of Canada should be held, and the sooner the better. That is the only way I can answer you on this question.

The CHAIRMAN: Mr. Jodoin, and members of your delegation, I would like on behalf of the committee to extend to you our thanks and appreciation for coming before the committee with this brief and presenting it for our consideration. Thank you very much.

Mr. JODOIN: With all the constructive criticism we indicated? We appreciate it. Thank you very much.

The CHAIRMAN: Would Mr. Varcoe please come up to the head table.

Gentlemen, may I present to you, Mr. F. D. Varcoe, Q.C., a former deputy attorney general for Canada, and a former deputy minister of justice, who has indicated an interest in the bill of rights before the committee, and a desire to appear before the committee.

I now ask Mr. Varcoe to make such observations as he sees fit.

Mr. F. P. VARCOE Q.C.: Perhaps I should say at the outset that I had no thought of appearing before this committee until I received a suggestion from the clerk of your committee that I might do so, if I felt inclined.

I thought it over, and at first I thought I should not appear, because I took part in an official way in discussions concerning the previous resolutions of Mr. Diefenbaker and Mr. Coldwell, some years ago, and I might have acquired some rigid views at that time that are a little out of date today. I do not know.

But I decided on the whole that I would come and say just a few words. I have no brief, and of course I represent no one except myself.

Now let me make this suggestion to the committee: a bill of rights in the true sense of the word involves the restriction of the power of governments and legislatures. That is the purpose of it; to impose some new restrictions on the government and the legislatures. That is the true nature of a bill of rights.

Now, if you proceeded to do that by means of a United Kingdom amendment, it would mean, in effect, that Canada would be asking the United Kingdom parliament to subtract some power that we now have, and my own personal feeling is that it would be a regressive step.

For that reason I do not join with those who criticize the government in connection with this bill on the ground that they have not proceeded to obtain an amendment by the United Kingdom parliament with the approval of the provinces.

My second point is that I would have thought that the draftsmen would have proceeded under head 91 (1) of the British North America Act, which authorizes the Parliament of Canada to amend the constitution.

I do not want to read the whole of it. I might say that this head (1) was incorporated into the British North America Act a few years ago, and I must say that at the time we drafted it I thought that this was the very sort of thing we had in mind that parliament would do, if it felt the time had come.

It reads like this:

> The amendment from time to time of the constitution of Canada except as regards matters coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces.

There are a number of exceptions which I shall not take the time to read now.

Now, if you did proceed in that way, of course, the bill would be entirely different in form from the bill we have here, because you simply would say something like this—notwithstanding anything contained in section 91, or certain heads of 91, the parliament of Canada shall no longer have power to, let us say, authorize or effect the arbitrary detention, imprisonment or exile of any person. That would be enshrined in the constitution, and it would take quite a lot of courage, I should say, on the part of a future parliament deliberately to repeal that amendment. Now, that is my second point.

I have two points that I would like to mention in connection with the drafting of this bill, because I do not fully understand it. I do not understand what effect it is going to have in certain circumstances.

Section 3, which really is the heart of the matter, provides that no such act shall be applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person. That is one of the seven or eight paragraphs in that section. Now, what does that mean? First of all, you have to find an act which does that. You have to find an act that does authorize or effect the arbitrary detention; then, you apply this, and if that act is an act that was passed before this act, then, of course, this act constitutes an amendment or repeal of it. However, if it is an act that is passed after this bill becomes law, the subsequent act, in effect, repeals that clause.

Now, I thought when I first read this bill that it was merely a sort of an interpretation act. In fact, the marginal note clause says "construction of law", but it does not say that in the event of doubt the act shall be construed or applied so as to do this. It categorically says that no matter what is in that act, no matter how clear it is that parliament intended to authorize or effect the arbitrary detention, imprisonment or exile of any person—that this rule is to apply. It is not, strictly speaking, an interpretation act at all.

I had not given any thought, to section 2—that is, as to the constitutionality of it. I must say, in reading it rather hurriedly yesterday for the first time, I concluded it would be construed along with the other provisions of the act, and that quite possibly a court would say, we interpret that section as meaning that the declaration, is to relate only to matters in the federal field. However, on looking this over again tonight, I note that it reads like this—it is hereby declared that in Canada there shall continue to exist the following human rights or fundamental freedoms, namely—and so on. Now, I cannot say that that is unconstitutional. I am inclined to think it is constitutional, but I cannot say with certainty what the Supreme Court of Canada would say that, for example, respecting an enactment—that there shall continue to exist freedom of religion. Supposing that a province decided that there should not be any freedom of religion in that province any more? There would be a clear conflict between them, and you would have to decide which of the two statutes was valid. All I can say about it is what my opinion is but I can say that there is a large body of legal opinion in this country that thinks these matters, in many important respects, are within the provincial field.

I think that is all that I wish to say concerning this bill.

The CHAIRMAN: Did you indicate, Mr. Varcoe, that there is a substantial body of legal opinion that freedom of religion is within the provincial field?

Mr. VARCOE: Yes. I think there was actually an observation by one of the judges of the Supreme Court not many years ago that that was his view.

Mr. STEWART: Does not the Birks case decide that?

Mr. VARCOE: That had to do with the freedom of the press; but in a very restricted manner.

Mr. STEWART: There is a clear indication in that case.

Mr. VARCOE: Sir Lyman Duff clearly said that freedom of the press was not a provincial matter.

Mr. STEWART: That is the Alberta case?

Mr. VARCOE: Yes, that is the Alberta case.

Mr. STEWART: I am talking about *Birks v. The City of Montreal*, a very recent case.

Mr. VARCOE: Yes, I think you are right. There was a recent case: I think it was Chief Justice Kerwin who made some observation that was open to my mind, to the construction that he thought freedom of religion was a provincial matter. You do not think so?

Mr. STEWART: No. I think that if there was any *ratio decidendi* in the case, it was to the effect—

Mr. VARCOE: I was not thinking of the *ratio decidendi* in that case, because there was a difference of opinion amongst the judges.

Mr. STEWART: Freedom of religion is a federal matter?

Mr. VARCOE: I agree. All I am saying is that there is some opinion in this country to the contrary, that is all.

Mr. DESCHATELETS: If I understand correctly, you would share the views expressed by the Canadian bar association a few days ago as to uncertainties of certain rights enumerated in clause 2?

Mr. VARCOE: Yes, I do.

Mr. DESCHATELETS: Would you think that this difficulty, or these uncertainties, should be clarified before the passing of this bill, in your experience?

Mr. VARCOE: Yes. I am glad you added that: in my experience, I would like to see somebody sit down and clear up some of these points in this bill.

Mr. DESCHATELETS: Was it not customary, in your experience with the Department of Justice, that when legal uncertainties of this kind arose, reference was made to the Supreme Court for an opinion?

Mr. VARCOE: There was a time when that was frequently done. I do not know whether or not the present government has any views about that.

Mr. DESCHATELETS: Were you here when—if I remember correctly—reference as to the right of the federal government to legislate on rentals was made in 1948?

Mr. VARCOE: Yes. that is one, yes. Then there was the chemicals reference earlier than that. And there was the margarine reference, and the reference respecting radio. There have been quite a number. It was, at one time, quite a common means of getting a determination of constitutional questions.

Mr. DESCHATELETS: Mr. Chairman, I have one last question on this item. In your experience, do you agree with some witnesses who have come here and testified that they would prefer a particular case to arise before clarifying the mutual powers of the provincial or the federal goverenments; or would you be in favour of our referring this matter to the Supreme Court right now?

Mr. VARCOE: I would prefer the latter course, myself, on that, from a personal point of view, because I think you would clarify it quickly then and get the problem disposed of. Uncertainty over a prolonged period of time is not a good thing in connection with the administration of justice in my opinion.

The CHAIRMAN: Are there any further questions?

Mr. FULTON: I would like to ask Mr. Varcoe one or two questions. Perhaps I was not very clear on what you said earlier but I think you said you would have thought this was the type of a bill which should be enacted under section 91(1) of the B.N.A. Act.

Mr. VARCOE: Well, mind you, I have not given very much consideration to that, but I thought a draftsman might take, say, one of the earlier resolutions and qualify it by limiting it to federal matters and enact it in the B.N.A. Act.

M. FULTON: Yes.

Mr. VARCOE: Perhaps you have given consideration to that.

Mr. FULTON: We have. I do not say that because we have considered it we are right. I would not take that position with you in a committee. However, I took it from you—perhaps I misunderstood you—that you would feel that the purview of what we are trying to do here is within federal competence because I understood you to say it is the sort of thing you would expect we might do under 91(1).

Mr. VARCOE: That is quite true. I do not know what the effect of section 2 is. I am a little puzzled about that. It does not carry along expressly the restriction that you find in clause 3 with reference to the matters being subject to being repealed, abolished or altered by the parliament of Canada.

Mr. FULTON: No. But I would suggest that the scheme of the thing is quite comprehensive. We declare what are the rights and freedoms which exist and then instruct the courts as to how they shall interpret the statutes in those respects.

Mr. VARCOE: I agree. I thought that possibly if you proceeded under 91(1) then you would have, of course, an entirely different type of bill to begin with.

Mr. FULTON: Yes.

Mr. VARCOE: I agree. I thought that possibly if you proceeded under other bill as you have said.

Mr. FULTON: However under 91(1) I suppose you would simply have a constitutional amendment saying that the parliament of Canada shall not legislate so as to deprive anybody, etc.

Mr. VARCOE: Yes.

Mr. FULTON: It seems to me it would apply only to statutes in the future.

Mr. VARCOE: I am bound to say that I have not thought of that.

Mr. FULTON: So that if the intention is to get the existing statutes in, in so far as you can do it and instruct the courts to interpret it with application to statutes previously enacted, does that not make it more difficult to do by a constitutional amendment?

Mr. VARCOE: I agree. There is a consideration there to be taken into account.

Mr. FULTON: The only other question I want to ask is in respect of the matter of a reference to the Supreme Court. You said that where there was uncertainty it was quite customary—and I agree—to refer the matter to the Supreme Court for an opinion. I think it is a fair question to ask if you would not agree that if the officers of the department were of the opinion that there was no uncertainty, and that what was being done was clearly within federal competence, that then there would be no reason to refer it?

Mr. VARCOE: That goes back to the margarine reference of years ago where I thought there was no doubt that the dominion legislation was good and it turned out I was completely wrong by the time we got to the Privy Council.

Mr. FULTON: Was there a reference?

Mr. VARCOE: Yes.

The CHAIRMAN: Thank you very much, Mr. Varcoe.

Gentlemen, before we adjourn I have a report of the subcommittee which I would like to present for adoption. The sucommittee met on Monday, July 18, and recommended as follows:

(1) That requests received for appearance before the committee be referred to the subcommittee for decision and recommendation.

(2) That written submissions from the Canadian chamber of commerce, the Waterloo chamber of commerce, the Canadian construction association, professor C. P. Wright, Q.C. of Ottawa, and a letter to the right honourable the Prime Minister from Mr. J. J. Robinette on behalf of the Canadian Daily Newspapers Publishers Association, be taken as read, copies distributed to members and be printed in the record of this day's proceedings.

(3) In view of the request by Mr. A. N. Carter, Q.C., Saint John, New Brunswick, that pages 259 to 262 of volume 37 of the Canadian Bar Review be referred to the committee, the article referred to, be taken as read, printed in the committee's proceedings, and copies distributed to members.

(4) That a letter received from Mr. Frank O'Hearn be filed with the committee.

(5) That the committee hear the following witnesses this week at the following times:

Wednesday—2.00 p.m.—Professor A. R. Lower, Queens university—
Representatives of the Christian Science Church

Thursday—9.30 a.m.—Professor O. E. Lang college of university of Saskatchewan

—2.00 p.m.—G. Eamon Park of Toronto

—8.00 p.m.—Professor Maxwell Cohen, McGill university

Mr. STEWART: Would you like a motion to that effect?

The CHAIRMAN: Yes.

Mr. STEWART: I would so move.

The CHAIRMAN: You move that this report be accepted?

Mr. STEWART: Yes.

Mr. BATTEN: I will second that.

The CHAIRMAN: The motion has been seconded by Mr. Batten. All those in favour? The motion agreed to.

Mr. BATTEN: Is the article suggested by Mr. Carter from New Brunswick a private article, or is it a representation of some organization.

The CHAIRMAN: Mr. Carter was referring to an article in the Canadian Bar Review which he wrote himself.

Mr. BATTEN: It is an article which he wrote himself?

The CHAIRMAN: Yes. He simply referred the committee to that article as being his representation.

Mr. DESCHATELETS: Could you indicate if we have any other witnesses in sight besides the ones you have already referred to?

The CHAIRMAN: There have been no definite conclusions that any other witnesses will appear before the committee but in order that we can make arrangements for any to appear I think it is desirable that the subcommittee get together to deal with this possibility.

Mr. STEWART: Are you calling a meeting of the steering committee now?

The CHAIRMAN: Yes, I would ask the members of the steering committee to remain for a moment or two. We have two other letters to consider.

THE CANADIAN CHAMBER OF COMMERCE
300 St. Sacrament Street
Montreal 1, Que.

July 14th, 1960

Mr. N. L. Spencer,
Chairman,
The Special Committee on Human Rights
and Fundamental Freedoms,
The House of Commons,
Ottawa, Canada.

Dear Mr. Spencer,

On behalf of the Executive Council of The Canadian Chamber of Commerce, I should like to place on record for the consideration of your Committee certain views with respect to Bill C-79, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms. We believe that the review of the Bill by your Committee is valuable and we hope that the following submission will be helpful in your examination of the proposed legislation.

The Executive Council welcomes the introduction of a Canadian Bill of Rights. Freedom is the central core of Canadian Chamber policy. This organization is constantly striving to advance public policies which protect existing freedoms of the citizen and which will widen the area of freedom in which

he lives. This means that the Chamber opposes those intervention and controls imposed by the State which are not absolutely necessary to protect a clearly defined public interest.

It is the view of the Council that the rights and freedoms set out in Bill C-79 are comprehensive. Yet it seems that there is a notable omission in this Bill of Rights purporting to protect individual freedom in a country which is highly industrialized. In this connection I would like to quote from Canadian Chamber policy as follows:

> The Chamber emphasizes that the democratic liberties of the citizen must be protected at all times and that every individual should be free to choose and follow the vocation of his choice regardless of his membership or non-membership in a labour union or employer's organization. . . .

Your Committee will no doubt agree that the right of an individual to earn a livelihood is as fundamental a right as any set out in Bill C-79. Consequently, the Executive Council urges that the Bill give due recognition to the fundamental nature of this right which belongs to every citizen. This right of a citizen to earn a livelihood at a vocation of his own choosing should be an unencumbered, unqualified freedom. The only circumstance in which this freedom to earn a livelihood should be limited is when a clearly defined public interest must be protected. After all, the earning of a livelihood is essential to life itself.

It may be argued by some that the inclusion in this Bill of the right of a citizen to earn a livelihood at a vocation of his choosing poses a threat to trade unions. Such, in the opinion of Council, is not the case. If vigilance is exercised in protecting the "freedom of assembly and association" clause in the Bill, the trade union movement is protected, as are all other such associations and organizations. Moreover, Canadian legislation prohibits any interference with the rights of employees to form and to join trade unions, rights of action which the Executive Council supports. Rather what is paramount surely is to protect the right of every citizen in the earning of his livelihood at a vocation of his choice, free of coercion from any body. It can be noted in this connection that according to an article in the April 1960 Labour Law Journal, this freedom is guaranteed in France, Austria, Belgium, Holland, Denmark, Greece, Luxembourg and Ireland which countries have prohibited by statutory regulations, compulsory membership in any Employees' Association. This freedom is also protected in approximately twenty States in the United States.

For the foregoing reasons, the Executive Council urges your Committee to seriously consider the inclusion of a clause in Bill C-79 which would give effect to the views expressed in this letter.

Yours very truly,

D. L. Morrell
General Manager.

THE WATERLOO CHAMBER OF COMMERCE
Waterloo, Ontario
Canada

JULY 15th, 1960

Mr. O. W. (Mike) Weichel, M.P.
House of Commons,
Ottawa, Ontario.

Dear Mike:

Re: Bill C79, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

While it is our view that the rights and freedoms set out in Bill C-79 are comprehensive, yet it seems that there is a notable omission in this Bill of Rights purporting to protect individual freedom in a country which is highly industrialized. In this connection I would like to quote from Canadian Chamber policy as follows:

> The Chamber emphasizes that the democratic liberties of the citizen must be protected at all times and that every individual should be free to choose and follow the vocation of his choice regardless of his membership or non-membership in a labour union or employer's organization—

You will no doubt agree that the right of an individual to earn a livelihood is as fundamental a right as any set out in Bill C-79. Consequently, we urge that the Bill give due recognition to the fundamental nature of this right which belongs to every citizen. This right of a citizen to earn a livelihood at a vocation of his own choosing should be an unencumbered, unqualified freedom. The only circumstance in which this freedom to earn a livelihood should be limited is when a clearly defined public interest must be protected. After all, the earning of a livelihood is essential to life itself.

It may be argued by some that the inclusion in this Bill of the right of a citizen to earn a livelihood at a vocation of his choosing poses a threat to trade unions. Such, in our opinion is not the case. If vigilance is exercised in protecting the "freedom of assembly and association" clause in the Bill, the trade union movement is protected, as are all other such associations and organization. Moreover, Canadian legislation prohibits any interference with the rights of employees to form and to join trade unions, rights of action which the Executive Council of the Canadian Chamber supports. Rather what is paramount surely is to protect the right of every citizen in the earning of his livelihood at a vocation of his choice, free of coercion from anybody. It can be noted in this connection that according to an article in the April 1960 Labour Law Journal, this freedom is guaranteed in France, Austria, Belgium, Holland, Denmark, Greece, Luxembourg and Ireland which countries have prohibited by statutory regulations, compulsory membership in any Employees' Association. This freedom is also protected in approximately twenty States in the United States.

For the foregoing reasons, the Officers of Waterloo Chamber of Commerce urge you to seriously consider the inclusion of a clause in Bill C-79 which would give effect to the views expressed in this letter.

Faithfully yours,

Waterloo Chamber of Commerce,
Clifford N. Hall,
Secretary-Manager.

CNH/hc

CANADIAN CONSTUCTION ASSOCIATION
Construction House, 151 O'Connor St.,
Ottawa 4, Canada

JULY 15, 1960.

Norman L. Spencer, Esq., M.P.,
Chairman,
The Special Committee on Human Rights
and Fundamental Freedoms,
The House of Commons,
Ottawa.

Dear Mr. Spencer:

The Canadian Construction Association wholeheartedly welcomes and supports the action of the Prime Minister and the Government in introducing Bill C-79, an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms. It is believed that its contents constitute a decided and valuable step towards the final achievement of the objective of safeguarding the individual freedoms of those residing in this country.

Our Association has for many years headed its own "Statement of Policies" with an item concerning freedom of the individual. The opening paragraph of the Statement adopted at our 42nd Annual General Meeting held at Calgary last January declares that

> The Canadian Construction Association believes that an economic and political system based on individual freedom and individual enterprise will operate to the greatest advantage and in the best interests of our country.

The Association would like to take this opportunity to express its views regarding one important aspect of the Bill now under consideration by your Committee. At its recent Summer Regional Meeting, the Association adopted a new Statement of Policy on Labour Relations. One sentence of this policy relates to the necessity to protect an important additional freedom of the individual not yet listed under Section 2 of the Bill. This sentence reads as follows:

> It should be made unlawful for a person or group to deny anyone the right to seek or accept employment or to deny anyone the right to employ him.

This Statement outlines a principle which Article 20 of the Universal Declaration of Human Rights, adapted and proclaimed by the General Assembly of the United Nations on December 10th, 1948 at Paris, recognizes when it states in perhaps even more direct terms that: "No one may be compelled to belong to an association".

The nature of the relationships which exist between management and organized labour or employer and employee are of the utmost importance to the welfare of Canada and apply directly to a large portion of our population. It is therefore strongly believed that this basic principle should be included in this important legislation coupled with the provision for "freedom of assembly and association".

In other words, the Bill (and other existing legislation) affords protection to employees on the right to join a union and against any employment policies discriminating against union members. There is, however, no equitable counterpart which affords protection to the individual to enable him to earn his living without belonging to a labour union. Experience has shown

that such a safeguard is necessary and that its absence leads to a serious curtailment of human rights. Surely the only criterion that should limit the free selection of a person's livelihood is that any qualifications set up in the public interest have been met, whether the individual is an employee, self-employed or an employer.

In the Association's submission of September 10, 1958, to the Honourable Michael Starr, Minister of Labour, concerning the Industrial Relations and Disputes Investigation Act, the opinion was expressed that compulsory membership in trade unions is incompatible with the professed democratic principles of trade unions and interferred with the "Freedom of the Individual". The ability of a union to bar an individual from earning a living in his chosen occupation, it was explained, constitutes a threat to the concept of democracy. It was recommended that all individuals should have a guaranteed right to choose to be—or not to be—a member of a trade union. Coercion, it was felt, should be condemned by trade unions as well as employers for the benefit of democratic freedom for the working man.

Inasmuch as this recommendation involves a basic question of human rights and civil liberties, our Association believes that such a provision should also form part of the Canadian Bill of Rights now that it is to be enacted. We strongly urge therefore, that your Special Committee recommend an appropriate amendment to Bill C-79 to guarantee the freedom of the individual to abstain from membership in an association if he so desires.

It is hoped that these representations commend themselves to you and your Committee.

Yours sincerely,

S. D. C. Chutter,
General Manager.

407, Island Park Drive,
Ottawa 3, Ontario.

18 JULY, 1960.

The Chairman,
Committe of the Bill on
Human Rights and Fundamental Freedoms,
House of Commons.

Dear Sir:-

On Thursday evening of last week your Committee did me the honour of giving a hearing to certain opinions of mine on the subject of the Bill now before you. I hope that I shall not seem unduly importunate if I ask for the privilege of making a second appearance before you in order to present the following further points.

1. *The Responsibilities that accompany Freedoms.*

I should like to suggest to the Committee that section 2 of the Bill, in which certain rights and freedoms are specified, should be amended in such a way as to declare that some at least, if not all, of these rights and freedoms carry with them duties and responsibilities to the community and the country. You will have remarked that the acceptance speech that was delivered on Friday night last by Senator Kennedy indicated that he was going to place special emphasis in his electoral campaign upon the duties of the citizens of his country; and for this reason it would seem to be peculiarly opportune

that a Canadian Bill of Rights (if it is to be enacted at the present time) should be, not merely a bill of *rights,* but rather a Bill of Rights and *Responsibilities.*

2. *The Employment Relationship.*

I have now seen the submission of the Canadian Chamber of Commerce to your Committee. I would not wish to challenge this submission in any way. But I should like briefly to place the following thought before the Committee; A thousand years or so ago a crime was regarded as the creation of an essentially personal relationship between the wrong-doer and the victim of the wrong; and it was only gradually realized that crime should be made the subject of public law. It may now be that, in the present state of our industrial society, the employment relationship should no longer be regarded as an essentially personal relationship, but should be made—much more than it is to-day—a matter of public law.

3. In continuation of the question I raised in my evidence about the powers and responsibilities of provincial Attorneys-general in relation to the principles of the Bill before your Committee, I should like (if only for the sake of the record) to call the attention of the Committee to the following resolution in the Quebec Resolutions of 1864 and the London Resolutions of 1866 on which the British North America Act was based:—

> 32. All Courts, judges and officers of the several provinces shall aid, assist, and obey the General Government in the exercise of its rights and powers, and for such purposes shall be held to be courts, judges, and officers of the General Government.

In the formal drafting of the bill for presentation to the United Kingdom Parliament which followed the adoption of the London Resolutions, this particular resolution was converted into nothing more than section 130 of the British North America Act. But it does still, I think, possess a certain significance at the present day.

4. In conclusion, I think I ought in fairness to say that, while I do in general question the desirability of the present Bill, it does appear to me that a declaration of some sort in favour of 'freedom of speech' and 'freedom of association' as both rights and responsibilities would be of considerable benefit to members of the teaching profession in Canada, in both schools and universities.

Yours faithfully,
(Signed) C. P. Wright.

MCCARTHY & MCCARTHY
Barristers, Solicitors, etc.

Canada Life Building
330 University Avenue
Toronto 1, Canada.

July 13, 1960.

The Right Honourable John G. Diefenbaker, Q.C., D.C.L.,
Prime Minister of Canada,
Ottawa, Ontario.

My Dear Prime Minister,

Re Canadian Daily Newspaper Publishers Association
Re Bill of Rights

First, may I express to you the deep gratitude of the Canadian Daily Newspaper Publishers Association for your courtesy in extending so much time to us this morning when we were in Ottawa. We all enjoyed thoroughly the interesting discussion about the Bill of Rights and I wish to reiterate that the Association is not approaching the matter in any spirit of criticism but rather in an attitude of co-operation.

The suggestion of the Association is that section 2 of the Bill be redrafted so that it will read as follows:

> 2. It is hereby recognized and declared that in Canada there have always existed and shall continue to exist human rights and fundamental freedoms. Parliament shall enact no law to abrogate, abridge or infringe
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> (*b*) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex;
> (*c*) freedom of religion;
> (*d*) freedom of speech;
> (*e*) freedom of assembly and association; and
> (*f*) freedom of the press.

Parliament can, of course, at any future time, either expressly or by necessary implication, repeal the Bill of Rights in whole or in part, but the view of the Association is that if section 2 is worded as suggested above, the psychological effect on a subsequent parliament would be more profound and less likely to lead in future years to any partial or complete repeal of the Bill of Rights.

We fully appreciate the significance of your observation that our suggestion as to the redrafting of section 2 might interfere with the scope and operation of section 3 of the Bill. However, it seems to us that section 3 deals with the interpretation and construction of a statute and that section 2, as redrafted above, would go somewhat further and would prohibit the enactment of laws purporting to abrogate, abridge or infringe the fundamental freedoms. In short, our suggestion is that the redrafting of section 2 would further emphasize the protection of the fundamental freedoms, would likely have a more profound influence on subsequent parliaments who might be disposed to repeal the Bill in whole or in part and also would have the advantage of using prohibitory language found in bills of rights in other constitutions.

We appreciate most sincerely your suggestion that you will discuss the matter further with the law officers of the Crown.

Yours faithfully,

(Signed) John J. Robinette.

Letter from A. N. Carter, Q.C., Member of the Special Advisory Committee to the Civil Liberties Section, Canadian Bar Association to the Editor of the Canadian Bar Revue appearing on pages 259 to 262 inclusive, Volume 37, Canadian Bar Revue

At the outset I should like to congratulate Mr. Mundell on the admirable summary he has prepared of the points raised by the proposed Canadian Bill of Rights. That I do not agree with either his approach or his recommendations must not detract from my sincere admiration of the ability, learning and fairness with which he has prepared his memorandum.

I cannot concur in the view that as the proposed Bill "appears now to be settled government policy", we, as lawyers, should accept it as inevitable, refrain from considering its need and value and confine ourselves to suggestions for its improvement.

I, for one, regard the Bill as unnecessary and as liable to cause uncertainty or undue rigidity in the law and, therefore, as objectionable. In expressing my views I confine myself to the common-law provinces, as I have no knowledge of the law in force in Quebec.

The Bill, notwithstanding its more impressive title, is simply a Bill for the protection of certain private rights. There is no need for protecting such private rights in Canada: they are already adequately protected by the law and by effective legal remedies. Canadian courts are vigilant to safeguard those rights as has been shown in recent years by the cases cited in paragraphs 30, 31 and 32 of Mr. Mundell's memorandum, viz: re The Alberta Statutes, (1938) S.C.R. 100, the Jehovah Witnesses case (Saumur v. City of Quebec, (1953) 2 S.C.R. 29), and the Padlock Law case (Switzman v. Elbling and A.G. of Quebec, (1957) S.C.R. 285), and also by the recent decision of the Supreme Court of Canada in the Roncarelli case. Two recent cases in England involving invasions of such private rights would undoubtedly be followed in Canada. I refer to Constantine v. Imperial Hotel, (1944) K.B. 693, where the palintiff, a man of colour, recovered damages from the defendant hotel for refusing him as a guest; and to Christie v. Leachinsky, (1947) A.C. 573, where it was held that in normal circumstances an arrest without warrant either by a policeman or a private person, can be justified only if it is an arrest on a charge made known to the person arrested.

These private rights have always been the special care of the courts, and even when the right to trial by jury has been limited in civil cases, that right has been preserved inviolate in cases of false imprisonment, malicious prosecution, libel and slander. These rights are the outcome of the ordinary law of the land enforced by the courts and safeguarded by trial by jury.

But none of these rights as they exist today is absolute, whereas in the proposed Bill in most instances they are expressed to be absolute. In their nature they are necessarily limited, otherwise injustice will result. Freedom of speech is subject to the limitations that you must not defame your fellows or communicate what is obscene or seditious. Freedom of the press, although designated separately in the Bill, is essentially an instance of freedom of speech. The freedom of assembly and association is merely the result of the views taken by the courts of the individual liberty of the person, and the individual liberty of speech, but in exercising the right of assembly the individual must not commit a trespass or make statements that are libellous or seditious, nor may the object of the assembly be to break the peace or commit a crime. The right by the ordinary law is, therefore, necessarily qualified. Similarly "the right of the individual to life, liberty, security of person and enjoyment of property, and the right not to be deprived thereof except by due process of law" is expressly qualified in the Bill by the concluding six words, and is simply a description

of the existing private right of every person in Canada. I read the concluding words "except by due process of law" as meaning "according to law". I do not understand what is the significance of the alternative meaning suggested in Mr. Mundell's memorandum, viz: "According to certain basic standards of justice". I do not see how the right of assembly and association is extended or its protection increased by its inclusion in a statute: if Parliament should decide to change the law affecting the right it could do so notwithstandng the enactment of the proposed Bll, as it would be doing so "by due process of law".

"The right of the individual to protection of law without discrimination by reason of race, national origin, colour, religion or sex" already exists. Surely it is not intended by such phraseology to abandon control over immigration or to extend to Indians the full rights of citizens.

Although the reasons of the members of the Supreme Court of Canada differed in the Jehovah Witnesses case the outcome recognized the right of the individual to practise the religion of his choice in Canada.

What I have sought to emphasize is that the private rights of individuals in Canada designated in the proopsed Bill of Rights are amply protected by the existing law, and that the enactment of the Bill would add nothing to that protection, and is therefore unnecessary. Moreover, a survey of the rights as established by the existing law shows that the rights are necessarily qualified as a result of the experience of centuries, whereas in the proposed Bill of Rights they are described in nearly every case as absolute and without qualification. It will be said that qualifications are implied: if so, what are they? If they are the existing qualifications, then the law as it exists will be calcified. Its flexibility will be lost, and, however public opinion may change, no change in the law relating to such private rights may be made without amendment to the Bill of Rights.

How much better it would be to trust Parliament and the courts as they have been trusted in the past to modify the law relating to such private rights as circumstances and public opinion require, and not put this part of the law in a strait jacket of the model of 1959. It will be a sorry day for Canada when Parliament is so distrustful of itself and its successors that it surrenders its power to change the law. Of course, the idea is absurd. If Parliament in the future should decide that the law should be changed, it would simply preface its enactment by the formula "Notwithstanding any thing contained in the Canadian Bill of Rights". The prohibition in the Bill against abrogation, abridgement and infringement of rights, in other words, is idle, and to the layman misleading.

I emphasize the great respect shown by Canadian legislative bodies, the courts and the executive for the protection of fundamental private rights. There has been one, and so far as I know only one, serious departure, and that was in the treatment given the accused persons investigated preliminary to the spy trials, so called, in 1946. The methods used were made possible, however, only by the War Measures Act and the regulations passed under it. Such extraordinary powers are undoubtedly needed in times of war, invasion and insurrection and I do not criticize their retention under the proposed Bill. What I do stress is that the Bill if enacted, will be useless to prevent a repetition in like circumstances, of the methods used in dealing with accused persons in 1946.

I have made clear that I am opposed to the enactment of the proposed Bill even if expressly confined as at present to laws enacted by, or subject to the legislative authority of the Parliament of Canada. Still more am I opposed to an extension of the terms of the Bill to override, or rather purport to override provincial legislation that infringes upon the rights and freedoms therein expressed. If such legislation were valid it would be unnecessary for the reasons

already set out in full, and it would substitute either unqualified rights for the delicately modulated rights fashioned by the courts and legislatures after centuries of experience, or rights with implied qualifications fixed in the model of today and incapable of adaptation to meet changing circumstances and public opinion.

Such an attempt by Parliament to appropriate to itself a large part of the subject matter of civil rights expressly assigned to the legislative powers of the provinces would be resented fiercely as an invasion unwarranted either by the B.N.A. Act or by any authoritative decision of the courts. For I repeat that these rights without exception are private rights inherent in the individual and the outcome of the ordinary law of the land. That they are frequently considered in text books on constitutional law does not alter their nature. "There is no hard and fast definition of constitutional law. In the generally accepted use of the term it means the rules of law, including binding conventions which regulate the structure of the principal organs of government, and their relationship to each other and determine their principal functions". (Wade and Philips, Constitutional Law, 3rd. ed., p. 2). Although the constitutional lawyer has a particular interest in the means which the law provides for safeguarding individual liberty, whether of the person or speech, the rights arise out of and are protected by the ordinary law and for the most part fall directly within the category of civil rights designated in section 92(13) of the B.N.A. Act. In so far, of course, as they are protected by the criminal law they are subject to the jurisdiction of Parliament, but this is because criminal law is so allotted by section 91(27) and not because of any vague, indefinite constitutional doctrine which some would read into the B.N.A. Act. Civil rights as a class of subject assigned exclusively to the legislatures of the provinces is excepted from the power given to Parliament to amend the constitution of Canada by 1949, c. 81 (U.K.). I do not think that this Council should recommend that the Canadian Parliament should attempt any such invasion of provincial legislative powers.

The suggestion that the Bill of Rights should be enacted by the Parliament of Great Britain as part of the B.N.A. Act is even more objectionable than having it enacted in its present form by the Parliament of Canada. If it were made part of the B.N.A. Act it would be beyond the power of the Canadian Parliament to amend it, and the law of Canada would either be distorted by the absolute rights designated in section 2, or have those rights as qualified today fixed on future generations if the courts were disposed to read those qualifications into the Bill. This would, indeed, be an abdication of its powers by the Canadian Parliament, and a clear admission that in future it should not be trusted to legislate soundly with regard to so-called fundamental private rights. No action of Parliament in the past has warranted such an admission.

It will be apparent that I do not support the first two recommedations set out in Mr. Mundell's memorandum, although I am in agreement with the third that the language of the Bill requires clarification, particularly as suggested in paragraphs 42 to 44 inclusive.

This committee stands adjourned until 2 p.m. tomorrow afternoon.

—The committee adjourned.

APPENDIX "A"

CONVENTION
FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS
AND
PROTOCOL

CONVENTION
DE SAUVEGARDE DES DROITS DE L'HOMME
ET DES LIBERTÉS FONDAMENTALES
ET
PROTOCOLE ADDITIONNEL

CONVENTION

for the Protection of Human Rights and Fundamental Freedoms

CONVENTION

de sauvegarde des Droits de l'homme et des libertés fondamentales

The Government signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:

ARTICLE 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

ARTICLE 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivaton of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

Les Gouvernements signataires, Membres du Conseil de l'Europe,

Considérant la Déclaration Universelle des Droits de l'homme, proclamée par l'Assemblée Générale des Nations Unies le 10 décembre 1948;

Considérant que cette Déclaration tend à assurer la reconnaissance et l'application universelles et effectives des droits qui y sont énoncés;

Considérant que le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses Membres, et que l'un des moyens d'atteindre ce but est la sauvegarde et le développement des Droits de l'homme et des libertés fondamentales;

Réaffirmant leur profond attachement à ces libertés fondamentales qui constituent les assises mêmes de la justice et de la paix dans le monde et dont le maintien repose essentiellement sur un régime politique véritablement démocratique, d'une part, et, d'autre part, sur une conception commune et un commun respect des Droits de l'homme dont ils se réclament;

Résolus, en tant que gouvernements d'États européens animés d'un même esprit et possédant un patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de prééminence du droit, à prendre les premières mesures propres à assurer la garantie collective de certains des droits énoncés dans la Déclaration Universelle;

Sont convenus de ce qui suit:

ARTICLE 1

Les Hautes Parties Contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au Titre I de la présente Convention.

TITRE I

ARTICLE 2

1. Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi.

2. La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument nécessaire:

a) pour assurer la défense de toute personne contre la violence illégale;

b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue;

c) pour réprimer, conformément à la loi, une émeute ou une insurrection.

ARTICLE 3

Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants.

ARTICLE 4

1. Nul ne peut être tenu en esclavage ni en servitude.

2. Nul ne peut être astreint à accomplir un travail forcé ou obligatoire.

(3) For the purpose of this Article the term "forced or compulsory labour" shall not include:

(*a*) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(*b*) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

(*c*) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(*d*) any work or service which forms part of normal civic obligations.

ARTICLE 5

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(*a*) the lawful detention of a person after conviction by a competent court;

(*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(*c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (*c*) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

3. N'est pas considéré comme "travail forcé ou obligatoire" au sens du présent article:

a) tout travail requis normalement d'une personne soumise à la détention dans les conditions prévues par l'article 5 de la présente Convention, ou durant sa mise en liberté conditionnelle;

b) tout service de caractère militaire ou, dans le cas d'objecteurs de conscience dans les pays où l'objection de conscience est reconnue comme légitime, à un autre service à la place du service militaire obligatoire;

c) tout service requis dans le cas de crises ou de calamités qui menacent la vie ou le bien-être de la communauté;

d) tout travail ou service formant partie des obligations civiques normales.

ARTICLE 5

1. Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales:

a) s'il est détenu régulièrement après condamnation par un tribunal compétent;

b) s'il a fait l'objet d'une arrestation ou d'une détention régulières pour insoumission à une ordonnance rendue, conformément à la loi, par un tribunal ou en vue de garantir l'exécution d'une obligation prescrite par la loi;

c) s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci;

d) s'il s'agit de la détention régulière d'un mineur, décidée pour son éducation surveillée ou de sa détention régulière, afin de le traduire devant l'autorité compétente;

e) s'il s'agit de la détention régulière d'une personne susceptible de propager une maladie contagieuse, d'un aliéné, d'un alcoolique, d'un toxicomane ou d'un vagabond;

f) s'il s'agit de l'arrestation ou de la détention régulières d'une personne pour l'empêcher de pénétrer irrégulièrement dans le territoire, ou contre laquelle une procédure d'expulsion ou d'extradition est en cours.

2. Toute personne arrêtée doit être informée, dans le plus court délai et dans une langue qu'elle comprend, des raisons de son arrestation et de toute accusation portée contre elle.

3. Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1 *c*) du présent article, doit être aussitôt traduite devant un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires et a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure. La mise en liberté peut être subordonnée à une garantie assurant la comparution de l'intéressé à l'audience.

4. Toute personne privée de sa liberté par arrestation ou détention a le droit d'introduire un recours devant un tribunal, afin qu'il statue à bref délai sur la légalité de sa détention et ordonne sa libération si la détention est illégale.

5. Toute personne victime d'une arrestation ou d'une détention dans des conditions contraires aux dispositions de cet article a droit à réparation.

ARTICLE 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 6

1. Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice.

2. Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.

3. Tout accusé a droit notamment à:

a) être informé, dans le plus court délai, dans une langue qu'il comprend et d'une manière détaillée, de la nature et de la cause de l'accusation portée contre lui;

b) disposer du temps et des facilités nécessaires à la préparation de sa défense;

c) se défendre lui-même ou avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office, lorsque les intérêts de la justice l'exigent;

d) interroger ou faire interroger les témoins à charge et obtenir la convocation et l'interrogation des témoins à décharge dans les mêmes conditions que les témoins à charge;

e) se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience.

ARTICLE 7

1. Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise.

2. Le présent article ne portera pas atteinte au jugement et à la punition d'une personne coupable d'une action ou d'une omission qui, au moment où elle a été commise, était criminelle d'après les principes généraux de droit reconnus par les nations civilisées.

ARTICLE 8

1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui.

ARTICLE 9

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

ARTICLE 11

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Men and women of marriageable age have the right to marry and to found a family, according the the national laws governing the exercise of this right.

ARTICLE 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 9

1. Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.

2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui.

ARTICLE 10

1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les États de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.

2. L'exercise de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions, prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.

ARTICLE 11

1. Toute personne a droit à la liberté de réunion pacifique et à la liberté d'association, y compris le droit de fonder avec d'autres des syndicats et de s'affilier à des syndicats pour la défense de ses intérêts.

2. L'exercice de ces droits ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. Le présent article n'interdit pas que des restrictions légitimes soient imposées à l'exercice de ces droits par les membres des forces armées, de la police ou de l'administration de l'État.

ARTICLE 12

A partir de l'âge nubile, l'homme et la femme ont le droit de se marier et de fonder une famille selon les lois nationales régissant l'exercice de ce droit.

ARTICLE 13

Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles.

ARTICLE 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II

ARTICLE 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

(1) A European Commission of Human Rights hereinafter referred to as "the Commission";

(2) A European Court of Human Rights, hereinafter referred to as "the Court".

ARTICLE 14

La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

ARTICLE 15

1. En cas de guerre ou en cas d'autre danger public menaçant la vie de la nation, toute Haute Partie Contractante peut prendre des mesures dérogeant aux obligations prévues par le présente Convention, dans la stricte mesure où la situation l'exige et à la condition que ces mesures ne soient pas en contradiction avec les autres obligations découlant du droit international.

2. La disposition précédente n'autorise aucune dérogation à l'article 2, sauf pour le cas de décès résultant d'actes licites de guerre, et aux articles 3, 4 (paragraphe 1) et 7.

3. Toute Haute Partie Contractante qui exerce ce droit de dérogation tient le Secrétaire Général du Conseil de l'Europe pleinement informé des mesures prises et des motifs qui les ont inspirées. Elle doit également informer le Secrétaire Général du Conseil de l'Europe de la date à laquelle ces mesures ont cessé d'être en vigueur et les dispositions de la Convention reçoivent de nouveau pleine application.

ARTICLE 16

Aucune des dispositions des articles 10, 11 et 14 ne peut être considérée comme interdisant aux Hautes Parties Contractantes d'imposer des restrictions à l'activité politique des étrangers.

ARTICLE 17

Aucune des dispositions de la présente Convention ne peut être interprétée comme impliquant pour un État, un groupement ou un individu, un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans la présente Convention ou à des limitations plus amples de ces droits et libertés que celles prévues à ladite Convention.

ARTICLE 18

Les restrictions qui, aux termes de la présente Convention, sont apportées auxdits droits et libertés ne peuvent être appliquées que dans le but pour lequel elles ont été prévues.

TITRE II

ARTICLE 19

Afin d'assurer le respect des engagements résultant pour les Hautes Parties Contractantes de la présente Convention, il est institué:

a) une Commission européenne des Droits de l'homme, ci-dessous nommée «la Commission»;

b) une Cour européenne des Droits de l'homme, ci-dessous nommée «la Cour».

SECTION III

ARTICLE 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

ARTICLE 21

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Commission, and in filling casual vacancies.

ARTICLE 22

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

(2) The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

(3) A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

ARTICLE 23

The members of the Commission shall sit on the Commission in their individual capacity.

ARTICLE 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

ARTICLE 25

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

TITRE III

ARTICLE 20

La Commission se compose d'un nombre de membres égal à celui des Hautes Parties Contractantes. La Commission ne peut comprendre plus d'un ressortissant du même État.

ARTICLE 21

1. Les membres de la Commission sont élus par le Comité des Ministres à la majorité absolue des voix, sur une liste de noms dressée par le Bureau de l'Assemblée Consultative; chaque groupe de représentants des Hautes Parties Contractantes à l'Assemblée Consultative présente trois candidats dont deux au moins seront de sa nationalité.

2. Dans la mesure où elle est applicable, la même procédure est suivie pour compléter la Commission au cas où d'autres États deviendraient ultérieurement Parties à la présente Convention, et pour pourvoir aux sièges devenus vacants.

ARTICLE 22

1. Les membres de la Commission sont élus pour une durée de six ans. Ils sont rééligibles. Toutefois, en ce qui concerne les membres désignés à la première élection, les fonctions de sept membres prendront fin au bout de trois ans.

2. Les membres dont les fonctions prendront fin au terme de la période initiale de trois ans, sont désignés par tirage au sort effectué par le Secrétaire Général du Conseil de l'Europe immédiatement après qu'il aura été procédé à la première élection.

3. Le membre de la Commission élu en remplacement d'un membre dont le mandat n'est pas expiré achève le terme du mandat de son prédécesseur.

4. Les membres de la Commission restent en fonctions jusqu'à leur remplacement. Après ce remplacement, ils continuent de connaître des affaires dont ils sont déjà saisis.

ARTICLE 23

Les membres de la Commission siègent à la Commission à titre individuel.

ARTICLE 24

Toute Partie Contractante peut saisir la Commission, par l'intermédiaire du Secrétaire Général du Conseil de l'Europe, de tout manquement aux dispositions de la présente Convention qu'elle croira pouvoir être imputé à une autre Partie Contractante.

ARTICLE 25

1. La Commission peut être saisie d'une requête adressée au Secrétaire Général du Conseil de l'Europe par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers, qui se prétend victime d'une violation par l'une des Hautes Parties Contractantes des droits reconnus dans la présente Convention, dans le cas où la Haute Partie Contractante mise en cause a déclaré reconnaître la compétence de la Commission dans cette matière. Les Hautes Parties Contractantes ayant souscrit une telle déclaration s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit.

2. Ces déclarations peuvent êtres faites pour une durée déterminée.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

ARTICLE 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

ARTICLE 27

(1) The Commission shall not deal with any petition submitted under Article 25 which

(*a*) is anonymous, or

(*b*) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

ARTICLE 28

In the event of the Commission accepting a petition referred to it:

(*a*) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(*b*) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

ARTICLE 29

(1) The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

(2) Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

(3) The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

ARTICLE 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and the solution reached.

3. Elles sont remises au Secrétaire Général du Conseil de l'Europe, qui en transmet copies aux Hautes Parties Contractantes et en assure la publication.

4. La Commission n'exercera la compétence qui lui est attribuée par le présent article que lorsque six Hautes Parties Contractantes au moins se trouveront liées par la déclaration prévue aux paragraphes précédents.

ARTICLE 26

La Commission ne peut être saisie qu'après l'épuisement des voies de recours internes, tel qu'il est entendu selon les principes de droit international généralement reconnus et dans le délai de six mois, à partir de la date de la décision interne définitive.

ARTICLE 27

1. La Commission ne retient aucune requête introduite par application de l'article 25, lorsque:

a) elle est anonyme;

b) elle est essentiellement la même qu'une requête précédemment examinée par la Commission ou déjà soumise à une autre instance internationale d'enquête ou de règlement et si elle ne contient pas de faits nouveaux.

2. La Commission déclare irrecevable toute requête introduite par application de l'article 25, lorsqu'elle estime la requête incompatible avec les dispositions de la présente Convention, manifestement mal fondée ou abusive.

3. La Commission rejette toute requête qu'elle considère comme irrecevable par application de l'article 26.

ARTICLE 28

Dans le cas où la Commission retient la requête:

a) afin d'établir les faits, elle procède à un examen contradictoire de la requête avec les représentants des parties et, s'il y a lieu, à une enquête pour la conduite efficace de laquelle les États intéressés fourniront toutes facilités nécessaires, après échange de vues avec la Commission;

b) elle se met à la disposition des intéressés en vue de parvenir à un règlement amiable de l'affaire qui s'inspire du respect des Droits de l'homme, tel que le reconnaît la présente Convention.

ARTICLE 29

1. La Commission remplit les fonctions prévues à l'article 28 au moyen d'une sous-commission composée de sept membres de la Commission.

2. Chaque intéressé peut désigner un membre de son choix pour faire partie de la sous-commission.

3. Les autres membres sont désignés par tirage au sort, conformément aux dispositions prévues par le règlement intérieur de la Commission.

ARTICLE 30

Si elle parvient à obtenir un règlement amiable, conformément à l'article 28, la sous-commission dresse un rapport qui est transmis aux États intéressés, au Comité des Ministres et au Secrétaire Général du Conseil de l'Europe, aux fins de publication. Ce rapport se limite à un bref exposé des faits et de la solution adoptée.

ARTICLE 31

(1) If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

(2) The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

(3) In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

ARTICLE 32

(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

(2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decisions of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

ARTICLE 33

The Commission shall meet in camera.

ARTICLE 34

The Commission shall take its decisions by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

ARTICLE 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

ARTICLE 36

The Commission shall draw up its own rules of procedure.

ARTICLE 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

SECTION IV

ARTICLE 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

ARTICLE 31

1. Si une solution n'a pu intervenir, la Commission rédige un rapport dans lequel elle constate les faits et formule un avis sur le point de savoir si les faits constatés révèlent, de la part de l'État intéressé, une violation des obligations qui lui incombent aux termes de la Convention. Les opinions de tous les membres de la Commission sur ce point peuvent être exprimées dans ce rapport.

2. Le rapport est transmis au Comité des Ministres; il est également communiqué aux États intéressés, qui n'ont pas la faculté de le publier.

3. En transmettant le rapport au Comité des Ministres, la Commission peut formuler les propositions qu'elle juge appropriées.

ARTICLE 32

1. Si, dans un délai de trois mois à dater de la transmission au Comité des Ministres du rapport de la Commission, l'affaire n'est pas déférée à la Cour par application de l'article 48 de la présente Convention, le Comité des Ministres prend, par un vote à la majorité des deux tiers des représentants ayant le droit de siéger au Comité, une décision sur la question de savoir s'il y a eu ou non une violation de la Convention.

2. Dans l'affirmative, le Comité des Ministres fixe un délai dans lequel la Haute Partie Contractante intéressée doit prendre les mesures qu'entraîne la décision du Comité des Ministres.

3. Si la Haute Partie Contractante intéressée n'a pas adopté des mesures satisfaisantes dans le délai imparti, le Comité des Ministres donne à sa décision initiale, par la majorité prévue au paragraphe 1 ci-dessus, les suites qu'elle comporte et publie le rapport.

4. Les Hautes Parties Contractantes s'engagent à considérer comme obligatoire pour elles toute décision que le Comité des Ministres peut prendre en application des paragraphes précédents.

ARTICLE 33

La Commission siège à huis clos.

ARTICLE 34

Les décisions de la Commission sont prises à la majorité des membres présents et votant; les décisions de la sous-commission sont prises à la majorité de ses membres.

ARTICLE 35

La Commission se réunit lorsque les circonstances l'exigent. Elle est convoquée par le Secrétaire Général du Conseil de l'Europe.

ARTICLE 36

La Commission établit son règlement intérieur.

ARTICLE 37

Le secrétariat de la Commission est assuré par le Secrétaire Général du Conseil de l'Europe.

TITRE IV

ARTICLE 38

La Cour européenne des Droits de l'homme se compose d'un nombre de juges égal à celui des Membres du Conseil de l'Europe. Elle ne peut comprendre plus d'un ressortissant d'un même État.

ARTICLE 39

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

ARTICLE 40

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four more members shall expire at the end of six years.

(2) The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

(3) A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

ARTICLE 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

ARTICLE 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

ARTICLE 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an ex officio member of the Chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

ARTICLE 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

ARTICLE 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

ARTICLE 39

1. Les membres de la Cour sont élus par l'Assemblée Consultative à la majorité des voix exprimées sur une liste de personnes présentée par les Membres du Conseil de l'Europe, chacun de ceux-ci devant présenter trois candidats, dont deux au moins de sa nationalité.

2. Dans la mesure où elle est applicable, la même procédure est suivie pour compléter la Cour en cas d'admission de nouveaux Membres au Conseil de l'Europe, et pour pourvoir aux sièges devenus vacants.

3. Les candidats devront jouir de la plus haute considération morale et réunir les conditions requises pour l'exercice de hautes fonctions judiciaires ou être des jurisconsultes possédant une compétence notoire.

ARTICLE 40

1. Les membres de la Cour sont élus pour une durée de neuf ans. Ils sont rééligibles. Toutefois, en ce qui concerne les membres désignés à la première élection, les fonctions de quatre des membres prendront fin au bout de trois ans, celles de quatre autres membres prendront fin au bout de six ans.

2. Les membres dont les fonctions prendront fin au terme des périodes initiales de trois et six ans, sont désignés par tirage au sort effectué par le Secrétaire Général du Conseil de l'Europe, immédiatement après qu'il aura été procédé à la première élection.

3. Le membre de la Cour élu en remplacement d'un membre dont le mandat n'est pas expiré achève le terme du mandat de son prédécesseur.

4. Les membres de la Cour restent en fonctions jusqu'à leur remplacement. Après ce remplacement, ils continuent de connaître des affaires dont ils sont déjà saisis.

ARTICLE 41

La Cour élit son Président et son Vice-Président pour une durée de trois ans. Ceux-ci sont rééligibles.

ARTICLE 42

Les membres de la Cour reçoivent une indemnité par jour de fonctions, à fixer par le Comité des Ministres.

ARTICLE 43

Pour l'examen de chaque affaire portée devant elle, la Cour est constituée en une Chambre composée de sept juges. En feront partie d'office le juge ressortissant de tout État intéressé ou, à défaut, une personne de son choix pour siéger en qualité de juge; les noms des autres juges sont tirés au sort, avant le début de l'examen de l'affaire, par les soins du Président.

ARTICLE 44

Seules les Hautes Parties Contractantes et la Commission ont qualité pour se présenter devant la Cour.

ARTICLE 45

La compétence de la Cour s'étend à toutes les affaires concernant l'interprétation et l'application de la présente Convention que les Hautes Parties Contractantes ou la Commission lui soumettront, dans les conditions prévues par l'article 48.

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ARTICLE 46

(1) Any of the High Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

(3) These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

ARTICLE 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

ARTICLE 48

The following may bring a case before the Court provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

(*a*) the Commission;

(*b*) a High Contracting Party whose national is alleged to be a victim;

(*c*) a High Contracting Party which referred the case to the Commission;

(*d*) a High Contracting Party against which the complaint has been lodged

ARTICLE 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ARTICLE 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 51

(1) Reasons shall be given for the judgment of the Court.

(2) If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 52

The judgment of the Court shall be final.

ARTICLE 46

1. Chacune des Hautes Parties Contractantes peut, à n'importe quel moment, déclarer reconnaître comme obligatoire de plein droit et sans convention spéciale, la juridiction de la Cour sur toutes les affaires concernant l'interprétation et l'application de la présente Convention.

2. Les déclarations ci-dessus visées pourront être faites purement et simplement ou sous condition de réciprocité de la part de plusieurs ou de certaines autres Parties Contractantes ou pour une durée déterminée.

3. Ces déclarations seront remises au Secrétaire Général du Conseil de l'Europe qui en transmettra copie aux Hautes Parties Contractantes.

ARTICLE 47

La Cour ne peut être saisie d'une affaire qu'après la constatation, par la Commission, de l'échec du règlement amiable et dans le délai de trois mois prévu à l'article 32.

ARTICLE 48

A la condition que la Haute Partie Contractante intéressée, s'il n'y en a qu'une, ou les Hautes Parties Contractantes intéressées, s'il y en a plus d'une, soient soumises à la juridiction obligatoire de la Cour ou, à défaut, avec le consentement ou l'agrément de la Haute Partie Contractante intéressée, s'il n'y en a qu'une, ou des Hautes Parties Contractantes intéressées, s'il y en a plus d'une, la Cour peut être saisie:

a) par la Commission;

b) par une Haute Partie Contractante dont la victime est le ressortissant;

c) par une Haute Partie Contractante qui a saisi la Commission;

d) par une Haute Partie Contractante mise en cause.

ARTICLE 49

En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide.

ARTICLE 50

Si la décision de la Cour déclare qu'une décision prise ou une mesure ordonnée par une autorité judiciaire ou toute autre autorité d'une Partie Contractante se trouve entièrement ou partiellement en opposition avec des obligations découlant de la présente Convention, et si le droit interne de ladite Partie ne permet qu'imparfaitement d'effacer les conséquences de cette décision ou de cette mesure, la décision de la Cour accorde, s'il y a lieu, à la partie lésée une satisfaction équitable.

ARTICLE 51

1. L'arrêt de la Cour est motivé.

2. Si l'arrêt n'exprime pas en tout ou en partie l'opinion unanime des juges, tout juge aura le droit d'y joindre l'exposé de son opinion individuelle.

ARTICLE 52

L'arrêt de la Cour est définitif.

ARTICLE 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

ARTICLE 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

ARTICLE 55

The Court shall draw up its own rules and shall determine its own procedure.

ARTICLE 56

(1) The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.

(2) No case can be brought before the Court before this election.

SECTION V

ARTICLE 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

ARTICLE 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

ARTICLE 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

ARTICLE 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

ARTICLE 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 53

Les Hautes Parties Contractantes s'engagent à se conformer aux décisions de la Cour dans les litiges auxquels elles sont parties.

ARTICLE 54

L'arrêt de la Cour est transmis au Comité des Ministres qui en surveille l'exécution.

ARTICLE 55

La Cour établit son règlement et fixe sa procédure.

ARTICLE 56

1. La première élection des membres de la Cour aura lieu après que les déclarations des Hautes Parties Contractantes visées à l'article 46 auront atteint le nombre de huit.
2. La Cour ne peut être saisie avant cette élection.

TITRE V

ARTICLE 57

Toute Haute Partie Contractante fournira sur demande du Secrétaire Général du Conseil de l'Europe les explications requises sur la manière dont son droit interne assure l'application effective de toutes les dispositions de cette Convention.

ARTICLE 58

Les dépenses de la Commission et de la Cour sont à la charge du Conseil de l'Europe.

ARTICLE 59

Les membres de la Commission et de la Cour jouissent, pendant l'exercice de leurs fonctions, des privilèges et immunités prévus à l'article 40 du Statut du Conseil de l'Europe et dans les Accords conclus en vertu de cet article.

ARTICLE 60

Aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux Droits de l'homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toute Partie Contractante ou à toute autre Convention à laquelle cette Partie Contractante est partie.

ARTICLE 61

Aucune disposition de la présente Convention ne porte atteinte aux pouvoirs conférés au Comité des Ministres par le Statut du Conseil de l'Europe.

ARTICLE 62

Les Hautes Parties Contractantes renoncent réciproquement, sauf compromis spécial, à se prévaloir des traités, conventions ou déclarations existant entre elles, en vue de soumettre, par voie de requête, un différend né de l'interprétation ou de l'application de la présente Convention à un mode de règlement autre que ceux prévus par ladite Convention.

ARTICLE 63

(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

(2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

(3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

(4) Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organizations or groups of individuals in accordance with Article 25 of the present Convention.

ARTICLE 64

(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 65

(1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.

(2) Such a denounciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

(3) Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

(4) The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

ARTICLE 66

(1) This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.

(2) The present Convention shall come into force after the deposit of ten instruments of ratification.

(3) As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

(4) The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

ARTICLE 63

1. Tout Etat peut, au moment de la ratification ou à tout autre moment par la suite, déclarer, par notification adressée au Secrétaire Général du Conseil de l'Europe, que la présente Convention s'appliquera à tous les territoires ou à l'un quelconque des territoires dont il assure les relations internationales.

2. La Convention s'appliquera au territoire ou aux territoires désignés dans la notification à partir du trentième jour qui suivra la date à laquelle le Secrétaire Général du Conseil de l'Europe aura reçu cette notification.

3. Dans lesdits territoires les dispositions de la présente Convention seront appliquées en tenant compte des nécessités locales.

4. Tout Etat qui a fait une déclaration conformément au premier paragraphe de cet article, peut, à tout moment par la suite, déclarer relativement à un ou plusieurs des territoires visés dans cette déclaration qu'il accepte la compétence de la Commission pour connaître des requêtes de personnes physiques, d'organisations non gouvernementales ou de groupes de particuliers conformément à l'article 25 de la présente Convention.

ARTICLE 64

1. Tout État peut, au moment de la signature de la présente Convention ou du dépôt de son instrument de ratification, formuler une réserve au sujet d'une disposition particulière de la Convention, dans la mesure où une loi alors en vigueur sur son territoire n'est pas conforme à cette disposition. Les réserves de caractère général ne sont pas autorisées aux termes du présent article.

2. Toute réserve émise conformément au présent article comporte un bref exposé de la loi en cause.

ARTICLE 65

1. Une Haute Partie Contractante ne peut dénoncer la présente Convention qu'après l'expiration d'un délai de cinq ans à partir de la date d'entrée en vigueur de la Convention à son égard et moyennant un préavis de six mois, donné par une notification adressée au Secrétaire Général du Conseil de l'Europe, qui en informe les autres Parties Contractantes.

2. Cette dénonciation ne peut avoir pour effet de délier la Haute Partie Contractante intéressée des obligations contenues dans la présente Convention en ce qui concerne tout fait qui, pouvant constituer une violation de ces obligations, aurait été accompli par elle antérieurement à la date à laquelle la dénonciation produit effet.

3. Sous la même réserve cesserait d'être Partie à la présente Convention toute Partie Contractante qui cesserait d'être Membre du Conseil de l'Europe.

4. La Convention peut être dénoncée conformément aux dispositions des paragraphes précédents en ce qui concerne tout territoire auquel elle a été déclarée applicable aux termes de l'article 63.

ARTICLE 66

1. La présente Convention est ouverte à la signature des Membres du Conseil de l'Europe. Elle sera ratifiée. Les ratifications seront déposées près le Secrétaire Général du Conseil de l'Europe.

2. La présente Convention entrera en vigueur après le dépôt de dix instruments de ratification.

3. Pour tout signataire qui la ratifiera ultérieurement, la Convention entrera en vigueur dès le dépôt de l'instrument de ratification.

4. Le Secrétaire Général du Conseil de l'Europe notifiera à tous les Membres du Conseil de l'Europe l'entrée en vigueur de la Convention, les noms des Hautes Parties Contractantes qui l'auront ratifiée, ainsi que le dépôt de tout instrument de ratification intervenu ultérieurement.

DONE at Rome this 4th day of November 1950 in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

FAIT à Rome, le 4 novembre 1950, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général en communiquera des copies certifiées conformes à tous les signataires.

For the Government of the Kingdom of Belgium:
Pour le Gouvernement du Royaume de Belgique:

PAUL VAN ZEELAND

For the Government of the Kingodm of Denmark:
Pour le Gouvernement du Royaume de Denmark:

O. C. MOHR

For the Government of the French Republic:
Pour le Gouvernement de la République française:

SCHUMAN

For the Government of the German Federal Republic:
Pour le Gouvernement de la République fédérale allemande:

WALTER HALLSTEIN

For the Government of the Icelandic Republic:
Pour le Gouvernement de la République islandaise:

PETUR BENEDIKTSSON

For the Government of the Irish Republic:
Pour le Gouvernement de la République irlandaise:

SEAN MacBRIDE

For the Government of the Italian Republic:
Pour le Gouvernement de la République italienne:

SFORZA

For the Government of the Grand Duchy of Luxembourg:
Pour le Gouvernement du Grand Duché de Luxembourg:

JOS. BECH

For the Government of the Kingdom of the Netherlands:
Pour le Gouvernement du Royaume des Pays-Bas:

STIKKER

For the Government of the Kingdom of Norway:
Pour le Gouvernement du Royaume de Norvège:

HALVARD M. LANGE

For the Government of the Saar:
Pour le Gouvernement de la Sarre:

E. HECTOR

For the Government of the Turkish Republic:
Pour le Gouvernement de la République turque:

F. KÖPRÜLÜ

For the Government of the United Kingdom of Great Britain and Northern Ireland:
Pour le Gouvernement du Royaume Uni de Grande-Bretagne et d'Irlande du Nord:

ERNEST DAVIES

Signed at Paris this 28th day of November 1950.
Signé à Paris le 28 novembre 1950.

For the Government of the Kingdom of Greece:
Pour le Gouvernement du Royaume de Grèce:

R. RAPHAEL

For the Government of the Kingdom of Sweden:
Pour le Gouvernement du Royaume de Suède:

K. I. WESTMAN

PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

PROTOCOLE ADDITIONNEL A LA CONVENTION DE SAUVEGARDE DES DROITS DE L'HOMME ET DES LIBERTÉS FONDAMENTALES

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE I

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

ARTICLE 4

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territoiries for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with Paragraph (1) of Article 63 of the Convention.

ARTICLE 5

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Les Gouvernements signataires, Membres du Conseil de l'Europe,

Résolus à prendre des mesures propres à assurer la garantie collective de droits et libertés autres que ceux qui figurent déjà dans le Titre I de la Convention de sauvegarde des Droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 (ci-après dénommée «la Convention»),

Sont convenus de ce qui suit:

ARTICLE 1

Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.

ARTICLE 2

Nul ne peut se voir refuser le droit à l'instruction. L'État, dans l'exercice des fonctions qu'il assumera dans le domaine de l'éducation et de l'enseignement, respectera le droit des parents d'assurer cette éducation et cet enseignement conformément à leurs convictions religieuses et philosophiques.

ARTICLE 3

Les Hautes Parties Contractantes s'engagent à organiser, à des intervalles raisonnables, des élections libres au scrutin secret, dans les conditions qui assurent la libre expression de l'opinion du peuple sur le choix du corps législatif.

ARTICLE 4

Toute Haute Partie Contractante peut, au moment de la signature ou de la ratification du présent Protocole ou à tout moment par la suite, communiquer au Secrétaire Général du Conseil de l'Europe une déclaration indiquant la mesure dans laquelle il s'engage à ce que les dispositions du présent Protocole s'appliquent à tels territoires qui sont désignés dans ladite déclaration et dont il assure les relations internationales.

Toute Haute Partie Contractante qui a communiqué une déclaration en vertu du paragraphe précédent peut, de temps à autre, communiquer une nouvelle déclaration modifiant les termes de toute déclaration antérieure ou mettant fin à l'application des dispositions du présent Protocole sur un territoire quelconque.

Une déclaration faite conformément au présent article sera considérée comme ayant été faite conformément au paragraphe 1 de l'article 63 de la Convention.

ARTICLE 5

Les Hautes Parties Contractantes considéreront les articles 1, 2, 3 et 4 de ce Protocole comme des articles additionnels à la Convention et toutes les dispositions de la Convention s'appliqueront en conséquence.

ARTICLE 6

This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

ARTICLE 6

Le présent Protocole est ouvert à la signature des Membres du Conseil de l'Europe, signataires de la Convention; il sera ratifié en même temps que la Convention ou après la ratification de celle-ci. Il entrera en vigueur après le dépôt de dix instruments de ratification. Pour tout signataire qui le ratifiera ultérieurement, le Protocole entrera en vigueur dès le dépôt de l'instrument de ratification.

Les instruments de ratification seront déposés près le Secrétaire Général du Conseil de l'Europe qui notifiera à tous les Membres les noms de ceux qui l'auront ratifié.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

Fait à Paris, le 20 mars 1952, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général en communiquera copie certifiée conforme à chacun des gouvernements signataires.

For the Government of the Kingdom of Belgium:
Pour le Gouvernement du Royaume de Belgique:

Paul van ZEELAND

For the Government of the Kingdom of Denmark:
Pour le Gouvernement du Royaume de Danemark:

Ole BJOERN KRAFT

For the Government of the French Republic:
Pour le Gouvernement de la République française:

SCHUMAN

For the Government of the German Federal Republic:
Pour le Gouvernement de la République fédérale allemande:

ADENAUER

For the Government of the Kingdom of Greece:
Pour le Gouvernement du Royaume de Grèce:

R. RAPHAEL

At the time of signature of this Protocol, the Greek Government, pursuant to Article 64 of the Convention, makes the following reservation relating to Article 2 of the Protocol: The application of the word "philosophical", which is the penultimate word of the second sentence of Article 2, will, in Greece, conform with the relevant provisions of internal legislation.

Au moment de la signature du présent Protocole, le Gouvernement hellénique, se prévalant de l'article 64 de ladite Convention, formule la réserve suivante, portant sur l'article 2 du Protocole: Le mot «philosophique» par lequel se termine le second paragraphe de l'article 2 recevra en Grèce une application conforme aux dispositions y relatives de la législation intérieure.

For the Government of the Icelandic Republic:
Pour le Gouvernement de la République islandaise:

Petur BENEDIKTSSON

For the Government of the Irish Republic:
Pour le Gouvernement de la République irlandaise:

Próinsias Mac AOGÁIN

For the Government of the Italian Republic:
Pour le Gouvernement de la République italienne:

Paolo Emilio TAVIANI

For the Government of the Grand Duchy of Luxembourg:
Pour le Gouvernement du Grand Duché de Luxembourg:

Jos. BECH

For the Government of the Kingdom of the Netherlands:
Pour le Gouvernement du Royaume des Pays-Bas:

STIKKER

For the Government of the Kingdom of Norway:
Pour le Gouvernement du Royaume de Norvège:

Halvard LANGE

For the Government of the Saar:
Pour le Gouvernement de la Sarre:

Johannes HOFFMANN

For the Government of the Kingdom of Sweden:
Pour le Gouvernement du Royaume de Suède:

Östen UNDÉN

For the Government of the Turkish Republic:
Pour le Gouvernement de la République turque:

F. KÖPRÜLÜ

For the Government of the United Kingdom of Great Britain and Northern Ireland:
Pour le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord:

Anthony EDEN

At the time of signing the present Protocal, I declare that, in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Au moment de signer le présent Protocole, je déclare qu'en raison de certaines dispositions des lois sur l'enseignement en vigueur au Royaume-Uni, le principe posé dans la seconde phrase de l'article 2 n'est accepté que dans la mesure où il est compatible avec l'octroi d'une instruction et d'une formation efficace et n'entraîne pas de dépenses publiques démesurées.

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APPENDIX "B"

United Nations at Work—No. 1

HUMAN RIGHTS IN THE UNITED NATIONS
with
TEXT OF DRAFT COVENANTS

BY CHARLES MALIK

Chairman of the United Nations Human Rights Commission and Minister for Lebanon to the United States

Reprinted from the United Nations Bulletin, Vol. XIII, No. 5, September 1, 1952

HUMAN RIGHTS IN THE UNITED NATIONS

BY DR. CHARLES MALIK

Minister of the Republic of Lebanon in the United States and Chairman of the Commission on Human Rights of the United Nations.

I

The eighth session of the Commission on Human Rights, lasting for nine weeks (April 14-June 13), was the longest the Commission ever held and one of the longest held by any organ of the United Nations. And yet all that the Commission managed to complete of its agenda was three or four out of a total of some twenty items. Those of us who have followed closely this enterprise ever since San Francisco now realize that we have all along underestimated the complexity and difficulty of this issue. We began with the somewhat naive, albeit sincere, determination to work out an International Bill of Rights and, in the initial impulse of our inexperience, we saw the completion of this task just around the corner. There were three steps to the undertaking: a declaration whereby the rights and freedoms appertaining to man are theoretically defined; a series of covenants whereby adhering states explicitly bind themselves to the strict observance of the rights and freedoms elaborated in them; and measures of implementation whereby the international community can make sure that human rights and fundamental freedoms, whether on the level of the Charter or of the Declaration or of the covenants, are in fact being promoted and observed. We completed the first step in 1948, and many of us thought the other two steps would be forthcoming in speedy succession. We have been grappling with them now for four years, and while much indeed has been accomplished during this time, the end is not yet in sight. We have all been sobered by the realization of the truly formidable task assigned to us.

Nature of Task—Now this task was none other than the determination of the proper structure of human dignity, the working out of all those enjoyments which are inherent to man and without which he would be less than himself, less than his Author intends him to be, less at any rate than he is capable of becoming and being. And we were not only to bring about agreement (or register whatever agreement there was) among the nations of the world as to what these natural rights and freedoms were, but also to suggest ways and means whereby human dignity, thus determined and thus agreed upon, can be promoted and achieved by international co-operation.

All that one has to do to appreciate what all this really involves is (*a*) to remember that man by himself is at best very difficult to determine, even if it were one philosopher proceeding from one coherent set of presuppositions who attempted this determination; (*b*) to reflect that the nations, in the consideration of this question in its present all-embracing scope, have really come

together seriously for the first time in history, and that, so far as international action by responsible representatives of governments is concerned, the Commission's work is creative and pioneering in every respect; (c) to keep in mind the radical differences that obtain in the interpretation of man among the effective cultures of the world, some stressing this, some stressing that side of his nature; and (d) to brood upon the said phenomenon of power politics entering into and vitiating everything, including man himself. We know now that the nobility and importance of our task is matched only by its inherent difficulty and by the long time we must in all fairness allow for its unfolding.

II

Among the general circumstances that conditioned the eighth session of the Commission, three are particularly worthy of consideration. There was first the oppressive weight of the general world situation which affected our progress at every turn. People's mind were on the whole elsewhere than on the problems of human rights, and some found it difficult to concentrate upon our immediate endeavors. The debate seemed to them utterly academic. Thus it is not clear how much the Foreign Offices of the Member governments, or the respective departments dealing with the United Nations, took active notice of our deliberations; nor whether we were just those eighteen "experts" blissfully left by our governments to hammer out all by ourselves whatever texts we could, as best we could. Now, the troubled world situation has been with us for a number of years, but the more we are removed in time from the original moral indignation evoked by the Second World War in favor of man and his freedoms, the more the questions of war and peace cast their pall upon the reality of our work.

World Situation—This is one of man's tormenting paradoxes: that such fundamental work, for man and in his name, cannot go on in a vacuum, but must take its proper place within the context of the serious world situation: must indeed reflect people's concern for their existence and their destiny. When existence is in question, the "how" of existence recedes to the background. And yet what is the "use" of existence unless it be made worthy of man and his highest, unless its just "how" is assured? When discord deepens and war threatens, we slacken in our interest in human rights; and yet is not the violation of these rights among the fundamental causes of war and discord, and can there be tranquility and progress without adequate recognition of these rights and freedoms throughout the world?

No Hurry—The second general situation that determined this session, a situation not altogether independent of the first, was that nobody seemed in a hurry to push our work to a conclusion. I cannot accuse anybody of intentional dilatoriness, but people were on the whole expansive, and many a decision could have been reached with one-half or one-third of the argumentation that led up to it. Certainly the sense of urgency and drive that characterized the preparation of the Declaration back in 1947 and 1948 was absent, and it was impossible to brush aside the reflection that the proclamation of the Declaration in 1948 was really something of a miracle, so that if it were not proclaimed then, possibly we would still be working on it now. In these fundamental matters vigorous leadership makes all the difference: one or two nations, knowing exactly what they want and determined in advance to finish a total job, have a good chance to lead the rest in the attainment of their end. But to leave eighteen representatives to argue more or less ramblingly about what belongs to the dignity of man, without an overarching vigorous design aiming at the completion of a job no matter how difficult, would doubtless lead, if not to trackless, then certainly to inconclusive wanderings. You could not this time—at least until the very last few days—get the Commission to adopt rules limiting the number of interven-

tions per person per subject and the length of time of each intervention, even in respect to those subjects gone over a hundred times before; nor could you set a firm deadline for the receivability of proposals, and amendments, and amendments to amendments; and always when the Chairman wanted to close the list of speakers, practically the whole round of representatives wanted to put their names in again. People simply loved going on and on—arguing, attacking, coaxing, refining.

One or two covenants—The third fundamental circumstance was that the situation prevailing in the Third Committee of the General Assembly with respect to this matter carried over to the Commission. The issue that was debated for weeks and weeks in the Third Committee last year and the year before was whether to work out one covenant, comprising within its scope civil, political, economic, social and cultural rights, or two separate covenants, one for civil and political rights, and one for economic, social and cultural rights. "One or two" became the question; and when great issues are reduced to such absurd simplicity, people in the confusion of the times do not always take sides on the merits of the case. There is room for neat, political manoeuvring and bargaining: room to score a victory against or inflict an embarrassment upon the "twoers" or "oners" by shrewdly siding with the opposite camp. From the point of view of the truth, it is always dangerous to over-simplify issues in international gatherings: overlapping, interpenetration, the providing of significant "riders," the insertion of pregnant nuances, all this helps to prevent false divisions of the house for reasons entirely extraneous to the objective subject-matter under consideration. He who thinks representatives are always swayed by the objective compulsion of the truth and never fall to the seductions of abstract simplification does not know the real character of international existence.

Be that as it may, the 1950 decision of the General Assembly was in favor of one covenant, and the Commission in its session in Geneva last year worked assiduously on the basis of that presupposition. But in 1951 the General Assembly reversed its directive to the Commission asking us to prepare two separate covenants, to be gone over with equal care, to include as much common language as possible, to be presented to the General Assembly and thence to be opened for accession at the same time, but withal to be two separate instruments capable of being adhered to separately and independently.

Now, there was nothing in the reversal in itself to cause the Commission any special difficulty or embarrassment: we receive our ultimate directives from the General Assembly through the Economic and Social Council and we try to execute them as faithfully as possible. But in this particular reversal, what was decisive from the point of view of the general conditions under which we carried out our mandate was the structure of the voting in the General Assembly, considered both quantitatively and qualitatively. From the former point of view, the decision to have one covenant for the two types of rights was carried in 1950 by an overwhelming majority, 38 votes to 7, with 12 abstentions. When this decision was reversed last year in favour of two covenants the voting was 27 for, 20 against, with 3 abstentions. On the other hand, those that favored two covenants were led by the more developed countries, whereas those who favored one comprised under-developed countries and the Soviet bloc.

Qualitatively, the house in general divided on this issue between the Western world and the Eastern world (India and Lebanon, however, went with the West) with the Soviet world siding with the East and the Latin American world dividing more or less evenly between the two. As a result, at once two matters came to the fore which are of the essence of our present involvement, matters that were, to be sure, partly the cause, but are undoubtedly also partly the effect, of this division: I mean the host of questions subsumed under the

rubric "self-determination of peoples" and the antithesis between the developed and the less developed. The whole atmosphere of human rights in the United Nations is now charged with these two themes.

Two blocs—The structure of voting in the Third Committee reflected itself both times faithfully in the Commission. Last year a strong majority of the Commission could always be counted upon in support of the idea of one covenant. This year the house was pretty nearly evenly divided on the most important issues. Some of the great decisions (whether to adopt or to reject texts) taken this year by the Commission were taken by a bare majority of one or two, and in certain cases we had to call into the room one or two members who were outside attending to some other business in order to enable the Commission to come to a decision. Nothing is more despairing to a Chairman than to be dealing with an evenly divided house: the grounds of seriousness seem then to be withdrawn from underneath his feet. The Commission's work at its eighth session this year cannot be properly appraised without constantly keeping in mind (and without fully appreciating the significance of this fact) that two more or less solid and equal blocs at once formed themselves on practically every important issue, the one composed of the U.S.S.R., the Ukraine, Poland, Yugoslavia, Chile, Uruguay, Pakistan and Egypt, the other of the United States, the United Kingdom, France, Australia, Belgium, Sweden, Greece and China, with Lebanon and India sometimes dividing between the two blocs, sometimes voting with the first, sometimes (in fact for the most part) voting with the second bloc. (This statement does not of course apply to every vote taken, but it certainly approximates the normal pattern observed in the voting. Also the listing above is made in the order of firmness with which the country in question stuck to the bloc under which it is listed. Thus the two or three countries toward the end of each listing did not invariably vote with the rest of that bloc, and in one instance—that of communications—the pattern of voting underwent a revolution: the Soviet Union, the United States, the United Kingdom and France coming together in indissoluble union.)

The Commission labored under the three great handicaps: the overshadowing world tension, the utter leisureliness with which people moved or wanted to move, and the even division of its membership on the fundamental issues. The first distracted our attention somewhat, the second slowed down our progress considerably, and the third cast a shadow of doubt upon the finality of such results as we were able to achieve.

III

In general and despite the expansiveness and repetitiveness, the quality of debate in this session was high. To attend the meetings day after day and listen carefully to the development of our themes was a veritable education in itself. Because of the nature of our subject-matter—the basic structure of human dignity—no fundamental issue in the world today was not directly or indirectly touched upon. This has always been the case in the Commission on Human Rights. It is doubtful whether in the debates of the United Nations anything compares with the proceedings of this Commission in depth and comprehensiveness.

Self-Determination—The debate on self-determination revealed two antithetical facts: on the one hand, that in itself this question is exceedingly complex; on the other, that the non-Atlantic nations would brush aside all such complexity in favor of a simple, direct affirmation that every people and every nation has a natural right to self-determination. It is not that the Atlantic nations and their friends are just defensively and selfishly resisting change; the problem is genuinely and objectively complex. Nor is it, on the other hand, that the Soviet,

Asian and Latin countries are just spiting and rebelling against the West: people today insist on their right to determine their own fate freely even if that should mean transfer of attachment from one power camp to another. The Western doctrine of freedom is gradually coming to full bloom in non-Western lands; and in this closely-knit world, so long as the two camps remain poised against each other in irresolution and unsettlement, everybody else has a chance to clamor for his right to independence of thought and action. The zest generated by the idea of self-determination is due precisely to the fact that the mind does not at first suspect the formidable complexities concealed under this idea. There is no short-cut to the sophistication of experience and reflection.

Among the questions raised and debated in this connection were the following:

(1) How much does world peace depend upon safeguarding the right of self-determination to peoples and nations?

(2) Whether the right to self-determination, to which all were agreed in principle, was an individual or a group right, and consequently whether it fell under the Charter concept of "fundamental human rights" which it was the intent of the Declaration to define and the covenants to implement.

(3) How much does the exercise of other rights depend upon the prior realization of the right of self-determination?

(4) Where should this right be affirmed? As an integral article in the body of the covenant or convenants? Or in the preamble? Or in the Declaration of Human Rights? Or in a separate document? Or in a special and separate resolution of the General Assembly? (Because our instructions were explicit, the Commission decided that self-determination be an article in the body of the covenants.)

(5) Should its content be a short simple statement of principle, or should it be detailed?

(6) If the structure of self-determination should be gone into in detail, was the Commission competent to undertake this job? Should it not rather seek assistance from the International Law Commission, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and UNESCO, in the determination of the diverse moments of this idea?

(7) How is self-determination related to freedom, independence, self-government?

(8) What constitutes a "people"?

(9) When are "minorities" entitled to this right?

(10) When in their maturation are "peoples" entitled to this right?

(11) What legitimate action may a people take to achieve this right?

(12) What should the attitude of other peoples and nations be to a people struggling for the right of self-determination?

(13) The question of plebiscites: when to be taken? under whose auspices?

(14) The great question of "cultural self-determination": is there such a thing? Are people, for instance, entitled to suppress freedom of thought, conscience and enquiry in the name of "cultural self-determination"?

(15) The great question of "economic self-determination," of the right of peoples freely to dispose of their own natural resources: how does this affect international economic co-operation, including the question of development?

(16) Is the right of self-determination according to the Charter unqualified? Is it subject to overarching considerations of international security and peace?

It will be highly rewarding to the student of this topic to go back to the clashes of opinion in the original proceedings of the Commission, and to try to penetrate to the reason and significance of these clashes.

The text of the article on self-determination finally adopted by the Commission for inclusion in both covenants under consideration was as follows:

1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.

2. All States, including those having responsibility for the administration of non-self-governing and trust territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.

3. The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.

The Commission was also instructed by the General Assembly to work out recommendations concerning international respect for the self-determination of peoples, the presupposition being that pending the elaboration and the coming into force of the covenants, surely the United Nations cannot remain inactive in this field. Two such recommendations were drawn up in which the member governments were asked to uphold the principle of self-determination, particularly with respect to non-self-governing and trust territories, and those responsible for such territories were asked to include in the information transmitted by them under Article 73e of the Charter an account of the political progress of these territories.

IV

Whatever we were able to adopt of the covenant on economic, social and cultural rights was gone over with great care. We have now precise texts on the right to work, to appropriate conditions of work, to social security, to special protection of maternity, children and the family, to food, clothing and housing, to an adequate standard of living, to health, to education, to science and culture, and to forming and joining trade unions. There is also an article on the progressive implementation of compulsory primary education free of charge for all. Besides these substantive articles, there are what might be termed "regulative provisions" on non-discrimination, especially as between men and women, on general limitations on the exercise of these rights, on the fact that the present convention cannot derogate from human rights already in force, and on the fact that the realization of these rights is to be "progressive."

The specialized agencies again took active interest in our work. Especially did the representatives of UNESCO and ILO play a significant role in our deliberations. The Commission respectfully deferred to their expert opinion, and our present text reflects some of their ideas.

The Soviet bloc, as is to be expected, were most active in the debates on these matters. They urged the most advanced provisions, especially with respect to non-discrimination, and never tired of alleging that in their respective countries economic and social conditions were incomparably better than in the Western world. I think a study of our proceedings will reveal that the amendments we adopted to the old texts under examination responded for the most part more to Soviet than to Western promptings.

Guarantees—But on their major thesis they were not successful. They wanted to see a strict governmental *guarantee* for practically every right. According to the Soviet concept, the government is the agency that "guarantees"

for everybody the enjoyment of the right to work, to proper conditions of work, to "social security" to education, etc. The majority of the Commission did not share this view, believing on the contrary that economic power and enforcement should not be a monopoly of the state. Of course this fundamental difference in viewpoint between the Soviet and the non-Soviet worlds raises the three formidable issues: (a) of how governments can enter into international compacts in matters over which they do not have direct control; (b) of how such compacts can therefore be implemented; and (c) of whether the international promotion of this type of right lends itself to the same sort of treatment as that possible for civil and political rights.

Limiting Clauses—In two limiting but important cases there is an expression of governmental guarantee. The first is the non-discrimination clause of the general "umbrella" article. Here "the States Parties undertake to guarantee that the rights enunciated in this Covenant will be exercised without distinction of any kind, such as race, color, sex, etc." The point of this undertaking is that while some of these rights may not be realized except "progressively", owing to limitations of "available resources" and other conditions, yet insofar as a right is exercised at all, it cannot be exercised on a basis of discrimination. Thus there may not be at once enough schools for all children, but the available schools must take in children without discrimination. The second case is the provision on trade union rights which reads: "the States . . . undertake to ensure the free exercise of the right of everyone to form and join . . . trade unions . . .," the idea being that all that the states here obligate themselves to is *not to interfere* in trade union activity, and therefore such negative (formal) obligation can be assumed all at once.

The other clause of the opening "umbrella" article reads: "Each State Party hereto undertakes to take steps, individually and through international cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by legislation as well as by other means." This text was probably fought hardest of all. Behind every phrase lurks a precise intention, or the avoidance of a supposed danger. The "enthusiasts" saw practically behind every word a possible loophole for evasion by governments; the "realists" argued that these "material" rights differed from the "formal" ones of the other covenant precisely by the feature that they depended on objective, material conditions which can only be brought into effective operation progressively. The realists finally won the day.

Science and Culture—In the debate on science and culture, some of the dread ultimate issues in the world today came to the fore. The Soviet viewpoint was again that the states must "ensure" that the development of science and culture subserve "the interests of progress and democracy." This proposal was defeated by 12 votes to 4, with 1 abstention. Nothing is more detrimental to the spirit and vitality of a culture than to make freedom of thought and enquiry subject to the opinion of the State as to what is good for "progress and democracy" or, for that matter, for anything. Science, culture, truth are absolutely independent of politics: their development obeys an autonomous law of its own. Even if "progress," "democracy," "peace," were univocal terms (and the present world crisis consists precisely in the fact that they are not), and even if they referred to good and desirable things, it is not the business of science, culture and creation to pursue them. These pursue their own proper ends, which are nothing other than the discovery and expression of the truth (which is fulness of life and beauty no less than of mind) in complete freedom. Not only will science and truth wither away where freedom is suppressed or curtailed, but the state itself will wake up one day to the realization that, both by reason of a pervasive dullness of mind which it has succeeded in generating among its citizenry, and by reason of the unavailability of material instruments

which the inventiveness of freedom alone can supply, it is decisively handicapped in the pursuit of its own ends. He tampers with the source of life itself who tampers with freedom.

Right to Property—For the second year an unsuccessful attempt was made to include an article on the right to own property. Article 17 of the Universal Declaration proclaimed this right, but since then the Commission has not been able to agree on an appropriate text for the covenant. The French Delegation put forward a proposal, but so many difficulties and objections were raised, particularly with regard to expropriation and compensation, that finally the Commission, tired of the apparent hopelessness of this matter, decided to adjourn the debate on it. The concept of property and its ownership is at the heart of the great ideological conflict of the present day. It was not only the Communist representatives who riddled this concept with questions and doubts: a goodly portion of the non-Communist world had itself succumbed to these doubts. A study of this particular debate will reveal the extent to which the non-communist world has been communistically softened or frightened. It seems incredible that in these economic matters, which reflect indeed much more than mere economic divergencies, the Western world is so divided on itself as to be incapable of presenting a common front against Communism. When the material appetite is aroused, there is no end to its claims unless it be checked at some point with the original restraints of the spirit.

V

No drastic revisions have been introduced in the civil and political formulations that have come down to us from the Commission's labors of 1950. One can in general speak of having subjected these rights only to further refinement.

The catalog comprises the right to life; the prohibition of inhuman or degrading treatment; the prohibition of slavery and forced labor; the right to liberty and security of person; freedom from imprisonment on account of inability to fulfill a contractual obligation; the right to liberty of movement; the protection of aliens against arbitrary expulsion; the right to a fair trial; the prohibition of retroactive criminal legislation; the right to recognition as a person before the law; freedom of thought, conscience and religion; freedom of opinion and expression; the right of peaceful assembly; the right of association; and equality before the law. There were further three articles of a "regulative" type: one expressing the obligation to respect and ensure the rights enumerated in the covenant; one on the scope and limitation of derogations allowable under exceptional circumstances; and one safeguarding the covenant from abuse and preventing any restrictions upon rights in force not recognized in it.

The student who wishes to go more deeply into these matters must read the records of the Commission or its report to the Economic and Social Council. Among the themes that received significant discussion were the following: the question of capital punishment; how to preserve the integrity and independence of the Genocide Convention in respect to the article on the right to life; what medical and scientific experimentation is permissible on man; the distinction between forced and hard labor; the question of conscientious objectors; the question of exile and of the possibility of return to one's own country, minimum guarantees for accused persons; for what purpose speech may be limited; and whether states may be allowed to sign the convention even if at the time they do not measure up to all its requirements.

Freedom of Religion—There was an interesting revision of the right to freedom of thought, conscience and religion. Thanks to the admirable endeavors and openness of mind of the representative of Egypt, and to the studied and profound concern of Dr. Frederick Nolde, representing non-governmental religious organizations, the modifications suggested by the representative of

Egypt were all unanimously adopted. Although it can be philosophically shown that the right to *change* one's religion or belief (the provision of the Declaration) necessarily implies the right to *maintain* one's religion or belief it was felt that this implication had better be made explicit in the covenant. Consequently, the formulation now is "freedom to maintain or to change" one's religion or belief. Now, this revision was meant to guard against an inordinate emphasis upon "changing one's religion or belief" but since it labors the obvious, and since freedom to change necessarily implies freedom to maintain, but freedom to maintain does not necessarily imply freedom to change, it in turn lays itself open to the criticism of overemphasizing the static aspect of freedom of religion or belief. To restore the balance once more, a new clause was introduced into this important article reading: "No one shall be subject to coercion which would impair his freedom to maintain or to change his religion or belief."

In this way, absolute fredom of conscience to see the truth and follow it, whether by confirming one's previous position or by changing it, is safeguarded. Although he heartily endorsed these modifications, Dr. Nolde read important reservations into our records. I believe no student or interpreter can afford in the future to fail to take notice of these reservations. Important statements guarding against possible misinterpretations of the concept of coercion were also made in the debate. It is always artificial social pressure (the sanction of the group), and not any innate and incurable perversion in man's understanding, that prevents him from seeking, finding and espousing the truth. But that weakness of the will called cowardice also plays an important role.

Fundamental Differences—Again and again it became apparent that our difficulties stemmed for the most part from radical differences in intent with regard to fundamental concepts. We referred above to the equivocal character of such terms as "democracy," "progress," "peace." One can make a list of the fundamental concepts, arising from the objective confusion of the historical moment, which were at the base of our perplexity and torment. Such a list would include, in addition to the three mentioned above, the concepts of "science," "arbitrary," "Fascist" and "Nazi." But it is primarily because "government" is understood and practiced in entirely different senses throughout the world that our confusion was worse confounded.

The utimate contrast is between "government" as the expression of the free will of the people, and "government" as possessing an independent wisdom and infallibility of its own which would enable it to dictate its will upon the people. This contrast reveals contradictory interpretations of the nature of man, and since our attempt was precisely to determine this nature, no wonder we did not agree. If real horses could meet and argue, presumably, since each is really a horse, they would strike some agreement. But when "governments" meet (through their representatives), and when, although the same term is used ("governments"), the realities indicated by the term are so radically different, how is real, effective agreement ever possible? The alternative is not despair, but patience and faith—both infinite—and a lively sense of humor.

Preamble—The Commission decided that there be no difference in the preambles of the two covenants. Much of the adopted language was taken from the preamble of the Declaration. The phrase "recognition of the inherent dignity and of the equal and inalienable rights" stresses the notion that these rights belong to the nature of man. Again, the recital "recognition that these rights derive from the inherent dignity of the human person" refutes any notion that an external power, such as a benevolent government or even the United Nations, "granted" man these rights. It is difficult to think of a stronger or more adequate language with which to express the law of nature. But the question remains: do all these rights have the same ultimacy so far as the natural law is concerned?

VI

Communications—Every year the United Nations receives thousands of communications concerning human rights. The procedure of treating these communications is regulated by strict decisions taken by the Economic and Social Council. An attempt was made this year, on the initiative of India, to recommend to the Economic and Social Council to change somewhat these regulations so as to enable the Commission to make reports and recommendations to the Economic and Social Council concerning serious cases of violation of human rights brought to the notice of the Commission by these communications. Some argued that it was a pity nothing whatsoever was done to these communications so far, and that it would conduce to the promotion of human rights if the Commission were allowed to make a significant report to the Economic and Social Council on them. Others, however, stressed the complexity and delicacy of the issue, denying at the same time any competence to the Commission, under the Charter and the Economic and Social Council to consider complaints or form any judgment on them. The Indian effort was beaten by 9 votes to 6, with 2 abstentions.

The commission permitted the publication this year of a preliminary analysis of the United Nations Secretariat of the communications received during the thirteen months from April 3, 1951, to May 7, 1952. Of course neither the Secretariat nor the Commission expressed any opinion regarding either the accuracy of the facts alleged by the communications or the constructions placed upon them by their authors. But it is interesting to note that, according to the analysis of the Secretariat, a total of 25,179 communications were received during this period; 36 of which discussed general theoretical principles; 24,194 alleged persecution on political grounds; 305 alleged genocide; 119 alleged violation of the right to freedom of assembly and association; 64 alleged discrimination against and persecution of minorities; 83 dealt with trade union rights; and some 480 alleged contraventions of a variety of rights and freedoms. Certainly the world seems to expect a great deal of the United Nations in the field of human rights.

So long as the Charter exists, which pledges Member states to promote human rights, these concrete communications cannot be altogether disregarded. Sooner or later the Commission or somebody else will have to do something about them. To suppose that all of them are unfounded is of course nonsense. To suppose also that to bring some of them, after the most careful and responsible sifting, to the attention of the Economic and Social Council is to contravene the domestic jurisdiction clause of Article 2 of the Charter, is to forget that, under the Charter itself, human rights problems are no longer exclusively or even essentially matters for domestic jurisdiction. There is no evading the fact that in the modern world, where everybody knows pretty well what goes on in everybody else's domain, we are all on the spot. The more man awakens, the more he will clamour for his natural rights and fundamental freedoms; and the future does not belong to those who hide their heads in the sand, but to those who, facing the truth in all humility, accept the joyous suffering of transforming the given into the image of the just and true.

VII

Shifting Emphasis—A quiet revolution has occurred in the Commission on Human Rights since its establishment. In the years 1946, 1947 and 1948 attention was fastened for the most part on what we now call civil and political rights. The archetype of what we were trying to ensure was free-

dom from discrimination and from arbitrary arrest, and freedom of religion and speech. It never occurred to us that anything else was as important as these.

Today the emphasis has shifted. Economic, social and cultural rights have come to their own, and indeed with a vengeance. The paradism today is "the adequate standard of living." There were three logical steps to this transition. The first is to say, the civil, political and personal is primary, but the economic, social and cultural also has its place. The second is to move insensibly from this position to the view that both types of rights are equally important. And the third obviously is to say, what is the use of the civil, political and personal if the economic and social is not first guaranteed? *Ergo*, the social and economic is primary and more important. It is a fit topic for research to trace this development not only with respect to the Commission as a whole, but also with respect to individual members of the Commission who have participated in this enterprise since its beginning.

We may characterize the revolution as the overwhelming of the end by the means, the personal and intellectual by the social, the wholeness of life by its components, the integral unity (the soul) of the indivdual by endless factors, conditions, impulses, the perfect and actual by the imperfect and potential, the dignity of freedom by the turbulence of desire. This is the materialistic revolution of the times.

Three not altogether unrelated causes have brought about this revolution. First, the increasing impact of Marx and the amazing persistence of the Soviet representatives in harping upon their views. Second, the rise of the economically and socially less developed, where the accent is far more on the material and social than on the personal and inner. And third, the apparent unimaginative helplessness of the Western World in the face of these two impacts.

What goes on in the Commission is but a reflection of what goes on in the wide world. There is a general disturbance of right order. It will not be by chance, or by halfheartedness, or by surrendering before the material, or by overlooking its just claims, that order is going to be righted, but by the rejuvenation of the original intellectual and spiritual grounds of life. The task is much harder than some people think, but salvation is coming, and when it comes it will not be from the Commission or the United Nations, but from the living institutions of the mind and spirit vigorously reaffirming their faith in truth, justice and order. There are, then, independent grounds of hope that the materialistic revolution will be arrested and reversed, certainly not without much suffering.

DRAFT COVENANTS ON HUMAN RIGHTS

Economic, Social and Cultural Rights

PREAMBLE

The States Parties hereto,

Considering, that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights and freedoms derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing, that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in this Covenant,

Agree upon the following articles:

ARTICLE ON SELF-DETERMINATION

1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.

2. All States, including those having responsibility for the administration of non-self-governing and trust territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.

3. The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.

ARTICLE 1

1. Each State Party hereto undertakes to take steps, individually and through international cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by legislative as well as by other means.

2. The States Parties hereto undertake to guarantee that the rights enunciated in this Covenant will be exercised without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ARTICLE 2

The States Parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in this Covenant.

ARTICLE 3

The States Parties to this Covenant recognize that in the enjoyment of those rights provided by the State in conformity with this Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

ARTICLE 4

1. Nothing in this Covenant may be interpreted as implying for any State, group or person, any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein or at their limitation, to a greater extent than is provided for in this Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

ARTICLE 5

1. Work being at the basis of all human endeavor, the State Parties to the Covenant recognize the right to work, that is to say, the fundamental right of everyone to the opportunity, if he so desires, to gain his living by work which he freely accepts.

2. The steps to be taken by a State Party to this Covenant to achieve the full realization of this right shall include programs, policies and techniques to achieve steady economic development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

ARTICLE 6

The States Parties to the Covenant recognize the right of everyone to just and favorable conditions of work, including:

(*a*) Safe and healthy working conditions;

(*b*) Remuneration which provides all workers as a minimum with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and

(ii) A decent living for themselves and their families; and

(*c*) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay.

ARTICLE 7

The States Parties to the Covenant undertake to ensure the free exercise of the right of everyone to form and join local, national and international trade unions of his choice for the protection of his economic and social interests.

ARTICLE 8

The States Parties to the Covenant recognize the right of everyone to social security.

ARTICLE 9

The States Parties to the Covenant recognize that:

1. Special protection should be accorded to motherhood and particularly to maternity during reasonable periods before and after childbirth; and

2. Special measures of protection, to be applied in all appropriate cases within and with the help of the family, should be taken on behalf of children and young persons, and in particular they should not be required to do work likely to hamper their normal development. To protect children from exploitation, the unlawful use of child labor and the employment of young persons in work harmful to health or dangerous to life should be made legally actionable; and

3. The family, which is the basis of society, is entitled to the widest possible protection. It is based on marriage, which must be entered into with the free consent of the intending spouses.

ARTICLE 10

The States Parties to the Covenant recognize the right of everyone to adequate food, clothing and housing.

ARTICLE 11

The States Parties to the Covenant recognize the right of everyone to an adequate standard of living and the continuous improvement of living conditions.

ARTICLE 12

The States Parties to the Covenant, realizing that health is a state of complete physical, mental and social well-being, nad not merely the absence of disease or infirmity, recognize the right of everyone to the enjoyment of the highest attainable standard of health.

The steps to be taken by the States Parties to the Covenant to achieve the full realization of this right shall include those necessary for:

(a) The reduction of infant mortality and the provision for healthy development of the chlid;

(b) The improvement of nutrition, housing, sanitation, recreation, economic and working conditions and other aspects of environmental hygiene;

(c) The prevention, treatment and control of epidemic, endemic and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

ARTICLE 13

1. The States Parties to the Covenant recognize the right of everyone to education, and recognize that education shall encourage the full development of the human personality, the strengthening of respect for human rights and fundamental freedoms and the suppression of all incitement to racial and other hatred. It shall promote understanding, tolerance and friendship among all

nations, racial, ethnic or religious groups, and shall further the activities of the United Nations for the maintenance of peace and enable all persons to participate effectively in a free society;

2. It is understood:
   (a) That primary education shall be compulsory and available free to all;
   (b) That secondary education, in its different forms, including technical and professional secondary education, shall be generally available and shall be made progressively free;
   (c) That higher education shall be equally accessible to all on the basis of merit and shall be made progressively free;
   (d) That fundamental education for those persons who have not received or completed the whole period of their primary education shall be encouraged as far as possible.

3. In the exercise of any functions which they assume in the field of education, the States Parties to the Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools other than those established by the public authorities which conform to such minimum educational standards as may me laid down or approved by the State and to ensure the religious education of their children in conformity with their own convictions.

Article 14

Each State Party to the Covenant which, at the time of becoming a party to this Covenant, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all.

Article 15

1. The States Parties to the Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications.

2. The steps to be taken by the States Parties to this Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

CIVIL AND POLITICAL RIGHTS

Preamble

The States Parties hereto,

Considering, that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights and freedoms derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying civil and political freedoms and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in this Covenant,

Agree upon the following articles:

ARTICLE ON SELF-DETERMINATION

1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.

2. All States, including those having responsibility for the administration of non-self-governing and trust territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.

3. The right of the peoples to self-determination shall also include permament sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.

ARTICLE 1

1. Each State Party hereto undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State undertakes to take the necessary steps, in accordance with its constitution processes and with the provisions of this Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant.

3. Each State Party hereto undertakes:

(a) To insure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To develop the possibilities of judicial remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent authorities, political, administrative or judicial;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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ARTICLE 2

1. In time of public emergency which threatens the life of the nation, and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strickly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

2. No derogation from Articles 3, 4, 5, 7, (paragraphs 1 and 2), 11, 12 and 13 may be made under this provision.

3. Any State Party hereto availing itself of the right of derogation shall inform immediately the other States Parties to the Covenant, through the intermediary of the Secretary-General, of the provisions from which it has derogated, the reasons by which it was actuated and the date on which it has terminated such derogation.

ARTICLE 3

1. Nothing in this Covenant may be interpreted as implying for any State, group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or of their limitation to a greater extent than is provided for in this Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any contracting state pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

ARTICLE 4

1. No one shall be arbitrarily deprived of life. Everyone's right to life shall be protected by law.

2. In countries where capital punishment exists, sentence of death may be imposed only as a penality for the most serious crimes pursuant to the sentence of a competent court and in accordance with law not contrary to the principles of the Universal Declaration of Human Rights or the Convention on the Prevention and Punishment of the Crime of Genocide.

3. Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

4. Sentence of death shall not be carried out on a pregnant woman.

ARTICLE 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation involving risk, where such is not required by his state of physical or mental health.

ARTICLE 6

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labor.

(b) The proceeding sub-paragraph shall not be held to preclude, in countries where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court.

(c) Forced or compulsory labor within the meaning of this paragraph shall not include:

(i) Any work or service not covered in Paragraph (b) and normally required of a person under detention in consequence of a lawful order of a court;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civic obligations.

ARTICLE 7

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the dentention is not lawful.

5. Anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation.

ARTICLE 8

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

ARTICLE 9

1. Subject to any general law of the State concerned which provides for such reasonable restriction as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant:

(a) Everyone legally within the territory of a State shall, within that territory, have the right to (i) liberty of movement and (ii) freedom to choose his residence;

(b) Everyone shall be free to leave any country including his own.

2. (a) No one shall be subjected to arbitrary exile;
(b) Subject to the preceding sub-paragraph, anyone shall be free to enter his own country.

ARTICLE 10

An alien lawfully in the territory of a State party hereto may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.

ARTICLE 11

1. All persons shall be equal before the courts or tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interest of justice; but any judgement rendered in a criminal case or in a suit at law shall be pronounced publicly except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly in a language which he understands and in detail of the nature and cause of the accusation against him;
(b) To have adequate time and facilities for the preparation of his defence;
(c) To defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in such case where he does not have sufficient means to pay for it;
(d) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(f) Not to be compelled to testify against himself, or to confess guilt.

3. In the case of juveniles, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

4. In any case where by a final decision a person has been convicted of a criminal offence and where subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

ARTICLE 12

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penality, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

ARTICLE 13

Everyone shall have the right to recognition everywhere as a person before the law.

ARTICLE 14

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to maintain or to change his religion or belief, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to maintain or to change his religion or belief.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

ARTICLE 15

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in the forgoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect for the rights or reputations of others, (2) for the protection of national security or of public order, or of public health or morals.

ARTICLE 16

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.

ARTICLE 17

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of this right by members of the armed forces or of the police.

3. Nothing in this article shall authorize States Parties to the Freedom of Association and Protection of the Right to Organize Convention, 1948, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantee provided for in that convention.

ARTICLE 18

All persons are equal before the law. The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

APPENDIX "C"

DRAFT PREPARED BY THE CIVIL LIBERTIES ASSOCIATION

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

The history of mankind establishes, as the United Nations Universal Declaration of Human Rights proclaims, that recognition of the inherent dignity and worth of every member of the human family and the preservation of the human rights of the individual are the foundation of freedom, justice and peace in the world.

Because these human rights form a fundamental part of our Canadian heritage and citizenship, respect for these rights is the corner stone upon which the welfare of our people and the future of our nation rest.

It is therefore essential to the maintenance and development of the democratic way of life to which we Canadians are dedicated that the human rights of every person within our borders be clearly stated and protected to the end that each individual may achieve fully his inherent dignity and worth.

Her Majesty by and with the advice and consent of the Senate and House of Commons of Canada therefore enacts this Act for the recognition and protection of the Human Rights and Fundamental Freedoms of the people of Canada.

1. This Act may be cited as the Canadian Bill of Rights.

2. This Act binds Her Majesty in the right of Her Majesty's Government of Canada and every board, commission or other authority established under any Act of the Parliament of Canada.

3. It is hereby recognized and declared that every person under the jurisdiction of the Parliament of Canada is entitled to the following human rights and fundamental freedoms; and is entitled to protection against their violation, namely,

(*a*) the right to life, liberty and security of person and the right not to be deprived thereof except on such grounds and in accordance with such procedures as are established by law,

(*b*) the right to equality before the law and before all courts and tribunals and the right to the protection of the law and to the human rights and fundamental freedoms set forth in this Act without discrimination of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,

(*c*) the right to freedom of thought, conscience and religion; this right includes freedom to maintain or to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief in worship, practice and teaching, all without coercion in any way,

(*d*) the right of freedom of speech including freedom to hold opinions and to express them,

(*e*) the right of freedom of the press including the right to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers,

(*f*) the right to freedom of peaceful assembly and to freedom of association with others,

(*g*) the right to the peaceful enjoyment of his property and the right not to be deprived of his property except in the public interest and in accordance with the law,

(*h*) the right to his privacy, his home and his correspondence without arbitrary or unlawful interference,

(*i*) the right not to be held in slavery or servitude and, unless ordered by a court or otherwise authorized by law, not to be required to perform forced or compulsory labour,

(*j*) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

(*k*) the right, if legally entitled to reside in Canada, to freedom of movement and residence within the country and the right to leave and return to Canada and not be subject to exile,

(*l*) the right, in the determination of his rights and obligations or any charge against him, to a fair and public hearing, in accordance with the principles of fundamental justice, within a reasonable time by an independent and impartial tribunal established by law,

(*m*) the right not to be compelled to give evidence before a court, tribunal, commission, board or other authority if he is denied the right to counsel, protection against self crimination, or other safeguards to which he is entitled by law,

(*n*) the right not to be subjected to arbitrary arrest, detention, imprisonment, or other deprivation of liberty,

(*o*) the right, if deprived of his liberty by arrest, detention, imprisonment or otherwise, to take proceedings by way of habeas corpus or otherwise by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(*p*) the rights, if charged with a criminal offence,

(i) to be presumed innocent until proved guilty according to law,

(ii) to be informed promptly, in a language he understands, of the nature of and reason for the charge against him.

(iii) to reasonable bail unless there be just cause to refuse it,

(iv) not to be put in jeopardy or be required to stand trial twice for the same offence,

(v) not to be compelled to be a witness against himself, or to confess guilt,

(vi) to defend himself in person or to retain and instruct counsel of his own choosing without delay or if he has not sufficient means to pay for legal assistance it shall be provided free when the interests of justice so require;

(vii) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and

(viii) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4. The human rights and fundamental freedoms set out in paragraphs (*c*), (*d*), (*e*) and (*f*) of section 3 of this Act are subject to such necessary existing limitations as are recognized by law.

5. If the War Measures Act is brought into force by proclamation of the Governor-in-Council none of the human rights and fundamental freedoms set out in section 3 of this Act shall be abrogated, abridged or infringed by any order or regulation made under the authority of the War Measures Act unless such order or regulation is submitted to the Parliament of Canada within sixty days after the day upon which the order or regulation was made and is thereafter ratified by Parliament.

6. Any person, any of whose human rights or fundamental freedoms set out in section 3 has been violated shall have an effective remedy by reason thereof and may apply for appropriate relief by way of mandamus, injunction, direction, damages or otherwise on notice of motion to the Supreme or Superior Court of the province in which the violation occurred.

7. The Minister of Justice shall in accordance with such regulations as may be prescribed by the Governor in Council examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every Bill introduced in the House of Commons to ascertain whether any of the provisions thereof are inconsistent with the human rights and fundamental freedoms set out in section 3 of this Act, and if he find any such inconsistency he shall advise the Governor in Council or the House of Commons as the case may be, thereof, and shall recommend amendments to remove such inconsistency.

8. All the Acts of the Parliament of Canada enacted before or after the coming into force of this Act, all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the coming into force of this Act that are subject to be repealed, abolished or altered by the Parliament of Canada, shall, unless it is otherwise expressly stated in any Act of the Parliament of Canada hereafter enacted, be so construed and applied as to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the human rights and fundamental freedoms set out in section 3 of this Act.

9. Nothing in this Act shall be construed to abrogate, exclude or abridge any rights or freedoms not set out herein to which any person is or may become otherwise entitled.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 4

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WEDNESDAY, JULY 20, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESSES:

The Honourable Senator Arthur Roebuck, Counsel for the Christian Science Church; Mr. L. A. Tufts, Christian Science Committee on Publication for Ontario; Professor A. R. Lower, Queen's University.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23558-0—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

and Messrs.

[1] Aiken,
Badanai,
Batten,
Deschatelets,
Jung,
Korchinski,
Mandziuk,
Martin (*Essex East*),
Nasserden,
Rapp,
Stewart,
[2] Winkler.

J. E. O'Connor,
Clerk of the Committee.

[1] Replaced Mr. Jorgenson on Tuesday, July 19, 1960.
[2] Replaced Mr. Martini on Tuesday, July 19, 1960.

MINUTES OF PROCEEDINGS

WEDNESDAY, July 20, 1960.
(10)

The Special Committee on Human Rights and Fundamental Freedoms met at 2.10 this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Badanai, Batten, Deschatelets, Dorion, Korchinski, Martin (*Essex East*), Rapp, Spencer, Stewart and Winkler.—11.

In attendance: The Honourable E. D. Fulton, Minister of Justice; Honourable Senator Arthur Roebuck, Counsel for the Christian Science Church; Mr. L. A. Tufts, representing the Christian Science Committee on Publication for Ontario; and Professor A. R. Lower of Queen's University.

Senator Roebuck and Mr. Tufts were introduced and Mr. Tufts read a brief, copies of which were distributed to Members of the Committee.

Following the questioning of Mr. Tufts and Senator Roebuck, they were thanked, and retired.

Professor Lower was called and commented upon the historical background of the Bill, giving the Committee his views on its content.

After his questioning he was thanked, and retired.

The Chairman read the following report from the Subcommittee on Agenda and Procedure:

TUESDAY, July 19, 1960.

The Subcommittee on Agenda and Procedure met at 10.00 p.m. this day, the following Members being present: Messrs. Badanai, Dorion, Spencer and Stewart.

The following decisions are recommended to the Committee:

1. That a copy of a letter from Mrs. Ryrie Smith, National President of the YWCA, addressed to the Right Honourable the Prime Minister and a letter from Mr. H. G. Curlett, Manager of the Associated Investors of Canada Ltd. addressed to Mr. Lambert, M.P., be filed with the Committee and copies distributed to Members.

2. That representations before the Committee by the Honourable Justice J. T. Thorson, President of the Exchequer Court, be not entertained for the reason that it would not be conducive to the maintenance of the dignity, independence and the inviolability of the judiciary.

On motion of Mr. Badanai, seconded by Mr. Stewart, the said report was adopted.

At 5.45 p.m. the Committee adjourned to meet again at 9.30 a.m., Thursday, July 21, 1960.

J. E. O'Connor,
Clerk of the Committee.

23558-0—1½

EVIDENCE

WEDNESDAY, July 20, 1960.
2:00 p.m.

The CHAIRMAN: Order, gentlemen. First of all I would like to welcome to the table our genial friend of the other place, Senator Roebuck; and, of course, our own Minister of Justice.

We also have with us Mr. L. A. Tufts, who is in charge of public relations for the Christian Science church for all of Canada. In that capacity he is appearing before you and will now give you his views on the bill that is before the committee.

Mr. LESLIE A. TUFTS (*Christian Science Committee on Publication for Ontario*): Mr. Chairman, honourable Minister of Justice and committee members. I think first of all I should like to express my appreciation for the privilege and opportunity of appearing before this committee to present in brief some of the views of the Christian Science church on one of the subclauses of the bill.

As your chairman has explained to you I am on our Christian committee for public service in Ontario, but in public relations work which affects our church on a national level I also represent the church in that capacity.

This is the brief to the chairman and members of the special parliamentary committee on the act for the recognition and protection of human rights and fundamental freedoms.

The following brief is submitted to you by the Christian Science committee on publication for Ontario, on behalf of the Christian Science churches and societies in Canada which are affiliated with the mother church, the First church of Christ, Scientist, in Boston, Massachusetts, and which are hereinafter collectively referred to as the Christian Science church, for your consideration in respect to proposed bill C-79, an act for the recognition and protection of human rights and fundamental freedoms.

The concern of the Christian Science church in making this submission is in relation to the provision of freedom of religion as referred to in part 1, section 2, subsection (c) of the proposed bill.

It is submitted that the right of religious freedom must be zealously guarded and that such freedom should extend not only to the right to worship in the manner one sees fit but to practice all the teachings of one's religion consistent with peace in the community and public well being.

Christian scientists, it is respectfully submitted, should, in the practice of religious freedom, be allowed to avail themselves of the benefit of treatment by Christian Science practitioners in keeping with their religious teaching. The request is made then that in making provision for freedom of religion there should be incorporated in the proposed bill of rights for Canada, the following provision:

> All persons within Canada shall possess the unrestricted right to the free exercise and enjoyment of religious profession and worship without preference or discrimination in accordance with the teaching and tenets of his religion; including the right of a person to depend wholly on prayer or spiritual means for physical healing in accordance with the tenets of the denomination to which such person belongs, provided that all sanitary measures, quarantine rules and regulations be complied with.

In requesting that the foregoing provision be added to the subsection stipulating "freedom of religion" we would point out that Christian Science healing is not hypothetical, but that it is a bonafide and established method of healing, and is supported by an abundance of documented evidence to this effect. From its inception 90 years ago Christian Science has produced striking healing results as well as reformation of character, enrichment of living, and spiritualization of thought. Authenticated reports of healings of organic and functional disease appear weekly in the Christian Science Sentinel, monthly in The Christian Science Journal, quarterly in the Heralds of Christian Science published in several foreign languages. Carefully verified testimonies may also be heard on weekly radio and television programs in the series "how Christian Science heals". Many of these testimonies record healings of cases which had previously been diagnosed as incurable. The record also shows that virtually all types of disease, including those considered most difficult and malignant, have been healed through the ministrations of Christian Science. Many entire families, over a period of years and sometimes through several generations, have relied exclusively and successfully for their health needs on prayer as taught in Christian Science.

Further acknowledgment of the effectiveness of Christian Science healing is found in the recognition by hundreds of insurance companies in the United States and Canada in their various casualty lines of Christian Science treatment and care in lieu of medical treatment.

A fundamental rule in the practice of the Christian Science religion is obedience to the laws of the land. Christian Scientists are known for their unfailing adherence to law, and are particular to observe sanitary and quarantine regulations. They are law-abiding citizens and they are careful to respect the rights of others. To quote a passage from page 220 of "The First Church of Christ, Scientist and Miscellany" by Mary Baker Eddy:

> . . . Whatever changes come to this century or to any epoch, we may safely submit to the providence of God, to common justice, to the maintenance of individual rights and to governmental usages. This statement should be so interpreted as to apply, on the basis of Christian Science, to the reporting of a contagious case to the proper authorities when the law so requires. When Jesus was questioned concerning obedience to human law, he replied: "render to Caesar the things that are Caesar's," even while you render "to God the things that are God's."
>
> I believe in obeying the laws of the land. I practice and teach this obedience, since justice is the moral signification of law. Injustice denotes the absence of law. Each day I pray for the pacification of all national difficulties, for the brotherhood of men, for the end of idolatry and infidelity, and for the growth and establishment of Christian religion—Christ's Christianity.

Freedom of religion can only mean the preservation of the basic human right of freedom of worship and conscience for you and me, and for everyone. In a word, universal freedom of individual conscience. It is a right which is precious to all men and it should be upheld in appropriate language in the legislation before this committee.

To preserve the right of religious freedom it is respectfully requested that earnest consideration be given to the recommendation herein mentioned.

All of which is respectfully submitted.

Thank you for your very close attention and if there are any questions, I will be very glad to endeavour to answer them.

The CHAIRMAN: Are there any questions, gentlemen?

Mr. KORCHINSKI: Mr. Chairman, may I be permitted to ask the first question.

Why do you feel that the bill, as now constituted, will not permit you the right to exercise your religious freedom as you would wish?

Mr. TUFTS: It is quite possible that it would. The very brief reference to freedom of religion does not seem to cover the ground as we understand it. We are perhaps unique, and possibly somewhat different to some other denominations in that Christian Science is best known for its system of healing. That is one point we wish to bring emphatically to the attention of this committee, so that something might be included in the bill to protect the practice of our religion as well its worship. Actually, from our standpoint there is no difference: the one is dependent on the other. What I mean by that is that worship in our religion and the practice of it are inseparable: they are one and the same thing.

Mr. KORCHINSKI: It seems to me that in a part of your brief here, if I can just refer to the appropriate quotation here—there is somewhere where you refer to methods of healing, and so on. It seems to me this is a matter of conscience, or a matter of your own feeling, as to how you feel about religion. Certainly, in my opinion, the bill provides you sufficient leeway in that it states that we shall have the freedom of religion. If you so wish to practise religion in that manner, I think the bill is sufficient in this regard. I cannot see what other language you might want to use in such an instance. Perhaps you have something in mind, and I would like to hear it.

Mr. TUFTS: What we have in mind is, the item on page 2, where it says:

> All persons within Canada shall possess the unrestricted right to the free exercise and enjoyment of religious profession and worship—

Mr. KORCHINSKI: I have that before me, but would you then feel that perhaps you should elaborate on that particular point—that is, the freedom of religion to this extent?

Mr. TUFTS: That is what we feel we have done in this brief. If you think otherwise, of course, it is the province and privilege of the committee to enlarge upon that, if they wish to do so. Actually, it is our feeling that the wording we have submitted will extend the privilege that we would like to have written into the act.

The CHAIRMAN: Would you excuse me, Mr. Korchinski. Mr. Tufts, has there been any instance, to your knowledge, in Canada, where you have been denied any of the rights which you assert in this provision on page 2 of your brief?

Mr. TUFTS: Going back a number of years, yes, there have been cases, and I cannot cite any at the moment. I did not make a record of them, but there have been cases in which there has been the right of freedom of religion challenged, and we have had to make our appearance in court on certain occasions in order to maintain our right to practise our religions.

Mr. STEWART: A good many years back now?

Mr. TUFTS: Yes, a number of years back.

Mr. KORCHINSKI: How far back would that go?

Mr. TUFTS: Could I ask the Senator if he has any recollection how long ago that would be?

Senator ROEBUCK: Back in the twenties.

Mr. MARTIN (*Essex East*): Was that not pursuant to the provincial law, because there was an alleged violation of a provincial act that had to do with one of the health departments?

Mr. TUFTS: Just what the case was, Mr. Martin, I cannot give you the details now; I do not recall it well enough; I was not in office at the time; but

I do know there were some actions which had to be taken in order to protect our interests. There was the non-supply of necessaries in the case of sickness.

Mr. MARTIN (*Essex East*): That is what I was referring to.

The CHAIRMAN: I think I should explain to the committee that Senator Roebuck is counsel for the church, and is probably well informed on the legal aspects of it.

Mr. MARTIN (*Essex East*): Perhaps I might ask Senator Roebuck, along the lines that Mr. Spencer indicated, if he knows of any statute—any federal statutes—we are dealing now with a federal bill—or any decision of the courts which violates the principle of the proposed recommendation.

Mr. TUFTS: No, I do not know of any. It is just that we feel there should be some enlargement, some elucidation of the term "Freedom of religion", and this is our recommendation, as it is contained on page 2 of our brief, as a suggested wording.

Mr. MARTIN (*Essex East*): Are there any existing provincial statutes which apply to the application for minors, with regard to the proposed process of healing, which is found in your religion?

Mr. TUFTS: Yes, there are certain provincial regulations in that respect, particularly having to do with the neglect of children, and that would be children under 16 years of age.

Mr. MARTIN (*Essex East*): Do you feel that that is a violation of your conception of religious freedom?

Mr. TUFTS: Well, actually, I do not think we have had a tested case of that kind. We are quite wise in promoting the practice of our religion, and we certainly try to avoid any situation that would get us into action that would be harmful to us in any way. It has been found, and we have proved on many, many occasions, that Christian Science is equal to any mergency, and that it is capable of healing under emergency situations, as well as normal situations. It has met our need, and has met the need of individual Christian Scientists, and Christian Science families. It has been substantially proven in that direction.

Mr. MARTIN (*Essex East*): Would you regard, for instance, any hospital insurance act, or medical insurance act as a violation of your concept of religious freedom?

Mr. TUFTS: Not unless there was some compulsion attached to it which forced us to accept medical treatment. In that case we would, but not otherwise.

Mr. MARTIN (*Essex East*): Or hospitalization?

Mr. TUFTS: That applies to hospitalization as well.

Mr. MARTIN (*Essex East*): What would you do, for instance, in the province of Ontario, where there is compulsion with regard to a particular group under the Hospital Insurance Act? I mean where they deduct from payroll workers?

Mr. TUFTS: We absolutely comply with any government legislation.

Mr. MARTIN (*Essex East*): I see. You do not have any difficulty in terms of your concept of religious freedom in that context?

Mr. TUFTS: No, there is nothing of that nature that I could put my finger on, no.

Mr. STEWART: What about provincial regulations regarding vaccination of children going to school?

Mr. TUFTS: We were given exemption from vaccination and other types of medical attention for children going to school.

That has been in effect under an administrative ruling of the Ontario health forces, and of the Ontario educational department since 1938, and it has been readily granted on each occasion when a request has been made since that time. It has worked very well and we have no complaints, with the fine cooperation we have received from provincial sources in regard to that problem.

Mr. STEWART: Does that apply to all the provinces?

Mr. TUFTS: Most of the other provinces of Canada have the same privilege.

Mr. KORCHINSKI: Might I return to my original question.

Mr. Chairman, I would just like to ask the witness one more question.

You cited what you think should be added into the bill of rights under that provision where we have granted, or we state we have freedom of religion. Now, this is your submission. I would like just to point out that other submissions could be made by other groups, and we could end up with volumes, setting out in detail what we feel we want as provisions in the act to protect what we say is our freedom of religion.

Is there not a danger of complicating the act on this one particular point? Furthermore, is there not also a danger that at some future date there may be another denomination spring up, which may feel that everything up until now, as set out in the act, is not in accordance with their conscience, or the way they want to practice their religion—and they would say it does not apply. If that was the case then, we would have to add more detail into the bill.

Mr. TUFTS: Well, I suppose that situation could possibly occur. The wording which we have submitted here is quite general. We have tried to design it so it will meet the needs of every denomination. We are not asking simply for something that will benefit Christian Scientists; we would like to see something that would benefit every worth while denomination of religion, and we have endeavoured to accomplish that in bringing up this wording.

Now, it is a fact that Christian Science does emphasize the element of healing a great deal more than the other major denominations, and some of the smaller denominations, but here again many of the major denominations today are working vigorously, and looking directly into this question of spiritual healing. They are to be commended for what they are doing, as I think they are making very fine progress in that direction. We have all of them in mind, in submitting this wording.

Mr. KORCHINSKI: You have answered the first part of my question, but you have not dealt with the second part, and it is that at some future date there may be some other denomination that may suggest something which is not covered within that phraseology.

Mr. TUFTS: It is possible that situation could occur. That is something we will have to deal with in the future, I suppose, when it occurs.

Mr. KORCHINSKI: Would you then not agree that simplicity is the best thing we could possibly come out with at the moment—that is, in terms of simple language that everybody could understand—"freedom of religion". To me it might mean one thing and, to another, something else.

Do you not agree that it would be best to keep it simple, at the moment?

Mr. TUFTS: I think, sir, you have answered your own question. You say to you it might mean one thing, and to another person another thing.

Mr. KORCHINSKI: But, it is still religion.

Mr. TUFTS: Yes, definitely.

We are glad to have that term, freedom of religion, in there, but we feel it should be clarified somewhat and enlarged upon so there will not be any question about what is meant when we say "freedom of religion".

Mr. DESCHATELETS: Sir, since, generally speaking, we have in this country freedom of religion—and I gather that you have no particular complaint to present as to any violation of this freedom of religion now—in fact, that is what you have said.

Mr. TUFTS: Yes. We are thinking more of protection and preservation of that freedom.

Mr. DESCHATELETS: In relation to what you have said, have you not in mind that we should have in this bill some provision as to enforcement of this freedom of religion in order that we could have freedom of religion more fully protected than we have it now, simply by enumerating the freedom of religion. Do you not think we should have some provision which would enforce this right?

Mr. TUFTS: Well, that is getting beyond my legal conception, and what you think should be incorporated, in the way of enforcement, is entirely up to this commendable committee. I would be glad to leave a situation of that kind entirely in your own hands. From our standpoint, what we have submitted here is our conception of what would be desirable, and what is essential, to preserve and protect our freedom of religion.

The CHAIRMAN: Have you a question, Mr. Aiken?

Mr. AIKEN: Mr. Tufts, we are on the fringe of what may be a very difficult matter, and I am not so sure whether our committee should go into it. However, it is raised in your brief, and it concerns the effect of freedom of religion, as expressed in this bill, as against provincial personal freedoms—medical care, and so forth. Now, in your brief, you present the fact that freedom of religion could include matters physically as well as spiritually and, in this sense, I am wondering whether this is encroaching on personal matters which may be provincial. I have in mind the question of Jehovah Witnesses who, as we all know, are averse to having blood transfusions. Of course, this is not mentioned in your brief, but it is pressing it forward one further step—to the point where there is a conflict between freedom of religion and, perhaps, some other freedom.

Have you any thoughts on how far such a concept could be carried.

Mr. TUFTS: Well, this requires some detailed explanation and, I might point out, this seems to be a worthwhile opportunity to do so.

There is quite a definite line of distinction between the procedure followed by our friends, the Jehovah Witnesses, and the healing practised by Christian Science.

Mr. AIKEN: I realize that.

Mr. TUFTS: Getting into the area of provincial legislation, we do not have that in mind here. This is, as we realize, a federal statute, and we certainly would not want to incorporate anything in these requests for amendment that would invade the provincial field in any way. We would be quite reluctant to do that.

Mr. MARTIN (*Essex East*): Could I ask Senator Roebuck, having in mind the Roncarelli case, and cases like that, if he would not agree that the fundamental law in Canada now provides the freedom which Mr. Tufts, in his very worthy submission, urges this committee to protect.

Senator ROEBUCK: I think it does.

If I may be permitted to address the house, not as a senator, perhaps, but as an individual, I might say that I have acted for the Christian Science

churches for many, many years. I do not think that the church, and Mr. Tufts, have come here to complain about the lack of freedom which we have enjoyed in the past. His difficulty is to see today that that expression in this bill of rights is broad enough to cover the practices which we have enjoyed in the past, and hope to continue to enjoy in the future. I am sure they are not here with any complaints. We have, in Canada, a freedom which I think we have all thoroughly appreciated; we want to protect it, and I welcome this bill in that way, if I may say so.

As a senator, I certainly welcome such a bill.

Mr. RAPP: Mr. Chairman, are not some of the provisions which it is suggested be incorporated in the brief already covered in clause 2, for instance in (e) "Freedom of assembly and associations?" This comes back to freedom of religion. Then there is the right of the individual to life, liberty and security of person. This, I think, covers some of the provisions or is similar to the provisions you have recommended in your brief here in connection with freedom of religion.

Mr. TUFTS: Here I think we are getting into a legal aspect of the bill. I would prefer to have our legal representative speak to that.

Senator ROEBUCK: Of course I did not come here with the idea of addressing the committee. I can imagine we will have a committee of our own on this. In respect of life, liberty, security of the person and enjoyment of property, I think that is a long way from what Mr. Tufts has suggested. I think the right to practise religion in a physical way was mentioned; that is the application of spiritual means for physical healing. I do not see that as being covered by such broad statements as the right of the individual to life, liberty and security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law.

The CHAIRMAN: Perhaps I might ask you this, senator. It seems to me in all religions there is a recognition of a divine influence on our health and well being, undoubtedly. Is not the practice of the Christian Science church simply an implementation of that thinking and a recognition by them that the whole power over, and influence on health, and so on, is divine and that man has little contribution to make to that aspect of it.

Senator ROEBUCK: Mr. Tufts already has said in effect that his church desires no monopoly on the exercise of religious freedom and that he is asking for this on behalf of everybody. Most of the denominations now-a-days are branching out into that kind of healing. The Roman Catholic church does it undoubtedly and the English church to which I belong does it.

Mr. TUFTS: And the Presbyterian church.

Senator ROEBUCK: Yes. So he is not asking anything especially for his own church, but rather recognition for them all of the right to exercise that power which they claim they enjoy of effecting physical well being.

The CHAIRMAN: I do not like the feeling to be entertained that I was indicating that the Christian Science church claimed anything special in this regard, but it does seem to me that you place more reliance upon divine influence in the field of health and welfare than do some of the other denominations. Nevertheless I would think, it still is the practice of religion and would be covered and embodied in the term "religion".

Senator ROEBUCK: There is the distinction perhaps between the Christian Science church and some of the others. The Christian Science church has professional practitioners, people who devote their entire time and their lives to the practice of that religion in its curative aspects. I do not think any of the other churches have that.

The CHAIRMAN: Well, gentlemen, if there are no other questions, it has been customary, with the approval of the committee to have the Minister of Justice supplement any of the questions. Perhaps he may have one or more questions to ask.

Hon. E. D. FULTON (*Minister of Justice*): I do not think I have today, Mr. Chairman, in respect of this brief. I think its point is made very clearly. I say that with due respect, because we have found it very difficult sometimes to be clear. You have made your point very clear.

Mr. TUFTS: Thank you.

Mr. FULTON: I would simply say I would have some reservations as to whether what is asked for in the wording following "including the right of a person . . . etc." on page 2, is not really a matter which, while not necessarily peculiar to the Christian Science church alone, is really a particular aspect of the practice of a religion, which it is arguable is embraced within the whole concept of freedom of religion. I express that rather as a thought than as a question. I have no questions to ask.

The CHAIRMAN: May I say on behalf of the committee, Mr. Tufts, that we are pleased to have had you come before us and present this very excellent brief on the point which you are making, and our thanks also to you, Senator Roebuck, in accompanying him. I do hope that if, when and as this bill is finalized you will be satisfied that there is that freedom which you feel you should have in the practice of your religion.

Mr. TUFTS: Thank you very much, Mr. Chairman. It has been a pleasure to appear before the committee and I would again like to express my thanks for the very courteous way in which you have received our brief. Thank you very much.

Senator ROEBUCK: Thank you, Mr. Chairman, and may I thank the committee for the courtesy which you extend to a member from the other place.

The CHAIRMAN: Gentlemen, we also are pleased to have with us Professor A. R. Lower, professor of history at Queen's university.

Professor A. R. LOWER (*Queen's University*): Mr. Chairman and gentlemen, first of all I would like to say that I much appreciate the fact that you have invited me to come to make a statement to this committee. Secondly, I hope you will pardon me and forbear with me when I tell you that I came away this morning and managed to leave behind all my written material.

Mr. RAPP: A typical professor.

Mr. LOWER: Well, I think I will make that good by having managed to remember most of it anyway, and I have scribbled some rough notes. Thirdly, as a preliminary point, I would like to pay my humble tribute to the Prime Minister of the country for having brought in this bill. He has forced discussion on an issue which I suppose in ordinary times most people do not give much attention to. I think it was commendable on his part and I am sure it will be infinitely useful in the future.

As I was sitting there I looked through one of the speeches made in *Hansard* the other day by Mr. Allard of Sherbrooke. I noted that he had a good deal to say about the historical background of the question of the bill of right. So I will not have to bore you very much with the question of history.

However, may I call your attention to the fact that we cannot possibly think of the subject without being carried into our history. The two are intimately bound up. As I suggest, most of us know English history, in particular, is almost mainly a commentary of this question of the freedom of the individual as, indeed, is the common law itself a commentary on freedom of the individual. So, we cannot pass this very important subject of the historical setting of bills of rights. We cannot pass that over.

I could make a few incidental or general remarks first. The first one that I would like to make is that we could very well decide on the principle of bills of human rights; whether they are necessary or whether they are not necessary, and leave to the lawyers that with which they are undoubtedly capable of doing, fitting the subject into our law and into the procedures of our courts. I do not, however, think that the lawyer, with his legal difficulties, should be allowed to take control. He is, after all, our servant, not our master, and it is up to the public, as represented by parliament, to make the general conditions of our law, and then to the lawyers to apply it. I would be inclined very much to put aside the rather minor constitutional points that constantly are discussed with respect to bills of rights.

There is no question that the bill does raise many searching matters, and bring up many searching points with respect to our whole constitutional arrangement. There are three that come to my mind at once. The first is the question of parliamentary supremacy. The second question is on fundamental law, and the third is the question of British precedents. I would like to talk about all of those a little, if I may.

As to parliamentary supremacy; parliamentary supremacy, of course, is a British doctrine. It is the doctrine of 1689, when you abolished the ancient constitution, or changed the ancient constitution radically by the revolution of 1689, and put in its place what gradually emerged, although it took quite a long while to emerge. That is the doctrine of parliamentary supremacy, and as Walter Page said in the 19th century, parliament was then all competent; parliament could do anything it said in the course of nature. He said it could not make a woman into a man,—that is the illustration he took—but it could do everything that is in the course of nature. He, of course, was referring to the British parliament, not to the Canadian parliament.

I suggest there is a very distinct difference between the two. Though, from much of the reading I have done, written by learned members of the bar, I would suspect that many of them have not yet discovered that. I would feel that in a country like ours in respect of the question of the doctrine of parliamentary supremacy, with very little inspection, indeed, it could not be maintained at all. We have not got a supreme parliament. We all know this. Everyone knows that the parliament of Canada is not the supreme legislative authority in Canada. There are ten competing legislative bodies. Some make the point that somewhere or other between the eleven governing bodies of Canada there must be some kind of feeling of total legal competency. That may well be, put it is certainly not in any one of them.

No parliamentary body in Canada is supreme. It is supreme under the limitation of the B.N.A. act, and those are extremely important limitations indeed. I do not see, and never have been able to see, for the life of me, how lawyers can maintain in Canada the doctrine of parliamentary supremacy. Parliament is fairly limited. Legislations of various parliaments are fairly limited. They are supreme in certain areas, and this leads me into my next point; this quite abstract question of fundamental law.

We are usually told that we do not live under a regime of fundamental law, in contradiction to the United States, which does. The constitution of the United States is the supreme law of the land. Here we are told we do not live under a regime of fundamental law. We had the revolutionary settlement which was the last big settlement of our public affairs, in 1689. Prior to that period, for many centuries, the doctrine that had always maintained was the doctrine of fundamental law. Certainly down through the middle ages people talked about the right and believed in the doctrine of fundamental law. Then with the rise of the Stuart kings and the revolutionary struggle of the 17th century when the kings were put in their place, parliament stepped in, and the doctrine of

parliamentary supremacy arose, as I tried to tell you. People gradually forgot the idea of fundamental law, and that there were fundamental things which no law made by a parliamentary body could change. So it has come to be believed that there is no such thing as fundamental law.

Now, on two points; one of them on which I perhaps have more antiquarian interest than anything else, I think I can controvert that. That is to say, the Hanoverian succession, under which we still live, is undoubtedly bound up with the bill of rights of 1689. It was enacted at the same time. If you accept one you accept the other. If the Hanoverian successions are fundamental in our institutions—and I suppose all you gentlemen have sworn to support that succession—if these are fundamental in our public institutions; if they are basic; if they are at the bottom of things, and if this is the point at which to draw the line and begin again, then I think, from that point of view, you have something very close to fundamental law. If you controvert the bill of rights of 1689, which was the ancestor to the American bill of rights of 1791-92, you controvert the Hanoverian succession. If you wish to destroy the present succession to the crown and set up a new reigning house which would be virtually a revolutionary act you will have to destroy the rest of the revolutionary settlement and the bill of rights. Incidentally, that bill of rights is still part of our law, and it guarantees, for what they are worth, our guarantees to this day; but that, I would suggest, is perhaps now becoming a somewhat remote case. There is no sense, until we can argue, and argue very strong, that you do not have parliamentary supremacy, but fundamental law, in doing this at all. The very fact that all one has to do is to point to the existence of the British North America Act to say: here is our fundamental law, supports this.

I have been interested in my lifetime in seeing how, day by day, year by year, it is becoming regarded more and more as the constitution of our country. It is not merely a simple legislative act; of course not. It would be ridiculous, it seems to me to say that it is simply a legislative act; an act of the British parliament that might be swept away tomorrow. Of course it is not that, and we know it is not. It is far more than that. It is something which stands at the base of our very existence. It is the foundation of our nation. It is that which regulates many numbers of our activities. I do not say there is nothing else in our system but the British North America Act, because, of course, there is; and so there is, despite the American constitution, in the American system of government. There are many things, and many good statutes still maintained under the law, for example.

Both of us inherit a great deal, but our constitutions do not include everything that we need in the way of public institution. However I submit that if you can get anything at all that is fundamentally basic, permanent, and enduring, which is a foundation of the state, then, for us, that is the British North America Act, and that is where we begin.

So I think on that basis I make quite a decided point against the doctrine of parliamentary supremacy. I say all this because every time a bill of rights is mentioned, you will hear people say "How can you make it accord with the idea of parliamentary supremacy and our unwritten constitution?"

But we do not have an unwritten constitution. We have a written constitution, and it is to be found in the same document, a bill of rights. There are two points there. First of all, there is the exploration of certain aspects of our written constitution, and secondly, an exploration of this statement which is so frequently made that the British constitution is an unwritten one.

Let me address myself to that. I was interested to note in that little speech which I picked up when I came in, that the gentleman referred to that point. I think it was the first time I have ever seen it referred to in any public statement, that there is in the British North America Act a whole series of enactments and clauses which do establish the rights and fundamental rights.

The educational clauses establish rights which are about as fundamental as we can devise, I think. They go back, of course, to religious rights, to section 92.

There is a language right, although I have forgotten the number of the section; I think it is 132, which gives us the right to the French and English languages.

These are rights. They are property rights, it is true, but they are rights. And there are others which are somewhat more marginal, such as the question of subsidies to provinces. The financial clauses of the British North America Act provide those rights. The British North America Act is full of rights.

The federal constitution itself is full of rights. I suggest that the federal constitution is a bill of rights.

If you are not too much attached to the exact form of the words, and if you could think of those words in the large, a bill of rights, a statement of rights—it is in our constitution already. It is there. We do have a bill of rights. I do not think there is any question about it that we have a bill of rights. Every federal constitution must have a bill of rights of some sort. The nomenclature is a matter of indifference.

So the conclusion from that is obvious; you go on to enlarge those rights, and it solves some of the difficulties of the lawyers, I should think in doing so; you go on to enlarge them. That is the point I have been coming to.

The second point I was going to make was simply this rather shopworn reference to the unwritten British constitution. I get a bit tired of hearing about it, because I do not think it is historically sound. The British constitution is largely a written one. It is not written out in detail as a constitution, but it is largely written, and it is written in great resounding statements, statements which usually came out of blood. It is written in letters of blood, if you like.

I do not mean to go through them all, but all the great historic documents are there for everybody to see and read. Many of them probably have been forgotten today, but they are still there. Many of those documents began hundreds of years ago, generation by generation, and they constitute statements of the kind of policy under which people think they live; and that, it seems to me, is something that every nation with some claim to self government has done, either directly or indirectly. It has made some kind of its statement of its political philosophy.

The British have done it largely indirectly, it is true; though, mind you, if it is not in the formal words of public documents, nevertheless there has been an enormous amount of discussion, debate, and fighting.

One could refer to all these documents of the English civil war period of 1640; and if he were to go to the British museum he would find there a collection of some 40,000 pamphlets which have never yet been really examined. There are some 40,000 personal pamphlets on the question of government, as it was viewed during the years from 1640 to 1650.

Do not tell me that people did not know where they were going, or were not thinking of where they were going, and that the whole thing was a sort of animal instinct. It was nothing of the sort. There has never been any question in the minds of the people of Great Britain which was more thoroughly thought about than the public policy under which they live; and while the lawyers have tried to keep us away from the spirit of the underlying doctrine of the laws, and have succeeded pretty well, with the idea of the supremacy of the crown and so on, yet the actuality is that everybody knows the spirit from which it emanated.

The spirit informs the letter. What are you to make of the phrase "unwritten constitution"? Just you try to repeal the parliament act of 1911 and see how far you get in Great Britain; or just try to repeal the Union with Scotland

Act, and see how far you get. It is just nonsense to speak of the British constitution as being unwritten. It is written in the big things, just as ours is written in the big things.

So my point here is that I cannot see why a little more writing will do us any harm. People may say: "What is the use? Why do we need this formal statement?"

Nearly every state makes some kind of a formal statement sooner or later, for what it amounts to, or what it stands for. I do not need to quote the example of our neighbours. They have a formal enunciation of their philosophy in their Declaration of Independence. They say: "We hold these principles to be self evident, that all men are born to be free and equal and equally entitled to the pursuit of life, liberty, and the pursuit of happiness."

It will not do to fall into the Canadian habit of sneering at our neighbours on that point, as being holier than thou, because while those words have often been forgotten and excluded, nevertheless, they are like something on the end of a big piece of elastic; they are apt to pull a man back, or to pull the public back to their meaning, every now and again. And if you read American history, you will see that they do so.

American history is the history of a people founded on a definite political philosophy which is clearly enunciated. I think of course you cannot expect that from the British. They are an empiric kind of people who find it very difficult to make these somewhat sentimental statements.

They are a follow-your-nose people. I have always said that the national anthem of the British should not be God Save the Queen, but

> "Lead Kindly Light, Amid the Encircling Gloom,
> Lead thou me on;
> The night is dark, and I am far from home;
> Lead thou me on;
> Keep thou my feet;
> I do not ask to see the distant scene;
> One step enough for me."

That is the genus of British politics.

But where do we stand? I suppose it is somewhere in between. We do not have too much difficulty since we live under a regime of fundamental law and we have already enunciated the nature of our study to some considerable degree. We do not have too much difficulty in thinking of those terms. That seems to be the main point. It would be relatively easy for Canadians to initiate certain principles which inform the nature of the subject, and by which the subject stands, and for which it stands. Nobody will deny those principles of course. There is no one in this room who would deny it. But there is some strange reluctance quite often to enunciate them.

You may say: "Why enunciate them, if they are contained in our law as maxims or working rules and so on? Why enunciate them?" Well, why enunciate the great truths of scripture? You cannot enforce them in a court of law. It was said, indeed: "love they neighbour as thyself"; but I do not think that is enforceable.

But has it been without influence? Has it had any effect on western civilization, that and similar statements? Surely the question answers itself. Now, from my point of view, apart from the strict legal application of a statement of principle which you may call a bill of rights—from my point of view its major importance is that it gives us the principles by which we live. We can always be drawn back to them. They are great, shining liberties, as it were. These are the things to which we have solemnly subscribed. This is the sort of thing I would hope a bill of rights would do.

Now, I must say, I have thought a good many years over its wisdom, and I know it is an exceedingly difficult thing to do, to draft a bill of rights under a parliamentary constitution, as all the litigation between our provinces and the dominion illustrates over the years. I was not at all sure we would be wise to proceed in this way, but later I came around to thinking we would be, simply for the reasons I give you, that we should have somewhere enunciated the principles under which our state exists, and I would hope to find them in a bill of rights.

The principles are there, in the fundamental documents, once and for all, perhaps. They were enunciated some seven or eight hundred years ago in Magna Carta, in the famous words of Magna Carta, chapter 39: "To no man shall"—I cannot quote too correctly—"To no man shall we deny justice." That is what it boils down to, "To no man shall we deny justice." And year after year, century after century, people were brought back to that elementary concept: "To no man shall we deny justice." So that I think it penetrated very deeply into English thinking and has come, of course, over to North America with, I would think, equal force "To no man shall we deny justice." It is from that maxim that all others proceed.

In the seventeenth century there was old Chief Justice Coke who said, "Magna Carta is such a fellow as he will have no sovereign." In other words, in that picturesque way, he was trying to illustrate what an important and fundamental document it was. But we all know that words wear out; the words of Magna Carta would be strange indeed today, and you would have to be a specialist to understand them. Words wear out, and now and again we need a re-statement. It seems to me we need a re-statement while we have these troubled days in the world, and we people in the west have to decide what we stand for. We are almost in the position, most unusual for Canadians, of having to stand up and be counted. We have to decide what we stand for. So that I suspect this is a rather good time for a re-enunciation or re-phrasing of the old words, but I am sure that within them the spirit will be that of the old document, Magna Carta, "To no man shall we deny justice," because out of that all else proceeds.

I do not wish to go any further into this business of abstrations, but there is another aspect of the proposed bill of rights to which I would like very much to call your attention; and that is to say the way in which it deals with the War Measures Act. It is clause 6 of the proposed bill—I suppose paragraph (4) is about the most significant paragraph:

> If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation—

—and so on.

First of all, the War Measures Act itself. I had a copy of it with me but, unfortunately, I have left it behind.

Mr. FULTON: Would you like us to get you one?

Mr. LOWER: I do not think it matters really, because I am certain all you gentlemen have read it and are familiar with it. You know what it does: it just cuts off your heads as members of parliament, very completely; you are just thrown into the garbage can so to speak; that is all. That simple little act of 1914 just destroys parliament and parliamentary institutions in this country, supersedes them, and gives unlimited power to government. You might say, "Well, parliament can always be called, and it could repeal the War Measures Act." Well, I ask you, will all those present stand up who would defy the Prime Minister of the day? Will they kindly rise? Not very many!

Mr. MARTIN (*Essex East*): What is the question?

The CHAIRMAN: Would you stand up and defy the Prime Minister?

Mr. MARTIN (*Essex East*): That is being done every day. I think Professor Lower should know that.

Mr. LOWER: By an inconsiderable minority, Mr. Martin.

Mr. MARTIN (*Essex East*): Only in parliament; it is growing in the nation.

Mr. LOWER: Well, you know what I mean. The government of the day is either in power or it is not. If it does not want an act repealed you are not going to get it repealed. I do not need to tell you gentlemen that. So that any suggestion that parliament is in control, it seems to me, is so much nonsense. That is my case against this present clause, of course, that it is not in control. In that case, you know how we get around parliament, and we got around it in six hours in 1940. It is true you must have a session every year, but we had a session which lasted from 3 o'clock to 6 o'clock, three hours, in 1940. You can find many ways around parliament.

This clause, it seems to me, giving parliament the power to resolve that the declaration be revoked, does not mean a thing. It just does not mean a thing because, of course, the government of the day, under that clause, will do as it likes and parliament will obediently follow it, especially in a time of hysteria such as wartime.

I would think today, when within our own country we are relatively peaceful and there are no particular difficulties coming forward, our civil liberties are not in too much danger. I must say I do not find any great complaint about the way things go on. Justice is fairly administered, and when something does occur which we do not approve of, there is usually a number of people who rally around and will fight it as, for example, the padlock law was fought through the courts and destroyed by a certain gentleman I know very well. I think, in general, the Canadian public or, at least, a minority of the Canadian public is pretty good on these matters. There is a good deal of political pursuit in it. It is not in peace time that our civil liberties are in any overly great danger: it is in wartime, or other such emergencies. When the public and people in general get hysterical that is the dangerous time, and that is when this legislation must be turned on that, although I must admit it does not amount to a greal deal—it must turn on what we do in wartime. As you know, we get very hysterical, and we Canadians, I think, in particular get thoroughly hysterical when war approaches, and almost anything can be done. In 1914 the War Measures Act was passed through, and parliament accepted it, of course. It was also put into force by proclamation just before the begining of the last war.

In effect, it is exactly like what they call in Latin America the state of siege, which sets up a dictator. The government of the day becomes a dictator under the War Measures Act. I do not know very much that it cannot do under that act. All our civil liberties go into the dust cart. You can be taken out of your house and interned without any trial, and so on: there are an infinite number of things that can be done—and these things were done, as we all know.

Under the defence of Canada regulations which were framed under the War Measures Act, the most coercive of measures were adopted, and many people were interned.

Of course, I do not say that was entirely unjust: I do say that if you put the power of arbitrary internment, or arbitrary arrest into any man's hands —I do not care how good he is—you put the key to our liberties in his hands; because if he has got that power, what may he not do? It is the 3.00 o'clock knock, as they call it in Europe—when the police come to the door and the man goes with them and disappears probably forever, without any trial.

We do not want that in Canada under any circumstances, I suggest—not even for the alien within our gates. Somehow or other I think we must try to avoid that; we must try to find a way around that, because with the power of arbitrary detention we surrender all other liberties, and almost certainly in any future group of defence regulations that is certain to be one of the things that will be included.

I am not arguing for some kind of loose regime in warfare. I know we cannot have that. We have got to look to our security, of course. I am arguing for the absence of hysteria in our framing of regulations, and for some effort to see that the regulations that are necessary are brought under our usual laws so that injustice will not be done.

I think that is something really for the experts to work out, rather than for the mere generally informed person, like myself. I do not see that it should be impossible. I do not see why, for example, when the state security requires the internment of an individual, somehow or other some investigation could not be held which would be more or less public. Why should the ordinary processes of the courts be superseded—if the courts, for example, were to conduct themselves in private in special circumstances, or with a limited number of people present?

In the last war we did succeed in getting that very dangerous power modified a bit. I think it was under Mr. Lapointe—I am not sure—who consented to the establishment of the committees of inquiry in respect to those who had been interned. The minister would not abandon his final power of decision; but he did set up these committees to inquire as to persons who had been interned—and that was a certain safeguard against the power of arbitrary arrest. If that could be invented at that time, I think other safeguards could also be invented, and we could have a reasonable body of law which could meet our situation in wartime. *Inter arma leges silent,* they say—"in wartime, the laws are silent".

But it is a most unfortunate people whose laws are completely silent in wartime, because from the arbitrary powers that the government is given under the War Measures Act, tyranny can easily follow. As everybody knows, nothing is so easily abused as power—"all power corrupts", said Lord Acton; and while I would be the last person to charge that people with tyrannous instincts turn up very frequently in our government—I do not think they do—yet temptation is always there. The opportunity breeds the exercise of this kind of power, and we could go a long, long way in arbitrary government.

I think we tended to disgrace ourselves in the last war in that respect. We went further than any other English-speaking country. The British, at least, required their regulations to be laid on the table of the house. I think there was time given after they were made, and there they could be read. Questions could be asked, and so on.

I do not know what the situation was in Australia and New Zealand; but I am pretty sure that they did not go that far—and they did not go that far in the States. No other English-speaking country went so far as we did in surrendering our ordinary civil liberties. I have always felt ashamed of my countrymen for what we did in the last world war. The very thing that we said so much about fighting for, liberty, we were ready to disregard under the stress of war hysteria. And it did not come back too easily you know. And it never will come back too easily.

Today is the day of the efficient person, of the expert, of the individual who is constantly getting more and more power under his control—and that process goes on and on, law or no law. But why should we hurry it? Why should we make it worse and more severe by our disregard of our own rights and privileges, rights and privileges that have been so hardly won?

It is not a matter of yesterday. I feel tradition very strongly, I must say. I feel that it is perhaps—as an English-speaking person; I have to say that—perhaps as an English-speaking person it is my major reason for existence, that I have this tradition behind me. It is the great tradition of the modern world; this tradition of liberty, liberty under the law; ordered liberty, liberty which is framed in institutions. I think that every man who throws away that freedom carelessly—as the parliament of Canada did on two occasions—does not deserve well of his country.

Just to wind up, I think it is for that reason that I feel very much like commending the present Prime Minister for introducing this bill. It may not be too successful. I do not know how it will go. I do not care, really. But I want to see it on the books. You can amend it afterwards. We can discuss this thing for centuries; it is the great social question. You can amend it afterwards; but here is a core. Let us start, and let the lawyers have their fun working it into our institutions in an arbitrary fashion. It will not do them any harm. But let us start with the bill.

Only I do hope that the Prime Minister will pay the most serious attention to the request I am just making, that he finds some method other than the one he has got here of dealing with the War Measures Act. I think that act should come right off the books: repeal it; get rid of the War Measures Act; put something else there, something more rational.

If he will do that, all I can say is that, in the words of the classical poet, he will have raised for himself in Canadian history a monument more enduring than brass.

Mr. MARTIN (*Essex East*): Professor Lower, may I simply say, as an old friend and admirer, that I am very happy to have been on this committee today when you came before it. You will not expect me to agree with everything you have said, particularly the very understandable and generous estimate of the place of the particular political personality with regard to this measure. But you have been a long, well-established champion of these matters, and we are very grateful to have you here.

I have a number of questions that I would like to ask you. You referred to the ancient charters, and I presume by that you meant—as you have indicated—Magna Carta, of course, which was included; but then the bill of rights, the habeas corpus acts, the act of settlement.

Can you tell us whether or not in clause 2 of this bill there is anything covered that is not already in these charters, that is not part of our fundamental law?

Mr. LOWER: It is a very difficult question to answer in detail, Mr. Martin. I would think that, just in a casual answer, this goes a good deal further than any of the ones in the document which you have mentioned. I have not before me the language of the bill of rights of 1689, which would be the one which would touch on this. It is much more specific. Now, in the petition of rights, one of its major clauses is that soldiers shall not be quartered on citizens without their own consent. That is an example of the English mode of procedure.

Mr. MARTIN (*Essex East*): Soldiers and marines are not henceforth to be billeted upon private persons.—that is the one you mean?

Mr. LOWER: Yes. I do not remember anything about freedom of religion. That has been secured by various statutes in English law, such as the oath and test act—the removal of disabilities on the Jews, in 1859. I cannot remember any general statement about freedom of religion, nor anything about freedom of speech. It may well be that the lawyers would say these are all impasse in this great document. Probably they are, and I must say that I think it is very much to the credit of our courts, and our law in general, that it assumes

freedom. It always has been said that the common law assumes freedom—complete freedom. It subtracts from it only if it is necessary. And, I suppose, that is the general rule the courts go on. So, in a sense, I suppose you could reconcile the two.

Mr. MARTIN (*Essex East*): I was just wondering in that connection, if you had read the judgment of Mr. Justice Rand, in the Boucher case.

Mr. LOWER: Which case?

Mr. MARTIN (*Essex East*): The Boucher case.

Mr. LOWER: I read one remarkably fine judgment of his two or three years ago. I do not know whether it is the one to which you refer. I think it is the one in which he does make a statement in this general direction, is it not?

Mr. MARTIN (*Essex East*): Yes. My impression is, and I do not want to labour the point, that apart altogether from its value as a declaration, the existing charters, which are part of our fundamental law do, at least, implicitly deal with the matters covered in section 2.

Mr. LOWER: Well, I think in a very general way I would agree with you. I think the Americans could have said the same thing in 1791 as well, when they adopted their first ten amendments.

Mr. MARTIN (*Essex East*): Yes. Now, I want to go particularly to your references to the War Measures Act. I have before me *Hansard* of July 1, and I will quote from page 5650, from the statement made by the Leader of the Opposition. He said:

> A very jealous, sensitive and vigorous guardian of liberty and freedom in this country, Professor Lower of Queen's university, whom the Prime Minister quoted, had this to say in connection with this matter not long ago in Ottawa:

He was dealing with the War Measures Act.

Mr. LOWER: What date is this?

Mr. MARTIN (*Essex East*): July 1, 1960. And, he quotes your words—what you are reported to have said in Ottawa:

> I submit that if we are going to have a bill of rights in Canada, and there will be a great deal of debate about it, we ought to have one that means something. I believe that in normal peacetime our liberties are not in very serious danger. But in wartime they are in very serious danger, the liberties of all of us. Hence it is the duty of the government to find a method of enacting legislation which will give at least minimum guarantees. Suggestions could be made which would modify the War Measures Act. In the meantime, as long as it is on the books, it is the duty of everybody who loves a free society, who loves liberty, to bend his best efforts to attack this act and try to get rid of this invidious liberty-destroying statute, the War Measures Act.

Mr. LOWER: Yes.

Mr. MARTIN (*Essex East*): Now, that does not seem to me to be completely what you said today. You recognize, I take it, from what you said today, that there is a need to preserve the War Measures Act.

Mr. LOWER: Yes, you will find that in the statement. I made it very clear I would like to get rid of the War Measures Act. I think there could be a change.

Mr. MARTIN (*Essex East*): You say you would like to get rid of it completely.

Mr. LOWER: Oh, indeed. I think my statement is completely consistent with what I have just said—at least, I hope so.

Mr. KORCHINSKI: It is consistent.

Mr. MARTIN (*Essex East*): I am just asking, because I had understood, from what Professor Lower said in his statement today, that he recognized reluctantly, as we all do, the necessity of having a War Measures Act in as liberalized a form as possible. However, I take it you believe we should get rid of it completely.

Mr. LOWER: There is an important point there where we might misunderstand each other—and I hope we will not, because I think we are in agreement.

I would like to get rid of the present War Measures Act completely. I agree you have to have special legislation in war, but I think it could be much more carefully framed than it is in this legislation.

Mr. MARTIN (*Essex East*): Well, I am going to pose some questions to you on that particular point. In view of what you have just said, do you think that we should have the War Measures Act in a bill of rights at all—altogether apart from whether or not we think there should be a War Measures Act?

Mr. LOWER: Well, I would rather see them separately dealth with, I must say. I hope you will not get me into a legal bog at this point.

Mr. MARTIN (*Essex East*): Oh, no. I have stated the same position.

Mr. LOWER: Well, I would like to see them separately dealt with.

Mr. MARTIN (*Essex East*): There would have to be, of course, a clause in this bill, excluding its application to a War Measures Act. However, you take the view—and I have expressed this view—that it should, perhaps, not be in a bill of rights.

Now, Mr. Pearson has made three suggestions with regard to the War Measures Act, and I would like to have your views about his suggestions. He said, first of all, that a bill of rights should contain a provision limiting the powers given to the governor in council under the War Measures Act by expressly excluding the power by order in council to deprive any Canadian citizen of his citizenship. What would be your views on that?

Mr. LOWER: By excluding the power by order in council?

Mr. MARTIN (*Essex East*): Yes—to deprive any Canadian citizen of his or her citizenship.

Mr. LOWER: Well, I speak with great humility on this matter, which is a matter so closely related to the practical administration of affairs, of which I am ignorant. I might be inclined to agree with you, because I think the same result could be achieved in other ways.

Mr. MARTIN (*Essex East*): What would you say about this proposition—that the governor in council should under an amended War Measures Act be expressly forbidden to act under the War Measures Act to banish or exile any citizen of our country, in any circumstances?

Mr. LOWER: Banish or exile, in any circumstances?

Mr. MARTIN (*Essex East*): Yes.

Mr. LOWER: That means that if we cannot deal with that in any other way than banishing or exiling, that there is no power within our law, constitutionally, to banish a man. I would agree with you.

Mr. MARTIN (*Essex East*): Then you also propose that there should be written into the bill of rights a provision that would limit the power of the governor in council under the War Measures Act to detain any person for more than a stated period say some few weeks—without a hearing before a superior court judge and without having satisfied that judge there may be serious grounds for believing that the detention of that person was essential to the security aspect?

Mr. LOWER: It is really an attempt to secure the continuous right of habeas corpus.

Mr. MARTIN (*Essex East*): Yes.

Mr. LOWER: I would agree with that, but I think you would want to make a provision there that the judge would have the right to have the hearing in camera, would you not? I quite agree in wartime there are certain things that must not come out.

Mr. MARTIN (*Essex East*): You see a necessity that there should be the right to have this hearing in camera?

Mr. LOWER: Yes, I think that would be pretty necessary.

Mr. MARTIN (*Essex East*): Yes. Well, that might run contrary to another section of this proposed bill of rights which provides for public hearings.

Mr. LOWER: Which one are you referring to Mr. Martin?

Mr. FULTON: That is clause 3 (*f*).

Mr. MARTIN (*Essex East*): Yes, 3 (*f*).

Mr. LOWER: Yes. Well, I would be just a bit nervous about that. We must not be sentimental over these things, must we?

Mr. MARTIN (*Essex East*): No.

Mr. LOWER: I would be a bit nervous. I would agree that in wartime there are certain things that probably cannot come out in public, but we have got to have the next best thing.

Mr. MARTIN (*Essex East*): Yes. Well, one further question. You said that the doctrine of parliamentary supremacy did not really apply in Canada. Would you modify that by saying that parliament's supremacy does exist in Canada either in the exercise of powers under section 91 and section 92, subject only to the limitation that is provided for, and the necessity of having to make an address to the United Kingdom parliament for an amendment of the constitution in respect of those matters that do not come within either of the jurisdictions of the two senior levels of government?

Mr. LOWER: Yes, that is quite right.

Mr. MARTIN (*Essex East*): Then you would agree?

Mr. LOWER: Yes, within the powers confirmed on the dominion, the dominion undoubtedly is the supreme parliament.

Mr. MARTIN (*Essex East*): Thank you.

Mr. LOWER: Yes.

Mr. DESCHATELETS: Professor Lower, you have said in your remarks, if I understood well, that in your opinion the British North America Act is in itself a bill of rights?

Mr. LOWER: Yes.

Mr. DESCHATELETS: I gathered from what you said that you had the opinion that the rights mentioned in the British North America Act should be enlarged?

Mr. LOWER: Yes.

Mr. DESCHATELETS: Did you imply by this that this should be done; that the bill of rights should be enacted and embodied into the constitution?

Mr. LOWER: Oh, no, no. We cannot do that, sir. I would like to see it done that way, but as you know, we would not get anywhere would we, because immediately we would have to have provincial consent.

Mr. DESCHATELETS: Did you say, professor, that you would like to give to this bill of rights greater permanence?

Mr. LOWER: Oh, yes, I would, indeed.

Mr. DESCHATELETS: This could be obtained by embodying this into the constitution?

Mr. LOWER: There has been a good deal of debate on this. Of course, I recognize quite readily that the best way would be to have a constitutional amendment. I do not think there is any likelihood in getting that, so I am prepared to take the next best thing, which is a statute. I am pretty sure that once a statute is passed and people get accustomed to it, and decisions are made under it, and so on, it will stay there in the whole, or in part. It will be amended, but it will stay there. I think it will be pretty permanent, and it will influence our policy pretty widely.

Mr. DESCHATELETS: Now professor, when you say it is going to stay there, do you feel and believe that a bill of rights can be easily amended? I am asking you to answer from your experience as a historian.

Mr. LOWER: You are speaking of a bill of rights?

Mr. DESCHATELETS: Yes, the bill of rights.

Mr. LOWER: I do not know what you mean exactly by that word "easily".

Mr. DESCHATELETS: Let us take, for example, the American bill of rights.

Mr. LOWER: Yes.

Mr. DESCHATELETS: Am I right in asserting that this American bill of rights has not been amended in substance since 1970?

Mr. LOWER: Since 1870?

Mr. DESCHATELETS: Yes, since 1870.

Mr. LOWER: Yes, I think you are right, as far as I know. Of course, you understand that there is technically no such thing as a bill of rights in the American constitution. This is simply a series of amendments to that constitution.

Mr. MARTIN (*Essex East*): It is the declaration of independence.

Mr. LOWER: It would all depend on the political climate of the day, I suppose. I do not really think one could answer that question as to whether it could easily be amended or not. It would depend on the judgment of the political forces of the day. It could easily be amended in the mechanical sense, in that all you would have to do is carry an amendment through parliament. That is quite clear, but you have to consider the other thing, and that is the state of public opinion, and so on. It would be a matter, of course, such as the old saying: "eternal diligence being the price of safety".

Mr. MARTIN (*Essex East*): I would like to ask a question.

Professor Lower, you are a distinguished writer of good prose. I am sure that you must find the legal jargon in this bill, with all of its understandable precision, rather a dull document and not the kind of thing that Mr. Fulton and I would like to see hung up in school rooms in our constituencies. Have you any suggestion in regard to a preamble to this bill?

Mr. LOWER: Mr. Martin, some years ago a gentleman suggested that I might try my hand in regard to that very point. I thought it over, but inspiration did not come. It was much like the way they cried out to the speaker: "louder and funnier". It just seemed I could not get funnier. I would like to have done so. I would agree that it would be very fine if we could have a kind of rhetorical exhortium there, but I would hesitate to try my hand at it.

Mr. MARTIN (*Essex East*): You are an emeritus now and have more time on your hands. Perhaps you could do it.

Do you agree with the statement in clause 2:

> It is hereby recognized and declared that in Canada there have always existed—human rights and fundamental freedoms—

Is that an historical fact?

Mr. LOWER: It depends on what meaning you attach to the word "Canada". I must say that before 1763 that statement would not have held.

Mr. MARTIN (*Essex East*): You think it would have held since 1763?

Mr. LOWER: Well, in the way in which you first suggested the thing, somewhere or other in British law you could find these things.

Mr. MARTIN (*Essex East*): Professor Scott has said, of course, that that was not an historical statement of fact.

Mr. LOWER: I would take a modified view. That is too general. I do not think it is the kind of statement that I would have made. I would be just as well pleased to see the words "there have always existed" changed in some way or other. They would be more defensible if they were changed, I think.

The CHAIRMAN: What would you say to substituting for those words "deemed to have existed"?

Mr. LOWER: Well, I do not think that would do either, sir.

Mr. AIKEN: Professor Lower, might I suggest that the word "heretofore" might cover the situation there—"there have heretofore existed—"?

Mr. LOWER: Yes, I think so. I would go along with that, I think—yes.

Mr. MARTIN (*Essex East*): As a champion of human rights and fundamental freedoms in Canada, would you not think that this bill might be strengthened if we were to impose on the Minister of Justice much greater obligations than are imposed on him in clause 4 of this bill?

Mr. LOWER: Mr. Martin, you are getting into an area there with which I would not be too familiar.

Mr. MARTIN (*Essex East*): I think that perhaps you are more familiar than your modesty allows you to acknowledge.

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in council, examine every proposed regulation submitted in draft form to the clerk of the privy council pursuant to the Regulations Act and every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this part.

Mr. LOWER: I suppose your idea would be to make it "and ascertain" or "and require"?

Mr. MARTIN (*Essex East*): The original word in the act was "ensure" instead of "ascertain".

Mr. LOWER: "Ascertain" is a rather weak word.

Mr. MARTIN (*Essex East*): Yes.

Mr. LOWER: I would favour its being strengthened.

Mr. MARTIN (*Essex East*): Are you familiar with the Inquiries and Tribunals Act in Britain?

Mr. LOWER: No, I am not.

Mr. MARTIN (*Essex East*): That is a body set up by parliament, under the chairmanship of the Lord Chancellor, to examine decisions of administrative bodies to see that there is no violation of the principles of human rights and fundamental freedoms.

Mr. LOWER: It sounds like a very good idea.

Mr. MARTIN (*Essex-East*): Would you think that was the kind of thing that we might well incorporate in a bill of rights?

Mr. LOWER: Just as an offhand opinion, yes, I would think so.

Mr. MARTIN (*Essex East*): Are you familiar with the procedure they have in New Zealand for the redress, on petition, of any individual who feels that his rights have been violated, of going before a body and making a complaint, and so on?

Mr. LOWER: I am somewhat familiar with it.

Mr. MARTIN (*Essex East*): Would you think that kind of procedure is one to which we might give attention for incorporation into this bill?

Mr. LOWER: Yes. I think there must be many of these expedients which would strengthen the bill. Of course, you do not want to have it too long, do you?

Mr. MARTIN (*Essex East*): No. Do you feel that there are in the bill sufficient sanctions to make it fully effective, or to make it more effective?

Mr. LOWER: There are no sanctions at all, are there?

Mr. MARTIN (*Essex East*): No.

Mr. LOWER: I would be chary myself about suggesting what sanctions could properly be put into a measure like this.

Mr. MARTIN (*Essex East*): But would you object to them?

Mr. LOWER: No, I would not object to them, certainly, if it could be devised.

Mr. MARTIN (*Essex East*): Thank you.

Mr. AIKEN: Mr. Chairman, in reference to Professor Lower's fears in regard to the War Measures Act, I wonder if it would make him feel any better about it if I were to read him a passage from *Hansard*, a very short statement of July 7, 1960, at page 5948, when the Prime Minister was speaking about the War Measures Act. He said:

> I think the whole act deserves to be considered,—

and further on he said:

> If hon. members of the house so desire, I would be willing that at the next session a committee be set up to consider this whole field, for the War Measures Act, like all measures passed for the purpose of ensuring the salvation and survival of the state, has been found in the light of experience not only here but in other countries to contain provisions that ought to be ameliorated or subdued in the interests of the individual while at the same time maintaining the security of the state.

Mr. LOWER: Yes, I think that is very wise. I am glad to hear that. There is no question about it, we may need this sort of thing. We do not want to be caught napping.

Mr. MARTIN (*Essex East*): Would you not think there was some danger in leaving over consideration of the amendments to the War Measures Act to another time? You do not believe it would be well to deal with the bill of rights and the proposed amendments to the War Measures Act at the same time? Otherwise, we might run into a position where, having passed the bill of rights, and as the War Measures Act would not be in any way subservient to it, there might not be the same disposition, or liberalization, within security grounds, to the War Measures Act as we would have if we dealt with the matter contemporaneously?

Mr. LOWER: Yes, that would be a very good position to take, and one which I would share. It is a question of the practicability of doing it here. You are getting well on into July. How long are you going to carry on doing this?

Mr. MARTIN (*Essex East*): Do you think that in a matter of this sort, affecting us for all time, we might as well sit here as long as possible in order to do this job properly?

An Hon. MEMBER: We are!

Mr. LOWER: I would not care to express an opinion on that.

Mr. BATTEN: In the first three lines of clause 2, Professor, if the word "always" were deleted, that might make that statement historically true?

Mr. LOWER: Yes, that is another way of going about it.

Mr. BATTEN: Do you think that by just deleting the word "always" and not putting some other word in there—as was suggested by Mr. Aiken, such as "heretofore"; but if you just left out the word "always", do you think that would weaken the phraseology of the bill?

Mr. LOWER: Would you mind repeating your question?

Mr. BATTEN: Do you think that by just leaving out the word "always", and not replacing it with some other suitable word, it would rather weaken the phraseology?

Mr. LOWER: I do not think that it makes any difference, really; it is a very general statement. "Heretofore" was the word this other gentleman suggested. I am not too keen on the word "always"; but I do not see that it makes too much difference. It is not of too much importance, what you put in.

Mr. MARTIN (*Essex East*): That is the kind of statement, surely, that ought to be in the preamble?

Mr. LOWER: Yes.

Mr. MARTIN (*Essex East*): And not in the statute, not in the clause?

Mr. LOWER: Yes, I think that is right. I think that would be a good idea.

Mr. BATTEN: May I ask this question, Mr. Chairman. It has probably been asked already, and if it has, I apologize. Has the Professor expressed any opinion on the value of a preamble to this bill?

Mr. LOWER: Yes, I did. I would like to see a good rhetorical preamble, if anyone could be found who could compose it. You mean, a sonorous preamble, a preamble that would have some weight, and so on?

Mr. BATTEN: Yes.

Mr. LOWER: Yes, I would like to see that. I think it would strengthen it very much. You cannot get these things to order, that is the difficulty.

Mr. BATTEN: Oh, no.

Mr. MARTIN (*Essex East*): Professor Lower, the rights dealt with here are mostly human rights, in largely their political and legal context.

Having in mind the declaration of human rights of the United Nations, particularly section 25, and the declaration of Philadelphia, the ILO declaration, do you not think there is at this time room in the bill of rights for something that in some way embraces the objective that it would have with regard to economic advancement and economic rights that are attached to this day and age?

Mr. LOWER: Mr. Martin, you know very much more about that than I do. But I certainly would be against that.

Mr. MARTIN (*Essex East*): You would be against it?

Mr. LOWER: I would yes. I think it would only complicate the matter.

The CHAIRMAN: Professor Lower, I was a little concerned about your indicated views of the function of parliament. I rather understood you to say that parliament does not mean a thing.

May I suggest to you that debates that occur in parliament, whether they be on legislation, or any other matter that comes before parliament, ensure the maintenance of democratic principles in our country?

Mr. LOWER: Mr. Chairman, no; I think you misunderstood me. Nobody has more respect for parliament than I have. I once wrote on that. That is on record. I have great respect for parliament. But the point, surely, is that in, particularly times of public excitement, when the government is in firm control, parliament by itself—the private members—cannot do anything towards deflecting government from its determined course.

The CHAIRMAN: May I refer you to subsections 2 and 3 of section 6, which deal with the proclamation declaring war being submitted to parliament, and an opportunity given for debate. I believe you indicated that the War Measures Act has remained in its present condition since 1914, without amendment. Is that correct?

Mr. LOWER: As far as I know.

The CHAIRMAN: So that here, for the first time, we are requiring, first of all, that the proclamation shall be laid before parliament forthwith after its issue, and if parliament is not then sitting, then within the first fifteen days next thereafter. And then subsection 3 goes on, and requires that it shall be debated in the House of Commons at the first convenient opportunity within four sitting days next after the motion in the house is made, by as few as ten members of the House of Commons. Do you not think that is a tremendous improvement, shall I say, in ensuring that these powers that are given to the government of the day shall not be exercised without careful consideration being given to the question as to whether or not the government alone should have these powers?

Mr. LOWER: Well, I can see a certain gain in this. However, I do not think it is an impressive gain. You are going to have a debate on whether war ought to have been declared. Well, if war has been declared, I am quite sure as to the way in which that debate will go, and I am quite sure what will happen to people who object to what has been done, in time of public temper. It would be a very dangerous thing to oppose the government.

The CHAIRMAN: Would not that be more a debate on whether or not the War Measures Act should be brought into effect?

Mr. LOWER: It simply says the proclamation declaring that war or invasion exists, and that this may be revoked. Is parliament going to say to government: you have no right to declare war; war is hereby undeclared? A debate in this, I think, would be useful, but I cannot believe that government action would be repudiated by parliament.

The CHAIRMAN: Well, at least the conduct of the governor in council in issuing the proclamation would be reviewed.

Mr. LOWER: Oh yes.

The CHAIRMAN: Not alone by supporters of the government but by the opposition as well.

Mr. LOWER: Oh, yes, I agree it would have its use—a debate on the wisdom of having declared war.

The CHAIRMAN: Or, perhaps, only a declaration that war was apprehended.

Mr. LOWER: Well, yes.

The CHAIRMAN: That was real or apprehended.

Mr. LOWER: It might match it in that condition; that is true.

Mr. DESCHATELETS: You realize, I imagine, that the provisions of this bill will apply within the federal jurisdiction only.

Mr. LOWER: It is a federal statute.

Mr. DESCHATELETS: It is a federal statute.

Mr. LOWER: Yes.

Mr. DESCHATELETS: Now, since there could be racial discrimination in a province—let us say the province of Quebec; it could happen in Ontario just the same—and this bill cannot be used as a legal basis for redress. Do you not think that every opportunity, or everything should be done, in order that we could arrive at a national bill of rights where the fundamental rights of the Canadian citizens could apply everywhere in the country?

Mr. LOWER: Oh, of course I do, sir. That is where you gentlemen come in. It is your duty, it seems to me, to try to educate your people and, certainly, let us hope we can get to that stage. I certainly would hope to see this thing made a national matter. If it is to bind the provinces, then it must become a constitutional amendment, and I doubt very much if you yourself think that is a practical situation at the moment.

Mr. DESCHATELETS: Well, I am thinking of a case that I mentioned the other day before this committe, of a coloured man who was refused admission to a hotel—

Mr. LOWER: Yes.

Mr. DESCHATELETS: —because of his colour, and I would say that, according to the opinions that already have been expressed here, this bill cannot bring relief to this man.

Mr. LOWER: Well, you see you have that covered in 2(b), the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex. You will note that colour specifically is mentioned.

Mr. DESCHATELETS: It would be left to the courts to find out, if it happened in the province, if this bill could be used as a relief.

Mr. LOWER: Yes, and then we get into pretty deep legal water at that time, do we not? I would not feel confident, in an offhand way to say how things would go from that point. Perhaps some of the legal members here would have a view, but I have not. Of course, the tendency has been in the courts, has it not, to uphold attempts to prevent discrimination? We have had some quite good examples of that in recent years. I am sure that the courts which take that view would find that strengthened by this enunciation. You know, years ago, when the Alberta laws were being discussed, back in the 1930's—the late thirties—the courts decided against some of those laws—the press law, particularly, and on a very interesting ground, I thought. I think Mr. Justice Cannon threw out the judgment—that is to say, that this is a country of a good type, which can only exist if there are certain freedoms, and one of those is the freedom of discussion. You could not imagine Canada existing in this great, loose collection of people, with religion and so on that we have, unless you would have freedom of discussion. Now, he just fund that principle in the very essence of our existence. It is conceivable to me any court could find the principle of non-discrimination against a Canadian citizen because he happened to be black or brown, or whatnot, in the same way, and then turn to an act like this and say: actually, it is on the book; here it is. It would greatly strengthen the hands of a judge who was disposed to find him that way. That is about as far as I can go in the legal analysis, I am afraid.

Mr. AIKEN: Just to follow up one point that the chairman brought up. During your initial statement, in connection with the War Measures Act, you intimated there was not too much point in having parliament approve the order in council declaring war, because in times of emergency parliament is pretty much prepared to go along with the government.

Mr. LOWER: Yes.

Mr. AIKEN: I think you expressed it more strongly than that.

Mr. LOWER: Yes.

Mr. AIKEN: I think you expressed it more strongly than that, but they are almost subservient to government. What I wondered at the time was how much better it will be or what advantage there may be whether the War Measures Act were there or not, because if the government is not doing it and parliament were its creature they could create an act and pass it during the emergency and replace the act that we may now feel like taking right off the books.

Mr. LOWER: Of course that relates to the question of a constitutional amendment versus the statute. If we had a constitutional amendment it could not be nearly as easily attacked. But I regard this as half a loaf and half a loaf is better than no bread they say. This undoubtedly could in a fever hysteria, be swept away; there is no question about that.

Mr. AIKEN: This is what I had in mind, whether you would follow to its logical conclusion that if parliament is going to do what the government says it must then whatever was proposed, unless it was unconstitutional, would be enacted.

Mr. LOWER: It would undoubtedly, but then would you not see in this an additional trench from which to fight for fundamental freedoms, the mere fact that even in a period of hysteria such an act as this had been swept away would be a work which would take some sweeping.

Mr. AIKEN: I was referring particularly to the War Measures Act.

Mr. LOWER: In 1914 we had nothing on the books at all and were a very inexperienced people. We have learned, I think, a lot since then.

Mr. AIKEN: You would then suggest either the revision of this act, the repeal of it, or replacement by another.

Mr. LOWER: The War Measures Act?

Mr. AIKEN: Yes.

Mr. LOWER: Yes.

The CHAIRMAN: Are you not satisfied with the suggestion made by the Prime Minister that at the next session a committe will be set up to review the War Measures Act.

Mr. LOWER: Yes. I would think that is wise. I would like to see an examination of it at all costs and under almost any circumstances. I suppose his suggestion is the practical suggestion of a man who is conducting the affairs of a country. I suppose he feels that is about as far as he can go and that that is about what time will permit.

The CHAIRMAN: Do you agree that we should not hold up the bill of rights pending that?

Mr. LOWER: I cannot agree with Mr. Martin there. No, I do not think we should. I would like to see this enacted.

The CHAIRMAN: Are there any more questions, gentlemen? Mr. Minister, would you care to ask a few questions?

Mr. FULTON: Yes, if I may be permitted to. I think the matter of the War Measures Act has been pretty well exhausted. I will only ask one or two questions on it. It did seem to me in one or two of the exchanges that a point might have been obscured which I though was clear from your first remarks. I take it that you do not question in principle the desirability of a government having at its disposal a War Measures Act or something of that sort in times of war?

Mr. LOWER: Special powers.

Mr. FULTON: Yes, an act giving it special powers in war time. What you question is the extent to which these powers should go?

Mr. LOWER: Yes.

Mr. FULTON: You would like to see written into the War Measures Act the maximum safeguards of the liberties of the individual consistent with the welfare of the state?

Mr. LOWER: Yes. You express it very well I think.

Mr. FULTON: But you said you think it is better under the present circumstances to have a bill of rights now and then review or revise the War Measures Act as soon as possible?

Mr. LOWER: Yes.

Mr. FULTON: In respect of your strictures on clause 6 of this bill might I ask you to consider this in the light of the fact that one of the things a government might try to do, even though it found itself confronted with a bill of rights, is to place reliance upon an emergency or fictitious declaration of emergency and thus seek to circumvent and get around that bill of rights by invoking the War Measures Act. That is one of the things that you and others are concerned about?

Mr. LOWER: Yes.

Mr. FULTON: In that light, looking at the War Measures Act which provides that it shall come into force upon a declaration that war, invasion or insurrection, real or apprehended exist, would you not say that that gives a government which might be a victim of such motives an opportunity to make a declaration, not necessarily that war exists but that it is apprehended to exist, whereas in fact there is no real justification for that declaration?

Mr. LOWER: That is the state of siege to which I referred which so many Latin countries incorporate in their constitutions.

Mr. FULTON: If it is possible then that a government might resort to such a declaration in circumstances in which such a resort was not justified, would you not think it is most desirable that parliament should have the right of veto over the invocation of the War Measures Act under that declaration?

Mr. LOWER: Yes. That had not occured to me before. That would give an important justification for this.

Mr. FULTON: This would seem to give parliament the right to review the declaration made by the government, and examine whether the state of affairs really warranted the resort to emergency measures.

Mr. LOWER: This makes me a lot happier about this clause. Of course I would like it to go further.

Mr. FULTON: I think I would accept the point that if there was an actual war and war was declared the debate might be pretty much *pro forma*, but I was directing my attention particularly to a situation in which there was a fictitious declaration which was being used as a device for the government gaining power. If there was a question as to whether there really was this state of emergency, both government members as well as opposition members might well be strongly inclined to check the government.

Mr. LOWER: Yes, indeed. That would be a very unlikely circumstance, but I can imagine a circumstance under which something of this sort might occur.

Mr. FULTON: Would you then agree with me that it is a sensible provision at the moment to put this safeguard in against abuses of the powers of invoking the War Measures Act, which will thus give you some protection against the abuse of the powers conferred by the act; and then say we will look next at the act to see whether improvements should be made in the statute itself.

Mr. LOWER: Yes. I was under the impression, when I read this, that this is an attempt to make criticism of the War Measures Act. From what you say about it I can see you have something additional in mind. I would be very happy not only to have this retained but also to have the revision of the War Measures Act made subsequently. Of course, I do think it is too big a thing to be examined at this time of year.

Mr. FULTON: Yes. It is a big thing whenever you examine it. When you get into the War Measures Act and you are into a really difficult philosophical as well as legal problem.

Mr. LOWER: Yes.

Mr. FULTON: Then the question was raised as to the desirability of the words in clause 2 "there have always existed". I think you expressed the opinion that you would be satisfied with the substitution of the word "heretofore". Is your concern about the use of the words "there have always existed" related to the fact that we do not say at what point of time Canada came into existence?

Mr. LOWER: I think this, really, is not an overly important point. It is something that most people could debate in a very minor way and quibble backwards and forwards.

Mr. FULTON: If I put it to you that on the basis of the provision in the British North America Act of 1867, "the four provinces shall be and form one dominion under the name of Canada", a reasonable person would assume that when we use the word "Canada", we think of Canada as it came into existence in 1867, would you think that was stretching a point, or would you think that would be a logical conclusion?

Mr. LOWER: No, I do not quite agree with that, because the average person would think of Canada as going back further than that. There was the old province of Canada that was in existence before, and there was upper, and lower Canada, and so on. I think he would think in those terms.

As you put it, yes, in a purely legal way, I think you make your point that Canada has existed since July 1, 1867; but in the common, ordinary use of the word, I think the average people would carry the conception back further than that.

Mr. FULTON: And you have already said that you do not think we should be governed by the lawyers; we should only be advised by them. May I say that with regard to the word "always" it is a good point you make, and it is something that perhaps should be looked into.

Mr. LOWER: I hope not very much time and energy will be spent on that point, though.

Mr. FULTON: I agree.

Then with regard to clause 4 of the bill, the clause with regard to the powers and responsibility of the Minister of Justice, you say you would like to see the word "ascertain" strengthened. It is, however, my view—I am not trying, even if I had the right, to cross-examine you; but this is a clause which has given us difficulty from time to time.

When we drafted it first in 1958, the word was "ensure". Then we looked at that ourselves and felt that word was a rather questionable one, because we felt: does that mean that the Minister of Justice, who is to ensure, must, by necessary implication, have the power to ensure? Does this give him some power of dictation over his colleagues in the cabinet or, indeed, over the rights of private members to introduce bills into the house?

If the Minister of Justice is to ensure, how is he to do this, unless you give him the power to do it? We felt that parliament would not want to give a single minister of the government the right to say in what form bills should, or should not, be introduced.

With respect to government bills, the matter is easier, because it goes through cabinet and presumably the views of the Minister of Justice as to the form of a bill would be accepted. But even there it is not desirable to give the Minister of Justice dictatorial powers over cabinet.

But when you came to private members in parliament, we felt we were against a real difficulty. If you give the minister the responsibility to ensure, you must then give him the power to ensure and then he may be too powerful; and that is why we changed the word to "ascertain".

Mr. LOWER: There is just one point there. May I ask you your explanation of this? This states, "to examine every proposed regulation".

Mr. FULTON: Yes—"and every bill introduced in the House of Commons".

Mr. LOWER: Yes, I see.

Mr. FULTON: That is our problem. When you said you would like to see the word "ascertain" strengthened, I was going to ask you, and I ask you now, whether, in the light of that problem, you could offhand—perhaps you would not care to do it offhand; but perhaps you could indicate to us another approach to the problem, or else, perhaps, a word that could be substituted and would have the effect of strengthening, without going too far.

Mr. LOWER: If the cabinet has thought over this word carefully in the way in which you say, I hesitate myself to give some kind of snap judgment. The word "ensure" has been suggested. There must be a good many others. What would you conceive to be your functions in "ascertain"? When you ascertain, what do you do?

Mr. FULTON: In so far as government measures are concerned, I would think my function would be to advise the cabinet, or my colleagues in cabinet, as to whether, in the view of myself and my advisers, they are proposals which transgress the letter, or the principles of the bill of rights. I would imagine that if such advice were given in concrete form, cabinet would have the responsibility of making a judgment.

But with respect to bills introduced into the house by private members, I would think there that under the word "ascertain" my only function, and surely a sufficient responsibility, is to ascertain, and then advise the house that in the view of the Minister of Justice this bill does, or does not, conform to the bill of rights. And then would it not be for parliament to decide whether to proceed with it?

Mr. LOWER: I think that would be a very powerful opinion, if it were expressed by the Minister of Justice to the house; and the opinion of the minister would apply to regulations, every proposed regulation submitted in draft form. Public bills, no doubt, would be hammered out before they were submitted, from that point of view?

Mr. FULTON: Yes.

Mr. LOWER: You might refuse it to private bills—which are relatively few in number, I understand, and do not, as a rule, touch public subjects, the subjects of public policy.

Mr. FULTON: We have two distinct categories: we have private members' private bills—like divorce bills—and we have private members' public bills, which may deal with public matters.

Mr. LOWER: Which never get to the statute books anyway.

Mr. FULTON: I beg your pardon—not often; but there have been two that I recall. I had a hand in one myself.

Mr. LOWER: I really think you pare the thing down to fairly narrow limits, Mr. Minister.

Mr. FULTON: Frankly, I did feel that the main responsibility was to advise the government, because, as you say, the great majority of bills that reach the statute books and have an effect on the public are bills introduced by the government.

Mr. LOWER: Yes.

Mr. FULTON: Would it not be likely—and, indeed, not only likely; but almost certain—that with such a provision in the law, very early in the debate of a government bill somebody would ask the Minister of Justice whether he has examined this bill as required by section 4 of the bill of rights, and whether, in his opinion, it does conform to the bill of rights?

Mr. LOWER: Almost certainly, in the course of years, you would work out a whole set of criteria which people would observe in drafting bills.

Mr. FULTON: Yes, that is my view. We may have to change; we may well be faced with the necessity of amending bills already on the statute book—and we are certainly going to have to look at every bill in the future to see that it conforms to the bill of rights. And this would be my special responsibility under clause 4.

Mr. LOWER: That may be, in itself, a most valuable aspect of our legislation.

The CHAIRMAN: Would you like to ask a question, Mr. Batten?

Mr. BATTEN: Mr. Chairman, I am just looking for information, and I want to ask Mr. Fulton, if I may—

The CHAIRMAN: I think that would be all right.

Mr. BATTEN: I think it is a little bit irregular; but it is on the topic the minister is talking about. When you say you would advise the house, do you mean, Mr. Fulton—let me put it this way: supposing a bill were brought in that you felt was not in accordance with the bill of rights, and you took the view that the house should be advised.

Do you mean by that you would advise the house during the debate on the bill, or before the bill was introduced?

Mr. FULTON: I would have thought, during the debate on the bill. The appropriate stage, it seems, would be second reading, because that is when the principle comes up for debate. But it might be that in the course of years we would work out, either on our own, or by suggestion from others, a sort of formal report process under which the minister's opinion could be delivered at the same time first reading was moved. We might work out some such procedure as that.

Mr. BATTEN: I was thinking of this: I wonder if the administrative effect of a bill of rights would be weakened if these powers were not used to prevent bills being brought in to the house which in any way interfered with the operation of this bill?

Mr. FULTON: It might be. But, there again, while Mr. Lower has said there is no supremacy of parliament, certainly any government must be very careful not to dictate to private members as to what are their rights.

Mr. BATTEN: That is true.

Mr. FULTON: And I should be very reluctant, politically, if for no other reason, to go about telling a private member he could, or could not, introduce such a bill.

Mr. BATTEN: I do not mean that.

Mr. FULTON: Surely the only function of the Minister of Justice is to advise the house on that, not to dictate on it?

Mr. BATTEN: I am just saying, you would advise the house whether or not it was in accordance with the bill of rights?

Mr. FULTON: Yes.

Mr. BATTEN: If he goes ahead afterwards, that is his own business, and he would have to take the consequences of the debate.

Mr. FULTON: The advice of the minister should be not earlier than coincidental with first reading: I don't see how a Minister of Justice could properly make a report in advance that there has been submitted to him such-and-such a bill, and then report to the house that in his opinion it should not be introduced.

Mr. BATTEN: Thank you very much, Mr. Chairman.

The CHAIRMAN: Mr. Badanai, do you have a question?

Mr. BADANAI: Yes, Mr. Chairman.

The CHAIRMAN: Is it on the same topic?

Mr. BADANAI: Yes, Mr. Chairman. I would like to ask the Minister of Justice this question: if his opinion were overridden in the cabinet, what would be the attitude there—what would be the result?

Mr. FULTON: I think that would be one of those very difficult problems that no doubt do arise sometimes. There is the doctrine of collective cabinet responsibility, and whoever was Minister of Justice at the time would have to decide whether he went along with the opinion of cabinet, that either his advice was wrong, or that under the circumstances he should accept the majority view. He would have to decide whether he would take that position—either one of those two positions,—or whether he would submit his resignation.

Mr. BADANAI: The Minister of Justice would subordinate his opinion to that of the cabinet?

Mr. FULTON: No. Let us take the thing by specific stages. If the Minister of Justice advised his colleagues in the cabinet that a bill was not properly drawn, or, in his opinion, it was contrary to the bill of rights—and your question was: supposing the cabinet rejects that advice and says "We are going ahead anyway; we do not care." Is that your question?

Mr. BADANAI: I would like to ask Professor Lower.

Mr. FULTON: Yes, but we have left this thing right up in the air.

Mr. BADANAI: Yes. I asked the question and you answered it. In your opinion it would appear that the cabinet would have the final say.

Mr. FULTON: No. You asked what would happen, and this is what we have not got cleared up. The cabinet, of course, is the body which decides what bills will be introduced by the government, and what policy the government will follow, and its decisions are reached on a collective basis, under the doctrine of collective responsibility.

Therefore, a minister of justice who found himself in the position of having advised his colleagues that, in his opinion, a bill runs contrary or counter to the bill of rights but whose advice was rejected by his colleagues, would have to make one or two fundamental decisions. He would have to conclude that he is wrong and that his colleagues are right, or that the exigencies of the situation require him to accept the collective view of the cabinet and therefore to go along with it or should he not be able to come to one of these conclusions his next decision, as a simple alternative, would have to be to resign. That would be the position as I see it.

Mr. BADANAI: Thank you. Now, I would like to ask Professor Lower what his opinion would be towards the appointment of a committee—an advisory committee, supposing a citizen should feel that his rights have been encroached or infringed upon? I mean a committee to which he could appeal; in other words, it would be a board of appeal, instead of his having to go to the Minister of Justice; he would go to a particular committee—it might be a parliamentary committee of the senate, or a parliamentary committee of the House of Commons, or possibly a committee appointed entirely outside of parliament.

Mr. LOWER: That question was raised before by Mr. Martin and there was some discussion about it, and it was suggested that there should be an appeal to the minister; and he also introduced the idea of a committee such as they have in New Zealand, and a similar type of machinery that they have in Great Britain.

I do not like to express opinions on matters of administration. I think the principle of the thing is quite clear, that the citizen must have some body or some person to whom he can appeal if he thinks that his rights are violated; but as to whether it should be the minister of a committee, that should be carefully considered, I would think.

Mr. FULTON: May I continue my question and put before you a statement which was made by the leader of the opposition, as reported at page 5661 of *Hansard*, as follows:

> Incorruptible and respected courts enforcing laws made by free men in parliament assembled and dealing with specific matters, with specific sanctions to enforce their observance; these are the best guarantee of our rights and liberties. This is the tried and tested British way, and this is a better course to follow than the mere pious affirmation of general principles, to which some political societies are addicted.

I was going to relate this to the question of sanctions and the enforcement of the statute. Is it not the case that the greatest safeguard of all our rights is the courts—courts reinforced by clear statutes declaring what our rights are, and describing them so that the citizen may know absolutely what his rights are, so that he may appeal to the courts for the protection and enforcement of his rights?

Mr. LOWER: In a general way, I would agree with you. But the courts depend on an informed and vigilant citizenry.

Mr. FULTON: I would agree with you entirely.

Mr. LOWER: Everything depends on that. You cannot invent any machinery which will work by itself. Let us all be clear about that. It all depends on us, and what our views of our duties as citizens are. Machinery alone will not do it, not even the machinery of the courts.

Mr. FULTON: Or even the machinery of a ministerial committee.

Mr. LOWER: No, no. Everything depends on the health of the body of citizens, and a constant effort to keep them vigilant. Let us understand that clearly.

But after that I have a tremendous respect for our courts and indeed, despite what I have said, for our legal profession too. I think it has done an enormous service in the way it has upheld these things.

Mr. FULTON: At one point in the discussion with Mr. Martin, you thought it would be better if the sort of declaration contained in the basic words of clause 2 were to be contained in a preamble. Did you mean that it would be better, or that it might be also suitable to have a preamble?

I ask you that question because I was going to ask you why it would be better to have it in a preamble, when the bill itself is designed to be declaratory of those rights.

Mr. LOWER: I think it was just in a very general way that I was thinking; when I expressed myself as being in favour of some kind of preamble, a good ringing preamble, if it could be secured. But in so far as a strict construction of the bill goes, it may well be necessary to have these words here, too, as you have it.

Mr. FULTON: I would not want to ask you to go any further than that. Those are all the questions I have, and I am grateful for your candid answers.

The CHAIRMAN: I hope the members will wait, because there is one report I would like to present.

Professor Lower, I would like on behalf of the members of the committee to thank you very sincerely for coming to the committee and taking the time to present this very learned treatise on this bill. I am sure that it will be most helpful to us.

Mr. LOWER: Thank you, sir, I appreciate very much the privilege of being asked, and although it involved my coming here, so to speak, it is only what a good citizen should do, and I simply hope that I am not the last one in the pack, so to speak.

The CHAIRMAN: I did not present this report at the beginning of the meeting because we had witnesses here and I did not want to delay the hearing.

> The subcommittee on agenda and procedure met at 10.00 p.m. this day, the following members being present: Messrs. Badanai, Dorion, Spencer, and Stewart.
>
> The following decisions are recommended to the committee:
>
> 1. That a copy of a letter from Mrs. Ryrie Smith, National president of the Y.W.C.A., addressed to the right honourable the Prime Minister and a letter from Mr. H. G. Curlett, Manager of the associated investigators of Canada ltd. addressed to Mr. Lambert, M.P., be filed with the committee and copies distributed to members.
>
> 2. That representations before the committee by the hon. Justice J. T. Thorson, president of the Exchequer court, be not entertained for the reason that it would not be conducive to the maintenance of the dignity, independence and the inviolability of the judiciary.

May I have a motion for the acceptance of this report?

Mr. BADANAI: I so move.

Mr. STEWART: I second the motion.

Motion agreed to.

Mr. RAPP: When shall we meet again?

The CHAIRMAN: Tomorrow morning at 9.30.

(The committee adjourned).

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 5

RECEIVED
AUG 1 1960
Parliament

THURSDAY, JULY 21, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

WITNESSES:

Professor O. E. Lang, College of Law, University of Saskatchewan; and Professor Maxwell Cohen, Acting Dean, Faculty of Law, McGill University.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

26764—1

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

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23570-5—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer Esq.

Vice-Chairman: Noel Dorion Esq.

and Messrs.

Aiken	Jung	Rapp
Argue	[2] Korchinski	Stewart
Badanai	Mandziuk	Winkler.
Batten	Martin (*Essex East*)	
Deschatelets	[1] Nasserden	

J. E. O'Connor
Clerk of the Committee.

[1] Replaced by Mr. Weichel on Thursday, July 21, 1960.
[2] Replaced by Mr. Browne (*Vancouver-Kingsway*) on July 21, 1960.

ORDER OF REFERENCE

THURSDAY, July 21, 1960.

Ordered,—That the names of Messrs. Weichel and Browne (*Vancouver-Kingsway*) be substituted for those of Messrs. Nasserden and Korchinski on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

Attest

LÉON-J. RAYMOND,
Clerk of the House.

23570-5—1½

MINUTES OF PROCEEDINGS

THURSDAY, July 21, 1960.
(11)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.38 this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Badanai, Batten, Deschatelets, Dorion, Martin (*Essex East*), Rapp, Spencer, Stewart and Winkler—(10).

In attendance: Professor O. E. Lang, College of Law, University of Saskatchewan.

The Chairman observed the presence of quorum and introduced Professor Lang, who set forth his views respecting Bill C-79.

Professor Lang was questioned, and thanked for the interest which prompted him to appear before the Committee, and retired.

The Chairman announced that the witness scheduled for an appearance before the Committee at 2.00 p.m. this day, Mr. G. Eamon Park, had advised that in view of the detailed submission by the Canadian Labour Congress, his appearance at this time was not necessary. He further announced that the Committee would meet at 2.30 p.m. this afternoon, at which time Professor Maxwell Cohen of McGill University, would be heard.

At 11.00 a.m. the Committee adjourned to meet again at 2.30 p.m.

AFTERNOON SITTING

(12)

At 2.45 p.m. the Committee reconvened. The Chairman, Mr. Spencer, again presided.

Members present: Messrs. Aiken, Badanai, Deschatelets, Dorion, Martin (*Essex East*), Rapp, Spencer, Stewart and Winkler—(9).

In attendance: The Honourable E. D. Fulton, Minister of Justice, and Professor Maxwell Cohen, Acting Dean of Faculty of Law, McGill University.

The Chairman observed the presence of quorum and introduced Professor Cohen who dealt with, among other things, the historical development of human rights and suggested an appropriate wording for a Preamble to the Bill.

Professor Cohen then reviewed the Bill, Clause by Clause, making observations and suggestions.

He was thanked by the Chairman for his presentation, and retired.

At 6.10 p.m. the Committee adjourned to meet again at 9.30 a.m., Friday, July 22, 1960.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

THURSDAY, July 21, 1960.
9.30 a.m.

The CHAIRMAN: Gentlemen, I would like to welcome to the committee Professor O. E. Lang, Professor of Law from the university of Saskatchewan who has manifested an interest in the bill of rights.

Professor Lang, we are happy to have you come before us and will be pleased now to hear your representations in connection with this bill.

Mr. MARTIN (*Essex East*): May I ask Professor Lang this: undoubtedly he has written some things on this subject, which we could look at.

Professor O. E. LANG (*Associate Professor of Law, University of Saskatchewan*): Actually the only thing I have written on the subject of the bill of rights which is obliquely relevant here is the note I did in the famous volume of the *Canadian Bar Review* in March.

Mr. MARTIN (*Essex East*): That is a note on this subject?

Mr. LANG: It is a note on the Saskatchewan bill of rights with some vague comments in respect of this bill. It is page No. 2.

Mr. MARTIN (*Essex East*): We have that.

Mr. LANG: Thank you very much, Mr. Chairman. I would like to express my thanks to the committee for being allowed to be here. I come with some trepidation and some of the feeling, I think, of David when he fired his stone.

I think that perhaps my trepidation is not as great as it would have been had I not denoted that it was an error when I received the last wire from the Clerk, because in the course of transmission the word "rights" was transliterated into "rites"; a committee on human rites. I thought perhaps I was coming before a different committee.

Mr. MARTIN (*Essex East*): I find it difficult to understand how anybody from Saskatchewan can come here with trepidation.

Mr. LANG: I am here to put forward a rather minority view, and perhaps that explains the trepidation. While this is a minority view, I can at least take this assurance, that there are some well known persons who have that same view, but it has been little heard in these whole discussions so far as I have seen. The sum total of my view comes down to this main proposition, that bill C-79, the bill of rights here before the committee, is in bare fact a reactionary measure.

The CHAIRMAN: I have heard that word before.

Mr. LANG: I say that, appreciating the fine motives behind such bills of rights, or very often fine motives; although in many cases man's motives must be measured in terms of results of their actions rather than in terms of what they may say about the thing.

I would like to say too, if I may, Mr. Chairman, that if I use strong language from time to time, I would like, as a matter of perspective, that it be remembered that I consider the bill an undesirable thing rather than a thing boding of catastrophe. It is a matter of degree.

Many times this bill has been linked by speakers with the magna carta, the petition of right, the bill of rights and the habeas corpus act. I want to make the point that this is a false linkage, and a deceptive one. The ancient

spirit of liberty flourished almost by mystery in the very hearts of our ancient Anglo-Saxon forebears. We do not know where it came from, but what we do know is, down through the ages they were ever conscious of the spirit of liberty that came to assert their rights and their conception of justice. In this spirit, through the ages, a battle raged amongst those who would attempt to usurp those rights, or interfere with that liberty. History of the later days, the days after the Ango-Saxons reached England, is a history of the attempt to institutionalize their fight for liberty, and the safeguarding of their liberty. The problem was not to arouse consciousness of the liberty, but to maintain it by adequate institutions, which could maintain it without constant or recurring revolution.

Now, it was that institutionalizing of the spirit of liberty that represents itself, or is symbolized in the Magna Carta, the petition of rights, the bill of rights, and indeed, the habeas corpus act.

Mr. MARTIN (*Essex East*): And the act of settlement.

Mr. LANG: The whole problem was to restrain those who would attempt to exercise power against the law.

To look at these acts, they all hark back to things past, granting to us the liberties of our forefathers; e.g. "Edward the Confessor". They all seem to be looking to the past, but all they are saying is; we will not have you, whether it be a monarch or an oligarchic group, interfering with our rights and our liberties those rights and liberties which we believe we are entitled to, and which, indeed, our fathers had, and which we will always strive to maintain. In each of these documents—and this was the great significance of them—there was contained a move towards the supremacy of parliament. This is why the Magna Carta is so great. It symbolizes that stand of parliament the people's representatives, against the king, or any oligarchic group.

Parliament, it was eventually then decided, was to be sovereign; sovereign in its power, and also completely responsible for the exercise of that power. Read Magna Carta, I suggest, and, indeed, those who want a poetic bill of rights might try reading Magna Carta to a public gathering, and then criticize a bill which is not poetic.

As I say, I think I have heard many spokesmen, whether in parliament or out, refer to this bill as though it was a fellow with Magna Carta, the petition of rights, and the bill of rights. Not only is that not so, but it is a backward step because, in essence, what it does is to begin, in its own weak way, an interference with the supremacy of parliament. It is a transfer of some of the parliamentary power to the courts. How great a transfer depends on how great a strength this bill will have.

There are some who say it is a very weak thing; and I would say, Mr. Chairman, that is the best thing I can say about it, I would prefer it weak to nothingness. But, on the other hand, some have pointed out it may be more difficult in days to come to repeal this bill; it may be difficult politically to repeal it; and in that you have a significant transfer of power from the people's representatives, expressing the will of the majority, to the courts. I am a great admirer of the courts, and in the doing of their very proper job I think we could ask for none better. But it is not the function of the courts to lay down policy decisions in broad lines. There is some narrow policy in the development of common law, and that always must be in the hands of the courts. But, surely, this should be kept as narrow as possible, both for safeguarding the courts which would then remain above policy and, therefore, above politics, and also because the proper place for these decisions on policy is in parliament, where the people have placed their representatives to express their will on their behalves.

Certainly, democracy is a difficult thing. It causes those of us who want something from a majority to go to that majority and try to convince them that what we want is right, just and proper. Of course, democracy is a dangerous thing because the will of the majority is so powerful, and it is so important, therefore, that we be ever watchful that this will remain a good will.

It was said in the seventeen hundreds that liberty was given to us on the condition of vigilance. We must remain ever ready to exert the efforts, where necessary, to maintain that goodwill, conscience of liberty throughout the land.

I would like here to refer to some words used by Judge Learned Hand in his book *The Spirit of Liberty*.

The CHAIRMAN: Would you identify Judge Hand, Professor Lang?

Mr. LANG: Actually, I do not think that he was a judge at the time that he did say this, and I think he has since retired, if I am not mistaken. The citation can be found in the March, 1959, *Canadian Bar Review*, at page 29, in an article by Professor McWhinney.

Judge Learned Hand said:

> This much I do know—

—and he was speaking about the spirit of liberty—

> —that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

He was referring to the need in our society to further discuss these vast issues, and this need will continually arise so long as we have to go to a majority—so long as we have our democracy, and in its fullest sense, so long as our parliament is supreme, and we have not handed over to the courts some of the guarding of that power which must rest somewhere in our society.

Is it not significant that many of the things desired by the supporters of this bill, or more particularly the supporters of a bill which would incorporate a bill of rigths, like bill C-79 into the constitution—what these supporters want is often something which they have not obtained, or were slow in attaining from an elected majority.

This is exactly what many of them are thinking when they want a bill of rights which will govern the provinces, and there is sometimes difficulty in obtaining from the legislature what they want. They want a bill so that the courts will exercise their power and obtain it for them. Now, in almost every case I am with these men in their objective, that is, I support the detailed items they wanted to obtain from the legislature; but I urge upon them that this is a democracy, and that their proper duty in that democracy is to take their case for this objective to the people, whether it be the people of a province, in order to get action from the legislature, or the people of Canada, in order to get action from parliament.

The very dispute which would then ensue about what is right and what is wrong is a thing which will safeguard democracy, as Judge Learned Hand said. This bill effects the transfer of some power, and this transfer would weaken the spirit of liberty, which he said, in the end, will perish. I think it is enough to have that spirit weakened.

And there are other problems with the bill. You have heard much about the legal problems which will arise. At the moment there is great uncertainty as to how this bill will be interpreted and as to how it will effect other legislation passed previously by parliament, and legislation which is yet to come. And this question of whether they are settled narrowly or broadly will have to come before the courts.

I suggest it might be worth considering, Mr. Chairman, the burden which parliament may be therefore placing upon future litigants. Is it not worth considering, that to some litigants a few thousand dollars in court costs are a significant burden, and are therefore as important an interference with them as the imagined problems meant to be faced by this bill?

And another thing about Bill C-79 is like the first point, in this way: whenever you have a written bill of rights or a constitution interpreted by the courts a danger arises that the discussion of right and wrong, justice and injustice in a community will be transferred into a discussion as to whether the thing is within or without the bill of rights, constitutional or non-constitutional: that poses the same problem, I think, to a large extent.

We can see this happening in the United States where among the questions which are arising are those as to whether a certain thing is desired, a certain act is right or wrong, and that is essentially a real question and it is transferred, in the discussions, into the question of whether it is either constitutional or within the bill of rights—constitutional for that reason. And, it is not as though they treat these as two separate questions. They tend to treat their answer to the question whether the thing is or is not constitutional as though that answered the question whether or not the thing is right or wrong. They have imported into their discussions of justice and injustice a legalistic answer which appears to be an answer to the question, but is only an avoidance of the question. Then too, as I have indicated before, I think there is a danger when this power over policy is transferred to the courts, that the reputation of the courts will suffer. This power is transferred to the courts by Bill C-79. The reason there is this transfer of power really is very simple. These rights which are so nobly set out in the bill are not, and cannot, be absolute rights. Of course, they are not. Freedom of speech runs up against the edges of sedition, criminal libel and nuisance; freedom of religion may run up against the offences of neglecting one's child, causing a disturbance and assaults. It is always a question of policy whether the values in regard to these rights are great enough to overcome the values involved in these other interests. That balance is a very important question of policy, and that question of policy is transferred here to the courts, and taken out of the hands of parliament. It is in parliament and it should remain, because it is that question which is a responsibility of parliament. Parliament would be, rather lightly, turning back to the courts some of the power and some of the responsibility which was obtained through such a hard struggle over the years, as is represented in the Magna Carta, the petition of rights and bill of rights.

If I may then, Mr. Chairman, I would summarize my worries about this bill.

The first is that this transfer of power from parliament to the courts, and interference with parliamentary supremacy is a backward step from the Magna Carta, petition of rights and the bill of rights. In that sense it is, indeed, to be deplored. It is, in that sense, reactionary.

Secondly, I suggest there is the danger to litigants that we are putting before them, because of the fact—and it is because of the fact—that we are transferring decisions as to policy, to the courts. Litigants will be troubled.

Thirdly, there is a duty to the courts' reputation, if they are engaged in this policy problem. For example, in the United States, I think the supreme court, in taking some of this policy power and policy decision to itself—in taking over what I would call the amendment to the American constitution—is in danger, in regard to its own reputation. I think there is also this danger: that a realistic test in the community is substituted for the frank and open discussion as to right or wrong, just or unjust.

My summary of the situation leads to these recommendations, as a matter of course. The first is that the bill of rights should not be passed, should not be postponed, but should be dropped, that in its place, perhaps, it would be wise to set up a permanent committee, whether of the house—so permanent as that can be—or a commission or committee outside the house, to watch over rights and liberties.

Mr. AIKEN: With what guide?

Mr. LANG: For that purpose a document such as bill C-79 might serve admirably as a point of departure, against which—and here, only against the possible interference with these values enunciated in clause 2—a committee alert to the importance of these values would not exercise power, but would only alert, if that alerting is needed, parliament to the interference, so that parliament could decide as a matter of policy whether that interference should be corrected, and could enact legislation so to correct it.

Mr. MARTIN (*Essex East*): So that we may clearly understand this recommendation: you say that you think the bill should be dropped; there should be set up a committee within parliament, or outside—and you said, in answer to Mr. Aiken, that the present bill would serve as a guide?

Mr. LANG: Yes, the gentleman asked about a guide.

Mr. MARTIN (*Essex East*): You suggested that the bill should be dropped. How could it serve as a guide?

Mr. LANG: I do not mean it should serve as a legislative guide; but rather as a matter of guiding this committee, in regard to clause 2.

The committee might be referred in this regard to clause 2, to the Gettysburg address, or any other document full of poetry, where there is emphasized and put forward the expression of our opinion of the importance of these values—because, after all, this is the thing that the committee will always have to be aware of. It is the importance of these values being balanced against other needs and desires in society, and it is on this decision, in the end, that parliament would have to say whether or not, in a given case, the values are sufficiently important to balance against some other need of society with which they are conflicting.

It may be, for instance, that it would be advised that there always be judicial appeals from decisions of executive or administrative personnel. I just suggest that as a "maybe". Parliament would have to decide whether or not this is possible in all cases, or whether, indeed, there is some case or another case where the problems arising from that appeal are simply too great to justify the honouring of this right by giving this appeal. I think that if a man like Frank Scott were on the committee, parliament would hear very quickly and thoroughly about any infringement of civil rights around the country.

But I would say, next, that if a bill of rights must be passed, because there may be something beneficial in having the title "the bill of rights", then why not collect together in a bill of rights certain particular, definite, positive proposals, positive enactments of policy correcting particular situations; enact, if you choose—a right of appeal from all administrative tribunals; enact, if you choose—the right of counsel before all these bodies; enact, if you choose—a more general right against self incrimination before these and other bodies.

But consider the matters particularly: deal with them particularly, and set them down particularly in the bill of rights, where they will not represent a transfer of policy, of power, and decision on policy, to the courts.

Mr. AIKEN: Excuse me for interrupting, Professor Lang. It seems to me that in doing this it would be completely reversing the role of the courts and parliament, as we have understood them.

You are now giving to parliament the right to apply rules, which has always been the role of the courts. Has it not always been the role of parliament to enact general legislation, and for the courts to apply it, rather than the proposition you have just made?

Mr. LANG: No. I may not have made myself clear. Certainly, what I mean is that the courts will apply this legislation; but what they will have from parliament is particularized legislation enacting exactly in what particular cases these various rights which are flowing, in the opinion of parliament, from the value given to the human rights and fundamental freedoms, are to be enforced; not a general and uncertain statement of the law, asking the courts to—what does it, indeed, ask the courts? Is it asking them to modify future legislation? It may be that is a possible interpretation, and an interpretation the courts would give the bill. Of course, if they give it a narrow one, it would weaken the bill.

Mr. MARTIN (*Essex East*): What you are saying—following up what Mr. Aiken has asked—is this: you would propose that the human rights and fundamental freedoms sought to be guaranteed should be brought about by way of amendment to specific statutes, or that new statutes would create situations not already covered?

Mr. LANG: That is right, yes, that these particular problems be dealt with particularly, rather than there be a general document attempting to transfer to the courts the control of policy decisions as to when the values represented in these human hights and fundamental freedoms are so great that some other legislation of parliament is not to be honoured, even though it is speaking plainly.

Mr. MARTIN (*Essex East*): Can you give us the acts that you would amend?

Mr. LANG: I have not made anything like a thorough study. I think this is, of course, an extremely important thing; but certainly there comes readily to mind the consideration of amending, for instance, the Immigration Act. But there the infringement upon human rights—and they are human enough, whether they are Canadian rights or not—comes directly against the policy question of what is to be our policy in regard to immigration. What right are we to take? What control are we to take over immigrants? Perhaps there the infringement on human rights stems more from the manner in which the Immigration Act is set up, the way in which deportations are automatic, in certain cases, always subject to some discretionary power, residing in the minister. This discretion is the thing that causes the problem in regard to rights there. Yet this is one of those areas which I think illustrates the policy decision that may be taken, and the kind of decision that parliament must make.

In other words, I do not particularly, this morning, want to suggest solutions to these policy questions; but simply to point up that there are enumerable areas in the law where this policy question does come in, and where it should be parliament that is deciding the policy question and should set out its decision in legislation which the courts will then apply to the case.

Mr. MARTIN (*Essex East*): Have you given consideration to the effect of an amendment of the Interpretation Act?

Mr. LANG: Yes. That, indeed, was my next alternative proposal, that if this bill could not be dropped, and a committee substituted for it, or if the bill was not replaced with a different bill—because it would be an altogether different bill, if it recited particular cases: it would then, indeed, be patterned after the Saskatchewan bill of rights and would deal with certain cases. Indeed, some of the things contained in the original Saskatchewan bill of rights might

be contained in the proposed bill of rights, such things, for instance, as making it an offence to discriminate on account of creed, colour, race, in regard to employment, in regard to inns, and so on.

Perhaps that kind of thing would fall within the criminal law and should be broadly inserted into a bill of rights, if that is desired. Personally, I think that is a wrong thing to do. I think it is a mistake, and—as I indicated in my article in the Bar Review—such legislation would interfere in the by-ways and by-plays of life.

But, coming back to the question put by Mr. Martin: my alternative suggestion is that if this bill must go forward, then let it be amended so that it in fact reads as part of an interpretation statute, that it is simply a statement to the courts indicating parliament's belief in the existence and importance of these human rights and fundamental freedoms; and that, wherever reasonably possible, legislation by parliament should be interpreted as not to interfere with these rights or freedoms. The key phrase is construed so far as is "reasonably possible". And, it should provide, that no act, of parliament abrogate, or interfere, or abridge these freedoms unless the express words, or the necessary implication of the words indicate it was parliament's intention to do so.

Mr. MARTIN (*Essex East*): May I, for the purposes of clarification, and to make sure that I follow exactly what you are suggesting, ask this question. I think I do follow you, but I want to make sure Clause 3(b) of the bill says no one shall "impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment". Would you construe that as meaning that the bill of rights will over-ride the Criminal Code, for instance, in so far as capital punishment is concerned.

Mr. LANG: Well, I would say that that certainly is a possible construction. I rather doubt, of course, whether the courts would take it that far. In other words, they would avoid that particular conclusion by saying that capital punishment is not a cruel or inhuman punishment. But it is over-riding.

Mr. MARTIN (*Essex East*): I agree with that of course; but the point is that many thousands of people who propose the abolition of capital punishment do say that capital punishment is cruel, inhuman, or is degrading, and the courts will be faced with a very difficult situation unless this language is more precise.

Mr. LANG: Yes; this is true. Not only that, but in this the courts are being given this power to decide such a matter, if all the judges happen to believe that capital punishment is cruel and degrading.

Mr. DORION: Mr. Chairman—

The CHAIRMAN: Gentlemen, I think we are deviating a little from the practice that we have adopted in so far as previous witnesses were concerned. It may be, in as much as we do not have before us any written brief which would facilitate reference back to the statements made by the witness, that it might be desirable to deviate from the former practice and allow questions as the witness proceeds. Do you feel that would be an agreeable procedure this morning.

Mr. AIKEN: Mr. Chairman, I was the first one to interrupt with a very short question in order to clear up something. I think perhaps that we should let the witness finish his brief.

The CHAIRMAN: Is that agreed?

Mr. LANG: I am so used to interruptions in my lectures that I would feel almost lost if there was none.

Mr. MARTIN (*Essex East*): I believe Mr. Dorion has a question. I think it is very difficult to listen to the statement when we have no brief before us. Mr. Aiken opened it up, and I think we would get along better if Mr. Dorion were allowed to follow up on the point I made.

The CHAIRMAN: I thought we might make a variation this morning because of the fact that we do not have a written brief. I disagree rather violently with some of the statements that have been made. I am going to have some difficulty in bringing the professor back to what was said and in being able to paraphrase accurately what he did say. Perhaps in this case it might be desirable to dispose of the issues as they arise.

Mr. BATTEN: I would suggest that Mr. Dorion proceed.

Mr. DORION: I would like to know if you believe, on this particular point raised by Mr. Martin in subclause (b) of clause 3 in respect of torture, or cruel, inhuman or degrading treatment or punishment, that it would be possible to interpret that in the following sense, that certain dispositions of the Criminal Code may be abrogated. Is that your opinion?

Mr. LANG: Yes.

Mr. DORION: Do you believe that the abrogation may be made only by such implication? Do you believe we can abrogate express texts of law only by implication coming from this text.

Mr. LANG: I do not know that it is only implication. As I read this bill it states, firstly, that acts of parliament, past, present or future, should be so construed and applied as not to do these things. That to me seems to be an express instruction to the courts where possible to read the acts so that they will not abrogate these rights; but it also says not to apply the acts so that they will abrogate these rights. Exactly what these words mean will depend on what the courts think of them, and of course it is perfectly true to say that this bill passed by parliament could be in effect repealed by the courts if they chose practically in effect to disregard it.

The CHAIRMAN: Could be repealed?

Mr. LANG: Nullified, by the courts acting as I do not want them to act, and they would be acting in this way in order to return the power to parliament.

Mr. MARTIN (*Essex East*): Is not that in effect what is being done by our courts in respect of the existing charters? Can you give me a case in the last five years where the courts have based their decision on any of the existing charters—the habeas corpus acts, the act of settlement, or the Magna Carta—except as a background.

Mr. LANG: I would be very surprised if they could base a decision on these.

Mr. MARTIN (*Essex East*): In all probability what the courts will do is, they will completely ignore this bill because of its penalty and will make their decision on the basis of a specific statute and a specific section.

Mr. LANG: I would think that would be a very tempting thing for the courts to do; but, on the other hand, the courts have been in the habit of trying to put into effect in their decisions the express intentions of parliament. Therefore, that very noble thought in the minds of the judges might actually hold them from reaching that conclusion. I do not say the courts will reach a conclusion that will tend to nullify the bill, but there is a possibility they will narrow it to nearly nothing. The unfortunate thing is that litigation may still continually ensue—a legitimate and fair attempt by a client's lawyer to raise a point upon the bill and obtain some relief for a litigant upon the bill—and costs as a result will be incurred by the litigants in any case.

I should then perhaps more particularly say that the problem with this bill is that as it is expressed it could very well, and I think does, invite the courts to look at parliamentary legislation—legislation of the parliament of Canada—and see whether that is altered as a result of the bill, whether it is altered because in some way it infringes or impinges upon these freedoms here enunciated; that therefore it would be possible for them to reach such a conclusion even in regard to the Criminal Code; although, in many of these cases, I suggest their good sense will keep them from that. In many other areas we cannot even imagine—we cannot know—where this bill will reach; we cannot know where it will arise and where the courts may say it has an application in altering the law of Canada. This is a rather startling thing, is it not, to have proposed the enactment of a bill about which we can predict and say that in effect it is unpredictable and can go beyond the scope of our sight in applying the policy of the courts to legislation of parliament.

Mr. DORION: We have to refer to the first part of this article. I will read the middle of the first paragraph. We are talking in generalities, but it says in the bill that no such act, order, rule or regulation, or law shall be construed or applied so as to (b) impose or authorize the imposition of torture. I do not believe with such a text that it would be possible in respect of any article in the Criminal Code. This is only an interpretation rule which is given here. You do not believe that?

Mr. LANG: If it said only "construed", I would perhaps agree.

Mr. DORION: No such act, order, rule or regulation shall be construed or applied so as to do these things. I say it is only a question of interpretation of the said act to which we can refer. I do not think it would be possible for a court to see this text as an abrogation of any of the articles of the Criminal Code.

Mr. LANG: If I may clarify the question, are you relying upon the proposition that the act is general in terms, and therefore will not in any way abrogate a specific act?

Mr. DORION: Yes, I do not believe that it would be possible to find any abrogation of any act, because it is only a question of interpretation of an act.

Mr. LANG: Yes, but it says "application" and this is the serious thing. It not only says that these acts are not to be construed so as to do these things, but it says, or can be read to say, that they are not to apply to these things. So, if the ordinary application of the act would result in something which, in the opinion of the judges, involves the various things enunciated, or any other thing they may add to the list, then they are not to apply that act. This is a construction which is taking the act at its broadest, but a construction which, I suggest, within the realm of possibility, the court could give to it. I doubt very much if they will want to operate very broadly under it, but we simply do not know, and for years will not know. The act may lie there idle for years and then suddenly blossom.

I was about to make a suggestion, Mr. Chairman, that this bill, as it now stands, be altered so that this possible implication, that acts of parliament shall not be applied, be removed from it. It should be made, if it is to be passed at all—this is, in other words, my last hope, my last recommendation—clearly a simple statute of construction. It is the direction of parliament that these are the values parliament holds dear, and that, wherever possible, where acts of parliament are ambiguous, they are to be construed so as not to interfere with these values. It should also be made clear in the act that, if parliament's intention is clear and interferes with freedoms, that clear intention should be given effect to. I think that change could be made by removing the

words in the fifth line on page 2 where it says: "be so construed and applied", and substitute, "construed so far as reasonably possible". That is added as a matter of extreme caution. This has removed the word "applied", and may be sufficient.

Then again in the ninth line, insert before the expression "no such act, order, rule, regulation or law shall be construed—" the words "unless explicitly or necessarily by implication demanded by its words", no such act—

Mr. DORION: Will you repeat that?

Mr. LANG: "Unless explicitly or necessarily by implication demanded by its words".

The CHAIRMAN: Professor, do I understand you correctly to say that the purpose of this proposed amendment is to restrict and reduce the effect of this bill?

Mr. LANG: Yes; provided my broad interpretation of the bill or possible broad interpretation, is correct, then this will narrow the operation of the bill and make it in fact an interpretation statute.

The CHAIRMAN: Are you aware, Professor, that the burden of most of the briefs that have been presented to this committee has been criticism of this bill because it has not got teeth in it, as they sometimes expressed it, and that it should be made more effective and binding upon the courts?

Mr. LANG: I am very much aware of that. Of course, my whole case this morning has been that, indeed, the contrary is true, and that the best possible situation is no bill, and the next possible situation is the weak bill we have now; or an improvement on that, perhaps, would be a change, weakening it a little more, and making it an interpretation statute. The whole burden of my argument, and the basis of that argument, rested upon the thesis that the supremacy of parliament was what we attained through hard struggle, and that this supremacy of parliament should not be abrogated, or derogated from by handing over some of the power to the courts. It is true the power was taken from the king and the oligarchic groups, and put into the hands of parliament. The courts are perhaps not the same, although these other problems arise in regard to it, as I have mentioned, but it is this derogation from supreme parliament that is involved in this bill. That is why I say it is not at all in line with the Magna Carta, but it contradicts the Magna Carta in regard to this supremacy of parliament's position.

Mr. MARTIN (*Essex East*): You would take this position whether or not the bill continues in its present form, or whether it became entrenched or enshrined in the constitution?

Mr. LANG: Only more so, if it became entrenched or enshrined. A bill anything less than that is an entrenching bill, but there parliament, not only politically, but legally, has some difficulty in abrogating it.

Of course, I understand why many people want a stronger bill. As I have indicated, while I have no doubt at all that the general motives are fine, very often what these groups are after is something they cannot so easily obtain from the majority of parliament, or a majority of a legislature, and that, in other words, they want to transfer the power to the courts in order to obtain some particular end. In general, those who want an entrenched bill, want a bill not because they are afraid some oversight in a legislature will result in interference with these rights, but because they do not want some conscious policy interferences which these legislators might undertake. The objective is noble, but I would suggest, Mr. Chairman, the proper route to obtain permanence of these human rights and fundamental freedoms is, for all those who are genuinely interested in these values, to be willing to go to the effort, and to go to the struggle of putting their case before a majority of the people,

and using the democratic procedure to obtain what they want. If they do not like something that the legislator is doing, then let them go to the people and the parliament. Let them indeed educate the people as to what is right and what is wrong. It may, after all, be their view, and only their view, and not necessarily the right one. In other words, let us impose upon these people who want to accomplish these things, the duty to be vigilant, which is noted in those famous words: "liberty is given to us on the condition of vigilance". Let all those who want to accomplish these things always be prepared to go to majorities.

I think we have got to the point now in this country where we do not have to be so fearful about what our majority will want. Perhaps, indeed, years ago, we had to be more frightened than now. I have confidence in democratic workings. I have confidence in our ability to convince a majority to have goodwill, and that will should then become law, through parliament.

Of course, it might be said—and this is my last point—that this bill would give the courts an additional power in the case of sudden and drastic attacks upon liberty, where there is some violent upheaval or feeling in the country. I would say about that, first of all, that in such a case I am not sure the courts need any additional power, because they are always there to use such power as they choose to use. It has been said that even the lowest judge is only shackled to the extent that he himself locks the shackles upon his wrists.

But in addition, there are other safeguards. We have the power of disallowance, which could control sudden upheaval or feeling in the province. And in parliament of Canada we have a Senate, which should, indeed, quite possibly, be able to stem the tide of violent feeling, should such an occasion arise. In any case, in the event of these drastic upheavals that are contemplated in this last discussion, we are almost on the verge of revolution anyway, and it is doubtful whether the courts, in trying to stem that tide, might not simply be apt to lead to their own downfall.

I think, Mr. Chairman, that with those remarks I can conclude. Most of the last discussion has been secondary to the basic, fundamental position that I take, that the proper place for sovereign power in the country is in the parliament of Canada; that it was put there for the struggle which is symbolized and is put in Magna Carta, the petition of rights, bill of rights; and that bill C-79 is apt to transfer away some of that power—and therefore it should not be enacted into legislation.

The CHAIRMAN: Professor Lang, how do you reconcile that last statement, that this power should remain vested in parliament, with a statement you made earlier in your presentation, that democracy is a dangerous thing because the majority is so powerful—and I presume you meant by that, the majority of parliament?

Mr. LANG: I meant, the majority will of the people, or the majority of parliament, if you like.

The CHAIRMAN: Do not the members of parliament represent the majority of the people?

Mr. LANG: Yes, that is right. When I said democracy is a dangerous thing, you must remember that what I was saying was democracy is a dangerous thing, and I believe in it; democracy is a difficult thing, and I believe in it.

In other words, it is dangerous indeed, but it is the best possible technique; and offsetting this danger that exists is my confidence in the goodwill of the people, and in the sense of liberty in our members of parliament and in the people, my confidence that the people will always be induced to elect and send to parliament men who have a sense of the value of their rights and liberties;

and that this will especially be true so long as a full and open discussion about these rights and liberties goes on all across the country, into the hustings. That is the best place it can go.

If you give the power to the courts to do something about it, you take away the need of going to the people. Go to the people, I suggest, and the people will have goodwill. This, I suggest, is what "dangerous" means. I used, perhaps, a strong word; but there is that danger in it. But I have confidence that the goodwill of the people would prevail.

The CHAIRMAN: You also stated that this bill was a backward step and was the transfer of parliamentary power to the courts. First of all, where, in this bill, is there any transfer of parliamentary power to the courts?

Is there not, in this bill, a direction to the courts that, in the construction and application of statutory law, they are to construe, or apply it so that they shall, in so doing, give effect to this bill? Is it not a straight direction to the courts, and not a transfer of power?

Mr. LANG: It is a transfer of power, because it is a general instruction to courts to exercise this power. That is the whole point and portent of the bill, that it is giving to the courts the decision as to when the values enunciated in clause 2 strike up against some other objective contained in an act of parliament.

This is a possible construction of the bill, that where these values strike up against another act of parliament, then the court is to decide. This is what it must mean, that the courts must decide where the limits of policy are. As I have indicated, freedom of speech—

The CHAIRMAN: Who can better do that? Parliament has set up the courts for that express purpose, and that is their function; and when the courts do not carry out the will of parliament, parliament has consistently amended the statutes, to make certain that in the future the courts will be implementing the will of parliament.

Mr. LANG: That is right, Mr. Chairman. That is one of the merits of this bill, of course, in my opinion, that it is open to amendment; although, as some have indicated here, there may be political difficulty eventually in amending it.

The CHAIRMAN: That is, if parliament considers it is being misinterpreted?

Mr. LANG: That is right; and parliament may find it more difficult to instruct the courts more clearly in the future, than it does now, as to what the law should be, because of the political difficulty of interfering with this bill of rights.

If the courts go to parliament, after parliament has passed the act and say, "we nullify clause 3 of Bill C-79, because it abrogates a right enunciated in clause 2", then, of course, parliament can speak again, and can go back to the courts and say, "We repeal clause 3 of the bill of rights", as far as it might apply to that matter. But there is political difficulty involved, in coming back and repealing, in effect, for that purpose, the bill of rights. The bill of rights, as I say, is not so dangerous as it would be if it were in the constitution, because that power might well be lost to parliament then; but even now it is a danger, because parliament is weakened, because of the political difficulty that may be involved in coming back and enunciating to the courts what its intention is and how that intention should be applied.

The CHAIRMAN: I have much more confidence in the courts than you apparently have, Professor, because I think that the courts will give effect to the rights declared in this bill. I anticipate no difficulty, and I do not see a better way of these rights being enunciated and made binding in this country than by a judicial decision of the courts.

Mr. LANG: Mr. Chairman, I would like to make this point quite clear, because I think it is an important and vital one. The point is that these rights enunciated in clause 2 are not absolute; they are not whole in themselves, as though they stand there never to be in any way interfered with.

Where freedom of speech is mentioned, of course there have to be policy decisions by parliament. I suggest that is where the policy decision should be—I suggest that is where the policy decision should be—as to what is a criminal libel, what is sedition and even—on the provincial level—what is slander. These decisions are properly decisions of parliament. These rights are set out there so fully, but are not absolute—there is always a policy decision as to where the boundary of these rights is; and this policy decision, I suggest, is the function of the legislature, of parliament, and not the function of the court.

The legislature should lay down the broad lines of policy and only ask the courts to apply that policy within those boundaries.

Mr. AIKEN: Professor Lang, following up your first suggestion: if you think that this bill moves towards limiting the power of parliament, would you suggest that it be applied, perhaps, to the rules and regulations of the executive only, in which case it would be a continuation of the ancient right of limitation on the powers of the monarchy, or the executive?

Mr. LANG: I think that, if I may say so, is a very worthwhile suggestion. That kind of thing would be admirable, but should not interfere with the power of parliament. But I am not sure that we would want exactly this sort of enactment in that regard. We would perhaps want a clearer statement of how the enactment is to work in detail in regard to the executive and the administrative. In other words, what it really comes down to, in part, is this: another one of the reasons why it is the parliamentary, and properly the parliamentary function to legislate, is that parliament is able to set up committees to investigate all the factors, circumstances and needs across the country, which a court is not set up to do. On the basis of all those facts and circumstances, it can then decide what the policy is to be. I would, therefore, suggest that perhaps what we should have is an investigation by a parliamentary committee into the details of administrative and executive functions, as well as all the other aspects of our society, and a direct detailed improvement in those areas. I would like to urge parliament to be specific on those matters.

Mr. AIKEN: Will you agree that in any case no matter what interpretation is placed on this bill by the courts that the power of parliament still is supreme, that there has been no limitation whatever on the power of parliament to amend, to make clear cases which the courts do not find clear, and to come back and make corrections of cases where the courts have not carried out their function, in the view of parliament, correctly.

Mr. LANG: Well, my answer to that in a sense is yes, but only in a qualified sense. First of all that involves a terrific amount of litigation which is rather a burden on the rights of individuals. My real basic answer is that the right of parliament to repeal this bill is only subject to this limitation; the political consideration that it may—especially as years go by and people say fine things about the bill even though it is not used for litigation—it may become difficult for parliament politically to amend it. I agree that this is not a very serious limitation of parliament's power; it is merely a little, a small step in that direction rather than the big step of making it constitutional. It is weak.

Mr. AIKEN: Is it, the weaker it is the better it is.

Mr. LANG: Non-existent is best.

Mr. AIKEN: I have some other questions, but there is not much time, and I believe there are other members who have questions.

Mr. RAPP: Mr. Chairman, the professor has made no mention whatsoever about the War Measures Act in part II. One reason for introducing a bill of rights is on account of what happened during war times. There was a big demand then, and there still is a big demand, from a majority of the people in this country to have a bill of rights so that things which happened during or after the first and second wars should never happen again. So this bill of rights is more or less an outcome of what happened to some of the people in this country. You have not mentioned anything about the War Measures Act and I would like to get some of your opinions on that.

Mr. LANG: I thank you for that question. In a way it perhaps allows my view to become even more clear. I am not going to make any case for the War Measures Act itself as to whether it is a good thing or whether it should be on the books. I say, however, that it should always be open to parliament to decide that the necessities of a situation are such that these values which we hold dear, which we would ordinarily like to preserve in our society, might actually have to be abrogated and limited in the case of necessity. I suggest it should be open to parliament to do that in particular, for instance in war time, we believe that parliament—the government, the society—can ask individuals to give up their lives for state because of the necessity of the situation, and yet we do not do this because we think there is little value in these lives; we do it despite the extreme opinion we have of the value of these lives. Surely it is a lesser thing if parliament finds it necessary to step slightly towards infringing some of these rights. As I said before these are not absolute rights; they must always be balanced against other values such as the needs of society in regard to other things, such as its defence.

Mr. STEWART: These are not absolute rights?

Mr. LANG: These are values rather than absolute rights.

Mr. RAPP: There is a need for the bill of rights and you stated that this bill should not be passed as it has no meaning.

Mr. LANG: I do not suggest it has no meaning. I suggest that if the duly elected representatives of parliament decide that times are such that the War Measures Act should not only be enacted but should be put into operation in its fullest extent, that that is a decision which should rest with parliament. I want parliament to have that responsibility and power to decide that human rights and values should be infringed when other rights become more important than these rights. I reserve my right as a citizen to scream my opinion about whether they are right in thinking it is necessary at that time, and my right to get parliament to step back if it is found that it was unnecessary, as so many screamed in respect to the famous order in council when it became public in 1945-46. This is the thing we should do. We should always be vigilant. But I want the responsibility and I want the power to be in parliament to decide at a time of crisis how far it is necessary to go. I do not want their decision at that time of crisis even to be subject to a veto by the courts.

Mr. RAPP: Would it not be a good thing for the parliament to know that there is a bill of rights where these rights are listed, announced, and so on.

Mr. LANG: I think it would be a very fine thing to pass as a resolution and have posted in the corridors of parliament as a reminder to all members of parliament, and have posted at election time as a reminder to candidates for parliament and the people that there are these values. In that sense I would approve of it as a statement of values.

The CHAIRMAN: You are almost going so far as to indicate that parliament should not only make the law but through this committee should practically administer it.

Mr. LANG: I do not see my statement going that far.

The CHAIRMAN: It is pretty close.

Mr. BADANAI: I gather from your statement and observation that you would prefer the establishment of a committee to deal with the abrogation of rights rather than leave the protection of these rights to the inerpretaion of the bill. I think you also intimated an uncertainty in the interpretation of the bill as it now stands which could or would lead to litigation. I would like you to enlarge on that point which you made in passing in the early statement you made here.

Mr. LANG: The problem of litigation, of course, arises because in its present form, as has been indicated, there could be even an argument as to whether capital puishment came under the bill or was abrogated by it and also if sedition came under it, and whether any one of these freedoms does or does not clash with some right contemplated or some duty contempated in some other enactment of parliament. There is no possibility of setting down and preserving all the possible cases. These clashes will come before the courts and lawyers will have to advise their clients of the possibility that under the bill what otherwise would be their right may be different. They may have to take these cases to the Supreme Court of Canada and it would probably cost a great sum of money to do it. I see the possibility of this bill being worse than the statute of frauds, and it was said about it, that it cost a subsidy. The possibilities here could well be worse if any significant effect is given to the Bill at all. In these areas it would not apear to give any certainly at all to the law in this whole area, and it is a broad area, where these rights meet every other need.

The committee I suggested would be alerted by individuals and solicited by individuals where it was felt there has been abrogation or interference unjustifiably—and that, of course, is the key word; "unjustifiably"—with these rights and values. That committee then could make its investigation and—that is assuming that parliament could make use of such a committee—that committee could then serve as an advisory and notifying body to parliament, to bring these matters to its attention.

Mr. BADANAI: Would you prefer a parliamentary committee or a committee outside of parliament?

Mr. LANG: I think probably I am not qualified to say that. You know much more than I about how permanent—

Mr. BADANAI: Would you suggest, professor, a committee similar to that which I believe functions in New Zealand, where they have a committee to which a citizen may petition for any grievance that he might have, or for the protection of his rights?

Mr. LANG: Yes.

Mr. BADANAI: In New Zealand they have one; in Denmark, I believe they have a similar set-up and, also in Australia they have a commission to which a citizen may petition for any wrong that he may feel has been imposed upon him.

Mr. LANG: Yes, that is the kind of thing I had in mind. This would alert parliament to cases which otherwise might too easily fall by the wayside, because a person who thinks his rights have been infringed may be the small person, the poor person out in outlying districts who finds it difficult to bring the matter to the attention of parliament.

Mr. BADANAI: In your opinion do you think that this bill could be improved upon? Do you think it could be improved and still be an effective bill of rights?

Mr. LANG: One suggestion I made is as to content. Of course, outside of changing it that way, let it become a construction act; an interpretation act. One positive bill that I think would be a good thing would be a bill—perhaps there is no time for it at the present session—which gathers together the rectifications of certain existing problems. For instance, if parliament is not satisfied that there is sufficient law preventing discrimination in regard to race, creed or colour, in employment, or in the serving of guests at inns, perhaps this is the kind of thing which parliament could enact under its power in regard to criminal legislation, and make it an offence. I am not suggesting this is a good thing to do, I am rather doubtful about it. That is the type of thing that could be looked at and included in a bill of rights which would then, in a sense, in its format, be patterned after the Saskatchewan bill of rights.

Things that I am more sure I would like to see, are things like the right to counsel, before all boards and tribunals; a positive enactment of the privilege against self incrimination before all boards and tribunals over which the parliament of Canada has control. I think that a very impressive and important list of corrections of individual grievances of this sort could be gathered together and put forward and, justifiably be then set out in a bill of rights. A bill confering these various rights upon our citizens is not in any way interfering with parliament's supremacy of power.

Mr. DORION: If I understood well what you told us, your main argument is that the result of the adoption of this bill would be the transferring of the powers of parliament to the courts. This is one of the main arguments you put forward against the adoption of this bill. If we refer to clause 2, you will see that we have certain rights or freedoms included in that clause; for example, freedom of the press, freedom of speech, freedom of assembly and association, and freedom of religion. Is it not true that these freedoms were recognized clearly by superior tribunals without having express context in our statute in order to determine that these freedoms existed? In other words, is it not true that our tribunals very often have taken the role of legislators?

Mr. LANG: They are known to do that, of course, from time to time.

Mr. DORION: This would only be consecration of freedoms determined by tribunals?

Mr. LANG: Except that I do not know that the Supreme Court of Canada has ever yet said that any of these things are beyond the power of either parliament or legislatures. It is true that there are individual judgments that have indicated that some of these freedoms, fundamental to the whole nature of our constitution, are beyond the power of parliament and legislatures to interfere with.

Mr. DORION: In other words it was unwritten law?

Mr. LANG: Yes. I do not think they have yet assumed that position finally.

Mr. DORION: By the Alberta case?

Mr. LANG: No, because there is no suggestion there, by the majority of the judges, that the parliament of Canada has not got the power to do these things, or, at least, that the parliament of Canada and legislatures together cannot do it. Certainly, to me, the important thing in the decision in that case was simply that the legislatures could not do these things. Some of the judges, of course, tended to take the view, and took the view, indeed, that no one could do these things; that this was fundamental to the constitution. Of course, from

a legal point of view, it could be argued that that comes up against another proposition of the British North America Act, that our constitution is like that of the United Kingdom. Certainly there is no doubt about the United Kingdom parliament's right to interfere with these freedoms.

Mr. STEWART: If I understood you correctly, your contention is that, if this bill is passed, then it has no effect on special or specific legislation unless the specific legislation incorporates the provisions of this bill either expressly or by necessary implication, is that correct?

Mr. LANG: No, that was the recommendation I was making about the amendment to the bill. What I said about the interpretation of this bill—of course with the great qualification that this is a matter that will be in much doubt until courts have spoken on it—is that if I were a judge, and actually honestly trying to read the express intention here, I think I would read it as though it meant to abrogate other specific acts of parliament, and that they not be applied in certain cases where these freedoms are infringed upon. So, therefore, I would have to make the next policy decision; were these freedoms infringed upon? That involves necessarily the problem that these freedoms have to be infringed upon in some areas, and this is, of course, drawing the line on infringements rather than simply upholding the freedoms.

Mr. BATTEN: Could I ask one question, Mr. Chairman.

To one who is not versed in the law, your thesis brings up many interesting questions. There is not time to go into these, but I would like to ask you one question. Do you think Canada should have a bill of rights? I do not mean necessarily this one.

Mr. LANG: I really see no need for it. Any bill of rights that has any form of limitation upon parliament or legislatures I dislike. An accumulation of various declarations of individual rights, calling it a bill of rights, I see no harm in. It is a guide, I think one must admit. The Saskatchewan bill of rights is really not a bill of rights in any traditional sense. It is a statement of some rights. A bill of rights, I think, would be commendable in that form, but I think "no bill of rights" is the best bill of rights.

The CHAIRMAN: I have an announcement to make so I would ask you to remain for a few minutes.

Professor, may I, on behalf of the committee, express to you our thanks and appreciation for your coming here this morning and presenting, what I think you yourself characterized as, a minority point of view, and to assure you that the committee naturally is anxious to hear all points of view, whether they be those of a majority or a minority. I am sure that what you have expressed this morning will receive the consideration of this committee. Thank you very much.

Gentlemen, apropos the meetnig this afternoon—we had scheduled a meeting for 2 o'clock at which we expected to have with us Mr. Eamon Park. This morning we received this telegram:

> In view Canadian labour congress submission to committee which we support and particularly reference to right of access in their submission feel it unnecessary to repeat that view before committee stop therefore will not appear today as previously arranged.

For this evening we had arranged for the appearance of Professor Cohen. We have been in contact with him, and he has arranged to appear before the committee this afternoon at 2.30 instead of 2 o'clock. With your permission we will then stand adjourned until 2.30 p.m. in this same room.

AFTERNOON SESSION

THURSDAY, July 21, 1960
2:30 p.m.

Mr. DORION: Mr. Chairman, before hearing Professor Cohen, I would just like to make an observation. Last Friday, at the end of our sitting, I suggested that clause 2 of the bill might be amended by adding to the word "Canada", at the first line of the paragraph, the following words, "In so far as within the federal parliament jurisdiction".

Having read the report of that sitting, I found out that my suggestion was not mentioned. May I ask, Mr. Chairman, that that omission be corrected by having reported what I am now saying.

Mr. STEWART: It is not in the evidence; is that right?

Mr. DORION: Yes, that is right. That is the suggestion I made last Friday.

Mr. STEWART: It should be.

The CHAIRMAN: I think there may have been some misunderstanding there, as I recall it. I suggested that that proposed amendment would better be dealt with at the time we would be considering the bill clause by clause.

Mr. DORION: That is right.

The CHAIRMAN: And I presume that, as a result of that observation—which seemed to have been concurred in—it was thought that that portion of the proceedings would be deferred until we start to deal with the bill clause by clause.

Mr. DORION: Yes, Mr. Chairman. But I made that suggestion at the time because it would be a matter to discuss, probably, and the members are not aware of that suggestion. This is the only purpose.

The CHAIRMAN: Yes. Is it satisfactory, then, if it appears in today's proceedings?

Mr. DORION: Yes, Mr. Chairman.

The CHAIRMAN: Gentlemen, I am happy to welcome to the meeting today Professor Maxwell Cohen, professor of law and acting dean of the law faculty of McGill university.

I understand that he has, over the years' given a great deal of thought and consideration to the matter of a bill of rights. I am sure that we are all happy to have you with us, Professor Cohen, so as to have the benefit of your observations in connection with this bill.

Mr. MARTIN (*Essex East*): I would just like to say, Mr. Chairman, that because of the way in which today's schedules have been arranged it would be very convenient if Professor Cohen had a brief, because I, for one, will not be able to be here after 3:30, because of other commitments and meetings. Have you a brief, Professor Cohen?

Professor MAXWELL COHEN (*Acting Dean of the Faculty of Law, McGill University*): No, I have just a few notes. I did not make a brief. I do not think, if I may say so, Mr. Chairman—

Mr. MARTIN (*Essex East*): I am not criticizing you.

Mr. COHEN: I would be glad to give Mr. Martin the summary of my notes, if that would help him. I only have the one copy. They are just a few ideas I have jotted down in preparation for today; but I would be glad to lend them to you, if they would help in any way.

Mr. MARTIN (*Essex East*): That is very kind of you.

Mr. COHEN: Mr. Chairman and members of the committee, I want to say it is always a pleasure to come before a Parliamentary committee, although I think I am foolish to come again. I was here ten days ago on a combines investigation matter and received such a good reception that my batting average must be about 850. Perhaps I am foolish to try again when I might find that my batting average has gone down if I do not do well on this occasion

The CHAIRMAN: Is it that high?

Mr. COHEN: Only in terms of the cordiality with which I was received. Morever I am second grade witness. I was not on the first list of telegrams; I was on the second list. As a second-grade witness you can only expect second-grade evidence from me.

I do not intend to sit here in any oracular fashion and expound the law to you. I am here to put forward a few ideas and really to raise more questions than I hope to answer. I do not think I will answer very many. I hope to explore with you, so far as I can, some of the issues which this legislation proposes.

I wish to make one thing perfectly clear. I am here in no political capacity whatsoever. I am beholden to no one. My views are my own. I hope to be helpful to all of you as objective students of this bill. You now have had a couple of weeks of intensive education with the aid of one law school dean, a couple of professors of law and one historian of the front rank in this country. Therefore, I do not intend to cover the same kind of ground that they perhaps have covered. But whatever I say is my own. My position, therefore is one which reflects what I think are the types of problem raised by the bill of rights and this particular bill of rights.

I would like first to ask the question: why this fascinating Canadian-wide interest in this subject at this time, bearing in mind that this is not the first time since the end of the war that we have gone into this problem. We had a Senate committee in 1949 and a joint Senate-house committee in 1950. There were submissions to those bodies; there were reports by those bodies. There was nothing, however, at that time, comparable to the very widespread and profound interest which we have seen in the past year or so on this particular bill, and most recently in the last few weeks while this measure has been before the house.

I would like to suggest three reasons why I think there has come, to our minds as Canadians, this very deep concern. The first, I think, is that there is a continuing interest in the development of our own constitution. We are aware, as we have never been aware before, particularly since the abolition of appeals to the Privy Council, since the power to amend in 1949, by resolution for at least those matters over which parliament has jurisdiction, and also I would say since the failure of the dominion-provincial conferences of 1950 and before, to find satisfactory solutions—all of these have given us the kind of constitution-mindedness in this country that we perhaps did not have before, or if we had it, we had it very sporadically and now it is highly concentrated.

The second reason is this. The pressures of the welfare state and the great rise in government activities, the extraordinary extension of the range of this intervention in the lives of the average people, (whether it is a wheat board today, or a marketing board tomorrow, or changes in the economic structure on the third day, and the power of the minister on the fourth day)—all of these have given us a sense of the impingement of the state on the individual.

The CHAIRMAN: Professor, may I just interrupt for a moment. I think that our reporters are possibly getting a little fatigued. Maybe you could slow down a little.

Mr. COHEN: Yes, I will slow down. Very good.

Another impingement, Mr. Chairman, is one that is not very often thought of in this country. We are familiar with the impingements because of the welfare state. But, what we are not too familiar with, is the problem of policing violence in urban Canada in response to some of the conditions in urban Canada; that is, in response to some of the conditions in urban life—which also is an indication of certain changing standards of behaviour in the community as a whole. I think no one, looking at the problems in the great centres of Canada—say Toronto, Montreal and Vancouver, and I am not putting them in order of sin; perhaps I might reverse the order, or have some other order—cannot but be impressed with the fact that there are problems, in the relations of police and investigative authorities to the individual which are more acute in some respects today, or seem to be more acute, than they have been for a very long time. This raises the problem of how one controls, or one supervises this relatinoship, which seems to have a novel and intensive character that it did not have before.

The third reason there is this interest, I think, in the bill of rights, Mr. Chairman, is that we have been affected profoundly by two world wars, and by the dramatic degrading of the individual human being, dramatized particularly by Hitler, and by the slave camps of the U.S.S.R., which did bring to our attention that the climate of international standards of behaviour had, between 1905, and say 1945, dramatically declined. I think that this fact, plus the development of the United Nations, with its own particular standards of behaviour, in the universal declaration of human rights, and the work of the International Labour Organization—where, out of its approximately 119 conventions passed since 1920, four or five have had a major concern with the problems of human rights (various forms—equal pay for women, discrimination by employers, and so on)—all washed back on Canada, as well as the washback on other countries. This new international concern with the problem of human decency, focuses attention of a well ordered country like our own on these questions. We have never had the moral and physical disasters that some of the central European and east European countries have faced in the past fifty years. We can imagine those disasters, and I think, Mr. Chairman, that that too has affected our minds, and we are concerned with the upgrading of the human being, and the upgrading, in the face of the tendency to downgrade, with the two world wars, and particularly the behaviour of the Nazis and the Soviets at their worst moments—their behaviour toward human beings. It is for these reasons I think that there arise a legitimate concern at this time for this problem of human rights.

My next point, sir; I think this bill should be viewed in the light of three perspectives. The first perspective is: one should see it as part of the general constitutional history and theory of both Britain and Canada. This bill is within a great tradition. It is part of a great stream of ideas. It may, or may not be as good, in fitting into that stream—and some people do think and other people do not. That is beside the point for the moment, but whatever its details it moves into the stream of a great tradition. What we have to ask ourselves, in due course, is; viewing it in that stream, how well does it fit into that stream; how successfully does it carry on that great tradition?

The second perspective, Mr. Chairman, in which we should see this bill; is as part of that fascinating story which is a signal characteristic of western legal ideas—the story of natural law. The view that there are certain fundamental inalienable rights which individuals have, irrespective of time and place—this is a subject which I shall refer to in more detail in a moment—one to which Catholic thought has given far more attention in recent years than non-Catholic thought. Nevertheless, as to ideas of natural law, there has been a revival of interest, I think, even in the Protestant and secular worlds. I would suggest

that this too is a reason why we should examine this bill from this perspective, because the bill reflects, in my opinion, this revived concern with the problems of natural law, here the concept is one which holds that certain standards transcend the power of the state, at a given moment in time, to behave in a particular way. I think these ideas about natural law were forcibly brought to our attention by the brutalities of World War II. They are bound up with the concept of democracy and justice, which are concepts we value. I think this bill is to be seen in that perspective.

The third perspective I feel the bill ought to be seen in is the perspective of Anglo-Canadian legal technique. We have had a very special experience in the field of dealing with the relations between the individual and the state. We have dealt with them in a particular way. Our ideas of liberty, our ideas of the extent to which the state may deal forcibly with the individual and his property have evolved in a certain and particular fashion; and we want to see this bill in the light of the techniques that are 300, 400 or 500 years old, and see whether or not those techniques have taught us something that will make this bill more understandable to us.

You will forgive me if I go into this, because I think it is important to have these perspectives if one is going to really try to understand this document in a constructive way. We have the perspective of constitutional history, the perspective of natural law, and the perspective of Anglo-Canadian legal technique.

First of all, some very general ideas about Anglo-Canadian constitutional history and thought. I do not want to repeat the very able summary made yesterday by Professor Lower. I may say that he did not seem to have a very high regard for lawyers. This, of course, is more a comment on Professor Lower than on lawyers, because I think it was conspicuous he talked mostly about the law, and when he was asked serious questions about the law he dissavowed any knowledge of the law. He cannot have it both ways: he cannot say that we cannot leave these matters to lawyers because they are too important for lawyers, and then talk about law himself with the respect it deserves.

I must defend what reputation my profession has, at least to the point of saying that the history of Anglo-Canadian freedom and the history of English political theory and constitutional development is unique. And it is unique because it is largely a legal and political commentary on the problem of the struggle for power between the crown, the royal prerogative, on the one side, and those who would control the royal prerogative, those who would reduce it to some control by the people, in whatever forum seemed appropriate at the time.

So, the whole history of English constitutional law, and, consequently, our own, is the history of the taming of power, the constitutionalizing of power in the state, and particularly of royal power.

The methods by which this process of taming took place were the evolution of the common law itself, case by case as well as the use of parliament and the use of the system of great charters and petitions which crystallized at a given moment in time to what the people felt should be their rights.

This whole development—which all of you know from your own reading—comes to a head in the conflict between parliament and the Stuarts. And the settlement on which we all live today, politically, of 1688, is the end product of that whole line of development which goes back to the middle of the thirteenth century and was brought to a climax in 1688-89. By that settlement the power of the executive, represented by the crown, was now to be controlled not by the crown, but by the crown in parliament; and what had previously been royal power became shared power, the power of parliament with a controlled king.

It is interesting to ask the question, what were the principal routes by which this extraordinary settlement was reached in 1688? I would suggest that three principal methods express the whole evolution from the 1300's on. I would say, first, the claim for rights expressed in charters or by parliament, and in petitions and debates. It is not only Magna Carta, but the whole system of borough charters, of local charters, the whole structure of local independence —the city of London, for example.

The story in British protocol life is expressed in this kind of documentation. We tend to acquire only a limited knowledge and so we are more familiar with the Petition of Rights of 1628 and the Bill of Rights of 1689, but they are only two in a very long line of development.

That is one way in which it developed—charters, petitions and bills of rights, over five hundred years ago, certainly from the middle of the thirteenth century, right down to the end of the seventeenth century.

The second way was in the development of the common law, in ordinary cases, ordinary criminal prosecutions, ordinary cases of contract and tort. These would come to the courts and some principle of power would be extracted from those experiences, and the accumulated development of those experiences became part of the story of our constitutional law and history.

The third was the interplay between the common law and parliament itself. It will be interesting to those of you who have ever read the fascinating life of Sir Edward Cook, written by the same woman who wrote the life of Mr. Justice Holmes, Margaret Drinker Owen—because it is a kind of book that gives you, in a semi-fictional form, more constitutional feeling than you might get from an ordinary text-book. Here you will see Cook in great debates with James I on these matters, referring both to Magna Carta, the Constitution of Clarendon, and the other great documents and, at the same time, referring to the common law. So both the common law and the great charter and statute system interplay with each other to form the main stream of legal ideas that became the foundation for the settlement in 1688.

Why did royal power decline? This touches on matters that are relevant to us today. Why did royal power decline? Why did the Stuarts fail where the Tudors succeeded? For one thing royal power was necessary so long as you had a feudal, disunited Britain, and royal power was the chief mechanism and, indeed, the British common law, the British court system was an important and useful device for the unification of feudal England.

When that task was accomplished even before the end of Elizabeth I's time, the main reason for accepting royal power was no longer the same as it had been. There were two other events which took place to make it unlikely that Englishmen would accept from the Stuarts what they took from the Tudors. Those two events were first the defeat of the Spanish Armanda, and thus the elimination for a long time to come of the real, external threat to the life and integrity of the British.

Second, there was the emergence of a merchant class, which were not going to allow the method of royal power to interfere with the development of their position in society, and particularly to interfere with their property rights.

These two developments, the defeat of the Armada, and the practical evolution of a merchant class did a great deal to make it unlikely, apart from political ineptness, for the Stuarts to be able to sell what the Tudors had been so successfuly selling until the end of the sixteenth century.

Now, the other aspect to this problem which I would like to bring to your attention is the urge, Mr. Chairman, to restatement, which, after all, this bill of rights is, in large measure; it is a restatement. The urge to restatement is strong in English law.

We tend to that idea of exceptional events, and I cite the Habeas Corpus Act of 1670, which was very largely a restatement of what already was the common law, dealing with the right of Habeas Corpus; the petition of right, of 1628, which is phrased in a form which says all these things ought to be, were, and are the ancient rights and principles, and we now restate them. The bill of rights of 1689, which does nearly the same thing. All of these were restatements of ancient liberties, and they recited them there.

James II did not follow these, and they got rid of him. Then William of Orange came along, and they said: "You have promised to do this, so we will give you the crown of England."

These rights have grown from deep roots in English history, and there is nothing particularly novel about them. There are two more factors in our constitutional history which I would like to bring to your attention, and that is the revolutionary settlement of 1689 transferred royal power, from the sovereign to parliament, and it marks the beginning of the theory of parliamentary supremacy.

But we should not forget, Mr. Chairman, that when you and I today talk about parliament being supreme—and Professor Lower yesterday raised serious doubts as to whether we have any right in Canada to call our parliament a supreme parliament—

Mr. MARTIN (*Essex East*): But he finally revised his opinion.

Mr. COHEN: Nevertheless, the settlement of 1689, it seems to me, did have that effect, because those who made that settlement never really had thought through to the theory that the political supremacy of parliament could not be cut down by any law.

It is not until you get down to the middle of the eighteenth century that you begin to have the concept of the supremacy of parliament, and eventually to have it given its most complete form, with the legal theorist of the nineteenth century, such as Austin, Bentham, and Baghot, and others at a later period, who tended towards the view that parliament can never be limited.

But in 1689 there was still the conception that there could be "fundamental law" and ancient liberties, limiting that power, and that parliament could not be absolutely supreme.

Indeed, it is interesting to remember that after the British passed the parliamentary act of 1911, which, of course, emasculated the authority of the House of Lords forever—the House of Lords committed suicide as a political instrument by that act—that there was the school of thought in Britain which did not want to face the effect of the theory of the supremacy of parliament on the one hand, and the supremacy of the House of Commons on the other, and they came to be known as the school which founded the Candid Review, a little magazine which flourished in 1914.

Some important Englishmen were the editors and contributors to that review, and their theory was that we must find a way to have a bill of rights of some kind by which to limit the authority of parliament, since now we have no House of Lords with real power; that is, we must find a way to limit parliament from being unlimited. But their program failed. It had a very short life.

Mr. MARTIN (*Essex East*): What was the year?

Mr. COHEN: 1914, and the name of the journal was the Candid Review.

Mr. MARTIN (*Essex East*): Who were some of the personalities?

Mr. COHEN: Camden was one, but I would have to check to see some of the personalities.

One of the bases for it was the fact that it arose out of a debate on home rule, out of the Irish question as well.

Now, a word about the Canadian constitutional tradition, and not so much about the British background. The Canadian tradition, it seems to me, has the following characteristics, both inherited and unique: First of all, it had inherited the whole idea of parliamentary government as well as, in theory at least, the idea of the supremacy of parliament.

Clearly it inherited the theory of the supremacy of parliament. Secondly, it inherited the common law, the entire body of common law, save where it had been changed by a particular statute; they inherited the whole corpus of the constitutional law of that country.

Thirdly, it inherited, Mr. Chairman, the customs and conventions of the constitution which made responsible government, and cabinet government in this country possible. All this was taken over, and it was developed largely in the revolutionary settlement of 1688, modified more or less.

Fourthly, by having a written document which distributed powers between the provinces and the federal government, although it was an imperial statute, it created a system of basic rights in the provinces, which were in fact limitations upon the supremacy of parliament.

In short, a main idea of the Canadian constitution from its beginning was that it tried to have both the theory of the supremacy of parliament, while from the beginning it also had the theory of limitations implicit in the distribution of powers, and implicit in the entrenched position of French Canada in respect to language, religion and education.

Two other characteristics which were unique in Canada, and which were partially influenced by the American experience, but only partially so—and I would suggest that the most important single attribute that we took from the United States experience—was the desire to have the theory that the residue of power should be in the federal statute, whereas in the United States, the residue of power was in the federation itself.

And finally, and this I think is perhaps among the most unique of our features as distinct from those of Britain—because we have a federal state, and because we have a constitution and a statute called a constitution—if not then, certainly now—it had to be interpreted, so we gave to the judges the role that had not been in Britain, in determining constitutional law, the validity of constitutional law.

They did not do it in Britain for hundreds of years. You will remember that at the end of the sixteenth century there was a solemn attempt in Britain, under the courts, to find a statute which was against the common law, and to declare it to be ultra vires. And they finally said this:—there were two schools of thought, but they eventually said this: the common law cannot make a statute, once passed by the king and parliament—it cannot declare it to be unconstitutional.

So the judicial role in this country met with final success over the British judicial role in constitutional matters.

I would like to add one more characteristic of the Canadian position, and it is the creation in Canada of a national public policy in many areas through two constitutional devices, through the peace, order, and good government clauses of section 91, and through section 91 (27), the criminal law provision of the British North America Act.

It seems to me that both of these provisions provide for the creation of a national policy, particularly in the area of liberties which would not have been possible had that jurisdiction not been given to the parliament of Canada. So much for the constitutional tradition in British and Canadian experience.

Let us take a look at some of the ideas of natural law that seem to me to be implicit here. Those of you who are raised in the Roman Catholic classical tradition will be much more familiar with these problems than I am; but let me at

least suggest to you how this bill of rights in front of us is in part influenced by these great notions that have such an ancient lineage.

We all know, of course, that natural law ideas go back a very long way. Certainly the Greeks and Romans knew about them, and indeed, apart from the Greeks and Romans, the Hebrews themselves did something which concerns this particular bill of rights. If you look at Crane Briton's book, *The history of western morals*, there is a brilliant chapter in that book on the whole idea about the dignity of man which western society assumes and which distinguishes it from eastern society, and how so much of this is due to the notion that each man is an individual soul in the eyes of God, and each man has made his covenant with God. It is this kind of thinking, Mr. Chairman, which I suggest has played a very big role in western legal thought.

Those of you who remember your Roman law will remember that the Romans worked out a nice system, where they had the civil law, *jus civile*, for themselves, and *jus gentium*—that was the law of the barbarians—for the rest of the world, for those things which they could not extend. In due course, the *jus civile* and the *jus gentium* were merged into one system, *jus naturale*.

Then you get the remarkable synthesis made by Sir Thomas when he divided the legal system into three parts. You may remember that he divided the legal system into Divine law, natural law, and positive law. The Divine law was based upon revelation; the natural law was based upon man's reason; and the positive law was based on man's will.

Mr. MARTIN (*Essex East*): And upon Divine revelation too.

Mr. COHEN: But he was prepared to provide, I suggest to you, a high role for reason in the natural law, which I think has a quite modern element in it.

Mr. MARTIN (*Essex East*): That is what Grotius did.

Mr. COHEN: As Mr. Martin has just mentioned—I was going to come to Grotius, who was the father of modern international law, who did so much work in this direction, notably, in terms of international law—because here was a man looking at the wars in Europe and seeing the mess created by Catholic fighting Protestant, and trying to find a rational basis for the break-up of the whole Roman empire, for all of these new nation states to get along. He said, they have to get along as a practical matter; but they must get along because there is a higher law beyond the laws of sovereigns themselves, and that was the natural law.

English law was both comfortable and uncomfortable with ideas of natural law, which makes some of the language in this bill difficult, it seems to me, to handle.

It was comfortable, it seems to me where—as Professor Lower said yesterday—it recognized something called fundamental law, something that went a long way back, to Magna Carta, which no one, in the opinion of some constitutionalists, could ever change. So that British common law ideas of fundamental law were not far removed in their method from natural law ideas, and to that extent British law has always had a little bit of the naturalist in it, even though it tended to reject it for a very long time.

But it was uncomfortable with natural law to the point where it did not believe that a specific statute could be overruled by natural law; and there was this great fight that I mentioned a while ago, in which it was perfectly clear that parliament could, if it wished to do so, offend whatever might be the natural law.

So far as civil liberties are concerned in English law, the debate on civil liberties tended to be very much concerned with these ideas of fundamental law, and when you look at the—shall I carry on?

Mr. RAPP: I just called the messenger's attention to the fact that some windows should be opened here. I see the Professor is perspiring.

Mr. COHEN: Oh, that is just my adrenaline. I am coming down to the bill, gentlemen. Bear with me, I am coming down to the bill.

Mr. RAPP: That is fine.

Mr. COHEN: I said a moment ago, Mr. Chairman, that if you look at the debates in the time of the Stuarts over this question of civil liberties, you will find them referring to our ancient rights and liberties. Some of these ancient rights just did not exist. They referred to them, although they just did not exist, because they made the assumption that no good society could be without these liberties. They made the assumption that they always existed. They simply made the assumption that they were always there.

This was true in the debates, not only in Britain, but in debates over the American revolution as well. When you get down to those two great English lawyers and judges—whom you all know—Blackstone and Mansfield, in the middle of the eighteenth century, you get these lawyers frankly revising ideas of natural law. Indeed, Mansfield, who was a great commercial law judge—perhaps the greatest commercial law judge English law ever had—reformed the whole law of sale, the whole law of bills of exchange, and he said that the nature of English law was such that the natural law was a part of English law. And then Blackstone attempted to say that, although with a good deal more modesty.

Of course, it was perfectly obvious that those who were fighting for the supremacy of parliament, remembering their fight against the royal prerogative, could never accept the idea that it was going to be the law that natural justice was higher than parliament itself; and the great theorists at the end of the eighteenth century, and the nineteenth century, John Austin, Bentham, Walter Bagehot, and others, rejected entirely the whole notion of natural law as part of English law.

Then you had a powerful naturalist tradition in the nineteenth century running through English legal and constitutional law, while at that very same moment there were two interesting developments taking place which were bound to affect the British and the Canadians in due course, as time passed by. One was the French revolution, and the other the American revolution. Both of these were revolutions which placed very great stress on the natural rights of man—and here is where you get an interesting transition, the words "natural law" began to be replaced by the phrase "natural rights". It had a less objectionable connotation in many areas, and was far more specific, far more manageable. The Americans and the French—in the French declaration of Rights of Man, in the American Declaration of Independence and in an American constitutional law, the phrase "natural rights" begins to be used.

But so far as we were concerned in Canada—the French Canadians rejected, as you know, the French revolution—it was an alien expression to them; they would not have any part of it. And English Canadians rejected the American revolution. Therefore, the language of Canadian "rights" discourse, our language, tends to be different in tone from the American and French discussion, because we rejected both of them at that time. The idea of natural law and natural rights, that appear to have been greatly weakened in nineteenth century Britain, never really left English law entirely. It was there in the courts of equity; it was there in the slow rise of administrative law; it was there, if you please, in Dicey's celebrated *Rules of Law*, but Dicey's concept was a concept of a rule that must be binding upon everyone, be it Prime Minister or clerk, of some positive kind.

Mr. MARTIN (*Essex East*): It has not changed.

Mr. COHEN: No, and what we have now is a revival in Canada, and this bill must be seen as a revival in Canada and the western world, and the Anglo-American world, of an interest in natural law ideas—a revival, partly explained by the welfare state and partly explained by our international experience, and partly by our own constitutional ideas. I do not think it is possible to look at the Supreme Court of Canada judgments in the six great cases—Samur, Boucher, Switzmann, Roncarelli, Chaput and Birks, without seeing in these six cases an essential revival of interest in some kind of notion by which all parliaments and legislatures shall be governed. Indeed, it is fascinating to read Mr. Justice Rand's various judgments particularly, since he was the greatest philosopher of public we ever had on the bench, I suppose, whose judgments seem to suggest the emergence in Canada, if not of a frank natural law, of at least a kind of secular natural law by which even the parliament of Canada should be bound. I would say one cannot read those cases without coming to the conclusion there are some things the parliament of Canada, even under section 91, could not do, if they went so far.

Mr. MARTIN (*Essex East*): Surely that is not the conclusions of all those cases, that parliament necessarily is bound in regard to human freedoms.

Mr. COHEN: Not particularly, but I am saying if parliament went so far as to pass an act which shocked the consciences of the Supreme Court, it would be declared *ultra vires*, in my opinion—if one is to look at the laws of developments since 1950.

Mr. MARTIN (*Essex East*): Is it not a fact the courts have not decided that point.

Mr. COHEN: I do not care about that. I am predicting what they are going to do. I am simply assuming, as I am sure you would, taking a look at it, as to what is the tenor of these cases. The tenor of these cases seems, to me, to put a limit on the behaviour of the state, whether at the local or national level, beyond the point where our sense of decency is affected.

Mr. DESCHATELETS: Was it not a temptation to put a limit on legislatures instead of parliament.

Mr. MARTIN (*Essex East*): No, no. Mr. Justice Abbott is the only one that pronounced himself and he made a public dictum where he said possibly parliament could not do these things. However, the other judge did not.

Mr. COHEN: I am quite prepared to admit to you that that specific *ratio decidendi* of these cases turn on the *intra vires* character of either provincial legislation, or on certain other matters, but I cannot conceive of the same judges being worried about indecency at the provincial level but not at the federal level. So, to me, it is inevitable.

Mr. FULTON: Are you saying they base their conclusions—their philosophy, on the existence of an unwritten body of natural law. Did not certain particular judges seek to grasp some written basis for it, and reached out to the preamble of the British North America Act?

Mr. COHEN: Not always. I would not go that far. If you look at Mr. Justice Rand's judgment in the Roncarelli case, it is frank in saying this kind of thing is impossible in a good society.

Mr. MARTIN (*Essex East*): In the Switzmann case this is impossible, if we are going to maintain the parliamentary system.

Mr. COHEN: Yes.

It is a question of legal technique which I now come to—and that is perspective. You must see this bill in terms of legal technique. I have a confession to make. A very senior member of the public service of Canada observing these committee proceedings was disappointed in the performance of some of

the professors here, in terms of the detail in which they examined some of these issues. I hope I will not be accused of going too far in the opposite direction—and you will forgive me if I go through this section on technique, and then, come down specifically to what this bill means, because I think you should see these techniques, and then examine the bill itself.

What is the perspective of legal technique against which one sees this bill in the particular tradition of Anglo-American law? First of all, I think one should say that English law has more familiarity with procedure and with process than it has with abstract ideas and abstract theories. It is more concerned with cases, with statutes, with writs and political practice than with general statements of an abstract nature about liberty as such.

The second point about legal technique is the problem of the interchangeability of terminology here. Take the word "right". Take a look at the word "right". You find in the bill of rights of 1689, not merely the word "right" but "liberties", "immunities" and "franchises". Therefore, we have not only the word "right" but a whole spectrum of terminology. Sometimes terminology is confusing. I will ask the question: what is the advantage of the word "freedom" as against the advantage of the word "right" in section 2? How does it fit into this Anglo-American legal technique we have developed in our terminology? Thirdly, it seems to me that the bill before us, as a matter of legal technique, tends to reflect two traditions—one, the classis Anglo-Canadian tradition about which I have been talking, but the other is a modern international tradition because, if you look at the terminology, it has terminology that is quite alien, until recently, to our tradition. The words "human rights", for example, are a creature of the United Nations charter; the words "fundamental freedoms" is a creature, partly, of the Atlantic charter, and partly of the United Nations Charter. To that extent, therefore, these terms tend to be relatively modern and relatively new with respect to questions of legal technique in our tradition.

The fourth thing I would like to raise about legal technique is that the word "right", wherever used in our civil liberty history, has no absolute quality to it at all. When we talk about "rights" we mean rights, but the right of free speech was always, "but" no blasphemy, no liber, no defamation; when we talk about right of assembly, there was the right of assembly, "but" no for unjustifiable assembly, and not for conspiracy. When we talk about the right of the press, we "but" the right—but not the right to publish libel and the possibility of being faced with actions for obscenity and other forms for which the civil law of tort might provide. So, the word "right" must never be seen as an absolute term. It is a very much relative term, and always has been viewed relatively, and now always must be.

The fifth point I want to make about our technique is that the word "right" may be seen in the classical sense to be confined to a particular area—an area that I would like to call political conscience, the area of politics—the area of conscience, and the area of freedom from arrest and from the arbitrary interference of property. It seems to me these are the classical areas in which the word "right" is used. It is, therefore, I think fair to say that it is no part of our tradition to use, in constitutional dialogue, or constitutional discourse, the idea of economic and social rights. To that extent, the introduction into constitutional documents of claims for education, claims for social security, go far beyond the great tradition that is part of our system of constitutional thought and ideas. Whether you want to go beyond, is a matter of public policy, apart from the constitutional issue in this country. But I wish to say that the terminology is not familiar to our constitutional documents, with these social and economic claims, apart from the claim of security and enjoyment of liberty and property.

Finally on this question of legal technique, I think that striking phrase, by our leading constitutional historian of the middle ages, Frederick William

Maitland; that wonderful phrase in which he summed up all the 600 or 800 years of development of constitutional history by saying: "writs, not rights"—"writs, not rights" explains the history of our development. Namely, it was not a question of stating rights, it was a question instead of having processes, and having the right kind of writ, of habeas corpus; the right kind of action to protect yourself from the intrusions of state power.

Now, of course, it very well may be that the ideas of Maitland, however relevant they may have been to English development, do not have that relevance here. What we may be faced with, therefore, is the notion of a better concept of writs *and* rights—writs *and* rights, where we want both process and substance written down.

Secondly, it seems to me we may not be exactly bound by this older description of rights if one considers the present context with which this discussion takes place in Canada.

Now, I come, sir, after this very long background, on which I have spoken for almost an hour, to the bill itself. I would like to put the bill in its context, and hope the minister will bear with me as I go through what I think are the problems raised by this bill.

First of all, I think one must see the bill as the whole and the bill in detail. We can see, it seems to me, this bill as a whole in the above context, we can see it best in the context of its constitutional history with this natural law, and of this specific legal technique.

Now, I think it is desirable to take a look at the bill itself and say: what seems to be its specific objectives, and then to consider it in detail; have these objectives been achieved; what are the implications of the language of the bill whether achieved or not?

Now, the bill as a whole. First of all, as to the atmosphere, I think the bill has both ancient, classical, and very modern international ideas in it. This is particularly true with respect to the reference to discrimination. That is particularly modern. The rest of the bill tends to be much more classical and much more ancient in character. As I see it, Mr. Chairman, there are eight objectives in this bill. Perhaps I will go slowly here. I see eight objectives in this bill, or an attempt to have these objectives.

I speak with great deference, Mr. Chairman, in the presence of the minister and the deputy minister, because they undoubtedly have had great responsibility here. I am going to rationalize my own views of the objectives.

The objectives are; first, I think the bill is meant to be symbolical. I think it was hoped to have a great symbol of some kind, which would state or be a picture of our rights and our liberties.

Secondly, I think the bill is meant to be a general re-statement of that policy and of the methods of liberty.

Thirdly, I think we can view this bill as a kind of sophisticated interpretation act influencing the way in which the courts will approach such other legislation, but influencing it in a most important series of directions.

Fourthly, I think we can see an objective in this bill of having certain important changes in the rules of criminal law, in substance. I think there are some important changes in the rules of criminal law in substance, either expressly, or by implication. These particular rules of criminal law happen to affect our liberties.

Fifthly, I see these objectives as rules of procedure for both criminal and administrative tribunals, to have a certain minimum content of similarity of treatment of the individual when he comes before a criminal or administrative tribunal.

Sixthly, I see the objective of a frank adoption; a very frank adoption of certain concepts of either "fundamental law" or "natural law", at least for the purpose of appearance before administrative tribunals.

Seventh; I see here the objective to introduce a supervisory role of some kind, not clearly stated, for the Minister of Justice in dealing with the effects of this legislation.

The final objective I see in this measure, is to provide for a higher degree of parliamentary control over the consequences of proclaiming the War Measures Act. This, I take it, is in this bill as an objective because of the frank realization of the impact that the War Measures Act makes on the problems of liberty.

Are those eight objectives sound in principle, each of them? My general reaction is, yes, in principle. Do they go far enough? I divide this question into two parts. Do they go far enough with respect to the classical liberties; the liberties of political action in its various guises; the liberty of conscience or the freedom and the safeguards against arbitrary imprisonment, arrest and detention, and safeguards to property. These are the classical liberties. Do they go far enough? I think they cover and refer to most of these classical liberties. I do not know that much has been left out of these particular statements in so far as the classical position is concerned.

What about the second part; the possibility they have left out any reference to the new area of economic and social rights; the right to education, the right to social security, the right to medical services, the right to hospitalization, and so on; the whole welfare state configuration? Here it seems to me that I return to the position I took a moment ago; however desirable on one level it may be to try to legalize this new system of claims the individual has against the state in modern society, I see no place for it in this kind of document. It seems to me the system of law that we are talking about here is of quite a different order than the system of claims of a special character which are made as a matter of social and economic policy. I do not wish to say that they are of a lower order of value. I do not say a man's right to employment, if we had a full employment act, as the United States passed in 1946; I do not say a social security claim, is any less important than certain aspects of the rights to have property protected. I merely say that from the point of view of the administration of Canadian law in society, I think this is a more manageable approach to the problems of public law and the protection of the individual, and all the other claims are of a different order requiring different machinery, and are of a different tradition.

Now, admitting all these particular objectives, that I have referred to—the eight objectives; can they be put in a better form than we have them here, taking the statute as a whole? It is not only a question of phrasing, but a problem of where to put them to be solved more agreeably. Well, you know the three arguments that have been put before you. First, that there should be an amendment to the British North America Act as to both sections 91 and 92. Most of my colleagues in the field of public law would argue that this is the neatest and most complete solution. But it is the most unlikely solution. There is no evidence that the provinces and the government of Canada will get together any more successfully than they did in 1950—no evidence at all. Indeed, considering the changing political complexion arising from recent events, it may be more difficult for them to get together on some issue, as we shall know next week. Therefore, I would be very surprised if anyone with any realistic appraisal of the political life in Canada would argue that this is something which you can hope for in the foreseeable future.

Secondly; should there be an amendment under section 91(1) under which we now have the power to amend those matters where Parliament has jurisdiction itself. This is harder to answer. My own inclination would be to prefer to see this kind of document as part of the British North America Act itself; but if there are wider political, traditional, and other reasons for not doing so,

I would not hesitate for one moment to support a bill rather than have to wait in this case for amendments as such. The argument which some of my colleagues put forward that you should have an amendment to 91 is this, that parliament in the future will be bound and that nothing it could do thereafter will be lawful if it contravenes a bill of rights made part of the British North America Act. The answer is very simple. If parliament, by a simple majority, can change the same B.N.A. Act, parliament by simple majority can change the amendment. I am not so sure that beginning our life as a country which for the first time will manage its own constitution, if we can get over the "92" problem one of these days—as we did with respect to own court appeal—I am not so sure I want to see easy amendments to the constitution as such. I am not so sure I want to see easy resort to amending procedure, even though the power to do so may often solve a problem. Here we enter into an area of debate, and an area of political and judicial debate. I merely put this forward to you for what the considerations are.

Now, finally: do we have a constitutional problem with this bill, looking at it as a whole? It seems to me on the surface that we do not. I do not see in any of the provisions of this legislation problems which are likely to be difficult if they ever went to the courts or if the bill as a whole were referred to the Supreme Court of Canada. But I must warn you that it seems to me we will be—when I come to look at clauses 2 and 3—indirectly affecting, in my opinion, provincial law, because if you state as a matter of national policy that it is intra vires, that there should be an anti-discrimination policy in this country, you are going to affect the law of contract even wherever the provinces already by statute have dealt with discrimination. Let me remind you what can happen.

Mr. FULTON: I do not want to minimize what you say, but will you direct your attention to the fact that subclause (*b*) refers to discrimination.

Mr. COHEN: Yes. I am suggesting that if the objective of the bill is to make an attack on the problem of discrimination I do not think it is successfully achieved here. This will not do what was done by the United Nations charter. But there is the case of in re Drummond Wren. Here is a case where a man said you cannot sell a house to a certain person of a certain creed or colour.

It came up before Mr. Justice Keiller Mackay now Lieutenant Governor of the province of Ontario. The judgment said that the test which must be met is: is the particular contract one which violates any concept of public policy. Mr. Justice Mackay asked himself the question, what is the public policy? How do I find it in this country? Do I get it out of the air? Then he said: Canada is a signatory to the United Nations charter and that it is now part of the law of Canada. The U.N. charter, in the preamble in article 1, has anti-discriminatory provisions. He said: ergo, here is something fundamental which has happened to the private law of this country; where as before there may have been a right to discriminate there now no longer is and this contract therefore for this sale of land fails on grounds of public policy. The fact that one very good Canadian judge could find the doctrine of public policy in a non-legal document such as the universal declaration of human rights—because it has no juridical consequence—it seems to me he could find it in this document which pretends to have juridical force. Therefore, the concept of "ordre publique" in the civil law and the concept of "public policy" in the common law I think would be effected indirectly—persuasively. If one thinks of the problems of administrative law which are raised in clause 3—with which I will deal in a moment, the creation of standards of behaviour—when you come before tribunals such as the income tax appeal board, the public utilities board, and so on what is going to happen? Now it is this: this particular document is a federal document. All federal administrative tribunals or delegated authorities

will be bound by it. If you have cases coming by way of certiorari before the Superior Courts of Canada where under this bill, I suggest it will be very hard to have a federal standard and a provincial standard. I do not say it will influence directly those provinces to change their legislation, but I do say it is going to have a long-term pervasive effect on the administrative law, wherever it is found in Canada.

Mr. DORION: Professor Cohen, I believe this is not new. Do you know the case of *l'alliance des profeseurs catholiques?*

Mr. COHEN: Yes, the alliance case.

Mr. DORION: The Supreme Court rendered a judgment which was against certain clauses of the law.

Hon. E. D. FULTON: (*Minister of Justice*): Certain what?

Mr. DORION: Certain clauses of the law. It is the case of *l'alliance des professeurs catholiques.*

Mr. COHEN: That is the case.

Mr. DORION: They called to their help exactly certain of these liberties indicated in this bill. They decided, for example that no one can be condemned without having been heard. It was not exactly against the letter of the law, but it was surely against the spirit of the law?

Mr. COHEN: Yes.

Mr. DORION: They had the assistance of precisely what we find out in the provincial Labour Relations Act.

Mr. COHEN: I think what you are saying I agree with entirely. There exists already a body of law like this which affect—

Mr. DORION: Provincial law?

Mr. COHEN: —provincial law. The existence of this particular clause crystallizes this, so wherever there is any doubt it will have a crystallizing effect on the doubt. So you have the interesting consequence of provincial administrative law being created by this national policy. I do not criticize it. It is, in my opinion, a favourable possibility; but I take it as a possibility.

Now I come to the bill clause by clause. Would you like to rise for a few minutes?

Some Hon. MEMBERS: Yes, that is a good idea.

—Recess.

Mr. DORION: I would like to have another example of article 50A of the provincial provision which was dropped or put aside by the courts, because it was against fundamental freedoms.

Mr. COHEN: There is a special article on that subject,—about the Quebec situation—if you want to see it, by a former colleague of mine, Gerald Le Daen, called "The Twilight of Judicial Review in 1955-56, McGill Law Journal."

Gentlemen, you have been patient with me, and I will go through now what I think are the important terms of the bill in detail. However, I would like to make this one last remark on the bill as a whole. It seems to me we should never forget, in this particular discussion, we are concerned with the highest problems of our society—the relations of the individual to the state, and I would like to stress it is absurd to look for perfectionism in finding answers to these relations but, at the same time, we must be very respectful of the need, if not to be perfect, to do the best possible job we can in the face of the great pressures of the welfare state, and many of the other matters to which I referred.

Now, the bill in detail. First, the preamble. It has been said in public, I think, by many people, and before this committee that the bill, if it is to be a symbolic and valuable statement in liberties, ought to at least start with something more than the rather drab way in which most statutes start. With that I am in agreement. I think there is room for a preamble. Now, I have drafted one.

Mr. AIKEN: Well, you are the first person to make the effort.

Mr. COHEN: Well, it is not very good. It is not a very good one but, at least, it marks a beginning. I do not, by any means, like certain parts of it, but I think it does the kind of thing that somebody ought to do, if they have the feeling for the symbolical role this document plays.

May I read it, sir.

Some Hon. MEMBERS: Proceed.

The CHAIRMAN: I was wondering how you get an inspiration, before you start to devise one. I was wondering if one waits until he gets an inspiration, before he starts to devise one.

Mr. COHEN: No, you sit down in the hammock, as I do, and you get fluent with fluid, and it seems to me under those conditions—

Mr. FULTON: It would be safer lying in the hammock.

Mr. SMALL: What potency does the fluid have to be?

Mr. COHEN: It has to have what we call a high judicial proof.

Now, I entitled this an act—the same as this one—for the recognition and protection of human rights and fundamental freedoms, so that everyone can perhaps get the flavour of it. It follows the traditional method of preambles—the "whereases". I do not like the "whereases". The United Nations way of doing preambles, with a verb at the beginning, strikes me as better. But I have done this the old-fashioned Canadian way, and you might be able to improve upon it. It goes like this:

> Whereas the people of Canada believe in the dignity of man and assert that every human being deserves respect;
>
> Whereas all Canadians claim as an historic right to have that dignity and respect safeguarded by law;
>
> Whereas the human rights and fundamental freedoms of Canadians long have been defined and protected by the laws, customs and conventions of the Canadian constitution and by the provinces;
>
> Whereas these rights and freedoms now have received international recognition and further enlargement under the United Nations charter and the universal declaration of human rights;
>
> Whereas the charter is part of the law of Canada and the universal declaration has been adopted by Canada as an ideal toward which all civilized peoples should direct their law and their policy;
>
> Whereas Canada is a federal state, uniting within a single nation many ethnic and religious groups while yet encouraging the preservation of and respect for all heritages;
>
> Be it resolved that the parliament of Canada express as a high aim of Canadian nationhood the respect for and protection of human dignity, rights and fundamental freedoms.

Mr. RAPP: I like that.

Mr. COHEN: It is a beginning, and I shall be glad to put that in the record.

Mr. FULTON: I am sure it will be most helpful.

Mr. RAPP: I definitely like this preamble.

Mr. COHEN: I therefore suggest, in agreement with many people who have been here before you, that we try and get a preamble; and I, without fee, give this to the government of the day.

The CHAIRMAN: You are not suggesting that that is what it is worth?

Mr. COHEN: No. The most expensive things are feeless—of love.

Mr. FULTON: I was going to say, a labour of love is all the more commendable.

Mr. COHEN: Thank you, Mr. Minister. I will remember that when I want a favour some day.

Mr. FULTON: I will remind you of it too.

Mr. COHEN: Mr. Chairman, I would like to refer to the title of the bill and clause 1 of the bill, and compare them. I want to bring to your attention, as an interesting fact, that the title is very definitely in the United Nations language. Clause 1, the short title, is very definitely in the classical Anglo-Canadian language. I merely bring that to your attention—one borrows from the United Nations tradition; the other borrows from our own tradition.

I now come to clause 2—first of all, that these things have always existed. I have two views on that, as all lawyers. Certainly, the main criticism my colleague, Frank Scott, made, that this is a lie and that these have not always existed, on one level is perfectly true. Some of these rights and freedoms did not always exist. If you are going to take the word "always" as meaning forever, or since there has been a Canada, that is perfectly true. I do not like the word "lie"; but it is not a mis-description.

On the other hand, it is perfectly true also that this is a kind of term of art that is not alien to the Anglo-Canadian tradition of talking about our ancient liberties. When the bill of rights of 1869 was drafted they took in all the ancient liberties. They were not really there. If you look at the situation in 1350, or 1540, then these were not there. This is a manner of speaking, to justify something by age. It is the value we put of grey hair on an object. I suppose it has certain validity. However, I do think that is a problem, in view of the criticism by responsible people. I think it is desirable not to create the impression that what you are doing is ratifying something that has existed always. I would suggest that you adopt one of the various proposals before you, sir, of which you have now many,—and I can think of three of them—the phrase "shall be deemed" is one way. The second way is to take out the word "always" and put in the words "heretofore", which I think Mr. Aiken suggested the other day when I was in the room, and finally to take out the word "always", and just leave the rest as it is; "there have existed". You do not need anything else. Take out the word "always". If you say they have existed; how much they have existed and for how long have they existed does not really matter, so it becomes merely a general rhetorical effort which need not worry one too much one way or the other. There are three possible ways here.

Now, I wish to bring to your attention the second point, namely, that clause 2 comprises two statements of rights and four statements of freedoms.

I wish now to deal with subclause (*a*), the first statement of right.

I believe subclause (*a*) is very much in the classical Anglo-American tradition. It deals with classical problems of the protection and enjoyment—the protection of life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law. This, of course, is the language—the phrase "due process of law"—which you find in article 5 and article 14 of the amendments to the United States constitution. I think that in so far as English law is concerned, the first major use of the phrase "by due process of law", which I am told that this committee has discussed—someone has objected to it before this committee—I would tell you

that so far as my research indicates, apart from its possible use in Roman law, its first major use in English law is to be found in Coke's Institutes, volume 2, paragraph 50, for those of you who are interested. Coke's Institute was published in 1603-04. When Coke talked about this—

An HON. MEMBER: Cook or Coke?

Mr. COHEN: We call him "Cook". It is Coke, but it is called "Cook". When Coke talked about this, he used the words "due process of law", words that meant to him the same as the last phrase in article 39 of Magna Carta: "the law of the land". So that really we are dealing with a phrase that has a very ancient lineage. The Americans have done very much more with it than we have done. This seems to me largely a following of their tradition. We do not use the words "due process of law" very much in our system of law, although it has a respectable lineage, and it goes back at least to Coke's Institutes. Whether you wish to change it seems to me a matter of professional and semantic Canadian taste. I do not think it matters very much one way or the other.

I wish to point out there are two implications from American experience to the phrase "due process of law", because the words "due process of law" have both a substantive implication and a procedural implication. That is, when you say you cannot deprive someone of his life, liberty or property, except by due process of law, you mean there must be a rule of law of deprivation, or you must mean that the process by which he is deprived must itself fit some decent standard; he must have a hearing, a proper hearing, proper notice given to him. Therefore, that phrase is both substantive in implication, and procedural in implication. The Americans have done a great deal of work in this field. They are the experts here. There is an immense body of case law, and a large amount of literature on "due process of law", because of the fifth and fourteenth amendments. I do not care if you leave it in, or use the words "according to the laws of the land", or any other phrase that has the same significance.

Clause (*b*) deals with the problem of discrimination, and a quick reading of that clause may think you have got—

Mr. FULTON: Before you leave clause (*a*) may I ask you a question: is it your view, or would you give us an opinion on whether the courts in Canada, when they come to interpret this due process clause and apply it to issues which may be before them, will be tempted to take as illustrative and guide rules the jurisprudence as worked out in the United States?

Mr. COHEN: That is a very interesting question which I am glad you have raised.

You know—those of you who have followed the arguments before the privy council on our own constitutional law cases—you will know that the privy council was very, very reluctant to accept American analogies.

If you look at Sir John Simon's arguments on one side, and those of Mr. Tilley on the other in the Toronto electric commission versus Snyder case, you will see that when counsel for the government of Canada tried to use analogies from the United States constitution commerce clause, which gave the federal government great power—Lord Haldane, I think it was, who was on the court at the time, said no, we do not want it. We know about the United States commerce clause, but it has no application to the Canadian constitution.

But whether or not the Supreme Court of Canada would be as narrow, I would doubt it. I think we are living in a far more flexible generation now; and I think that the Supreme court shows a scope, a breadth of view which would make it interested in what the similar language has resulted in in the United States; and we probably might find something in the nature of a penetration into our system of their constitutional laws and ideas.

If you ask me whether this would be good or bad for our public law and our system, I would say that the story of the due process in the United States is one which suggests great benefit in the protection of the individual.

But shortly after its passage in 1870 or 1871, when the fourteenth amendment was passed, it was abused; and the fifth amendment when it was passed, was abused, in that they left it to be used to protect, to a very large extent, the rising corporate structure in the United States from the effects of such federal and state regulatory measures. But I do not think that will apply here. It is in a quite different historical context.

So my net answer then is that probably our courts would look at it, and if they took a look at the recent doctrine, it would do us no harm to be aware of it.

Mr. AIKEN: Since the previous position of the Supreme Court of Canada, it has now become our final court, and therefore they might be more inclined to consider a matter in which their decision would be final, than they would have a few years ago when the privy council might have overruled them.

Mr. COHEN: In my opinion it is fair to say that the results of some of the cases to which I referred are virtually to create already a due process of law, in part, in Canada. We are emerging with a common law of due process, which this bill to a large extent, declares.

Mr. DESCHATELETS: Do you think that due process of law should replace these terms?

Mr. COHEN: I would say that the terms may not be comfortable to some Canadian lawyers and to some Canadian judges; but they do have a respectable lineage; the lineage is far back for us.

But if you wish to change it, you might use the phrase "except by law". Law means process; law means substance; "except by law".

Mr. RAPP: Or in accordance with the law?

Mr. COHEN: Oh, in accordance with the law of the land.

Mr. FULTON: I think that it might open the door to the interpretation that if parliament should pass a law, then as long as it stayed on the statute books, you could do this.

Mr. COHEN: It may be. I accept that, but I would assume the history of human life and the law during the last forty years suggests the Canadian courts look at the words "by law" as meaning "reasonably".

Mr. FULTON: But I was thinking of the statute itself. Some people think that the Expropriation Act is excessive in the powers it carries, but suppose you had the phrase "except by law", would it not be open to argue that so long as you have a law, even an excessive law or a harsh Expropriation Act, the courts could not look at it and say it is inconsistent with the bill of rights. The bill of rights would say "except by law". You are invoking a law.

Mr. COHEN: I think your point is well taken. It would require further imagination to read into it what I want to read into it.

Mr. DORION: I believe our Supreme Court accepts more easily now the American authorities and the interpretations given by American authorities, especially in administrative and criminal law.

Mr. COHEN: I would certainly think that the Supreme Court would not be adverse to looking at American experience in this field. They are doing it now in the anti-trust cases, for example.

Mr. AIKEN: If you were to eliminate the words "process of law" you would be eliminating perhaps a procedural meaning, and we understand that you explained the procedural part is the question of a person being given notice

of a hearing and having the right to appear at a hearing and having a right to speak for himself. If we took the words "process of law" out, I think we would weaken it.

Mr. COHEN: Let me explain why this is a bit of a headache. One must look at this question as part of the history of the relations of administrative tribunals to law in this country over the last fifty years. The story is that in the first thirty or forty years of delegating legislation, on the whole British and Canadian courts were hostile to it, so that by certiorari and prohibition they made the problems of modern delegation somewhat difficult. I think it is possible to argue that today our Canadian judges are often too executive-minded in some cases. I would like to see a revival of the reviewing interest of the courts. To that extent the words "due process of law" may encourage greater judicial review. But it is a two-way story. The very moment you open the door and encourage the courts to increase the quantum of their role in supervising delegated authority, the moment you may be interfering with the efficient process of government. This has been the subject of great debate in the United States. It is a risk you have to take. Nevertheless, it seems one must face up to the possibilities.

Clause (*b*) deals with discrimination. At first glance this looks like an attack on discrimination per se; but of course it is not. It is the right of an individual to the protection of the law without discrimination. The law may be discriminatory and say that a woman may have more rights, or a person who is coloured shall have more or less right, or a person under a certain age shall not have certain rights. This bill adds nothing to discrimination itself. It merely assures that the doctrine of equality before the law, irrespective of race, creed or colour, obtains in our courts or in those areas in which there is federal jurisdiction. Now it is a nice question whether this is all this bill should do. Should this bill not go further? Should this bill not face up to the fact that it has a opportunity here to assert some kind of national policy about non-discrimination per se, not merely equality of protection; that is in the law already. I would suggest that the imagination of this committee is not so modest as not to find language which does more than merely restate the doctrine of equality before the law. What you really ought to be aiming at, if you are influenced by the United Nations tradition, which this bill pretends to do, in part—what you really ought to do, first, is to incorporate, somehow or another, into national poilcy the idea of non-discrimination. Now, of course, you have a constitutional question.

Mr. DESCHATELETS: In your opinion, do we already have in Canada any provisions in the statute or in the law prohibiting discrimination?

Mr. COHEN: That amounts to discrimination?

Mr. DESCHATELETS: Do we have something actually in our statutes prohibiting discrimination?

Mr. COHEN: Yes, in all sorts of statutes. We have the Ontario Fair Accommodation Practices Act, which prohibits discrimination in the providing of accommodation, rentals, and so on, resorts. We have the Ontario Fair Employment Practices Act, which prohibits discrimination with respect to employment of labour. We have the Saskatchewan Fair Accommodation Practices Act, which does the same thing as the Ontario act. We have the Federal Fair Employment Practices Act, which prohibits discrimination on the grounds of race, creed or colour, employment on federal contracts, or on the Northwest Territories, or any of the federal areas of jurisdiction. We have the equality of pay as between the sexes, statutes in several provinces.

Mr. DESCHATELETS: We have a federal statute.

Mr. COHEN: Yes, and several provincial statutes on that. So there is a whole experience now with this attack on discirmination at the federal and provincial levels. But it by no means solves many of the problems, of which *Christie v. York*

is a recent classic example. What you have to ask yourself is—and I come back to something I said before, and I would be interested in the minister's view on this, Mr. Chairman, I think this whole effort—and I should have begun by saying this—this is an admirable effort in the sense we have never had a discussion in this country equivalent to what we are having now for human rights. It has some very important weaknesses, as we are discovering, but still it is a very important effort, and we ought to try to convert it into the best possible instrument.

Supposing we were to create a policy, a national policy, in which it was said that the rights of the individual shall not be infringed on the ground of race, creed, sex or colour—that type of language, the "rights" of the individual. Of course, there already are rights; and there is the question. I know you may have a statute, and it is most important that you define rights; but what happens then is this, that you have some Ontario judge or Manitoba judge or some Quebec judge saying this bill is different. Why would not he treat that with the same respect as Mr. Justice Keiller Mackay treated the U.N. charter and the U.N. universal declaration of human rights? If you did treat it that way it would affect the law of contract of Manitoba. It would affect the case law, or the public policy aspect of case law. So, I suggest that there is room here for creative approach. It would do, I think, a great service, and would be a marked advance over the classical system which clause (*a*) talks about.

Mr. FULTON: I do not know if you wish to discuss this now.

The CHAIRMAN: I think we should, as we go along.

Mr. FULTON: There is difficulty in the approach you have outlined, which we saw; but up to now we had not seen our way around it, in stating it in the form which you did. We thought we were going a long way, although, perhaps not as far as you go. I will give you some of the reasons, if I can, in a moment, for our approach.

Clause (*a*) guarantees, or states those fundamental rights which are really those things that everybody should have, the right of an individual to life, liberty, security of the person and enjoyment of property.

Mr. COHEN: Those are the classic ones.

Mr. FULTON: You say, in fact, everyone in Canada has these already, and the right not to be deprived thereof, except by due process of law. That being the case, we then said: now, how can we ensure that people have these rights without discrimination? After all, what is the great protection of their rights? It is the courts—If a person can get before the courts without discrimination, then he has really a sure shield of protection for his rights, because the statute says everybody has these rights. The statute also says that everybody, without discrimination, can go to the court for the protection of his rights. That was our approach. The difficulty which we saw, and which we thought we had accomplished as far as we could at the moment, and we thought we should not go further because we have not devised a method of meeting these sort of objections, is that if you simply say: there shall not be discrimination, you get into—perhaps you will say it is absurdities—this practical problem. What if you have gone so far as to make it illegal for a producer who stages shows to advertise for a chorus line and specifies women only need apply; are you discriminating? If you have a statute that goes too far, it may be contrary to the bill of rights to advertise in that way. Perhaps a more mundane, but still a very real example, would be if you took the case of a church. I think it is dangerous to specify churches by name, but take any church which says: we want a janitor, and then restricts the class of those who will be appointed to members of their own denomination. Surely that is not discrimination which should be outlawed by a bill of rights. Our difficulty was to find a principle along the line that you have suggested.

Mr. COHEN: Yes.

Mr. FULTON: Which yet does not go so far as to perhaps create what almost would amount to absurdities. So, as I say, we came back to this philosophy that if you define the rights and then give everybody without discrimination the right to go to court for protection of his rights, we thought that we had, in our approach, really accomplished what you said would be accomplished by your approach.

Mr. COHEN: I can certainly appreciate all the difficulties you raise, Mr. Minister. I think you ought to go a little further to give the courts a handle. It is not enough to say that you are entitled to have life, liberty, security of person and enjoyment of property, because on that basis, how do you eliminate covenants running with the land per se? A man wants to buy a piece of property. He has not got the enjoyment of it yet. He wants to have the enjoyment of it.

Secondly, the existence of the right to enjoy, which this particular clause provides, does not give you any particular policy or rule with respect to rights not yet enjoyed, but which you wish to enjoy. So, it seems to me you need something that creates a policy which can affect the climate of the doctrine of ordre publique, on the one hand, or public policy on the other. I would suggest —in fact, I would say this: surely if you are prepared to implement the United Nations charter, Mr. Minister, and if you are prepared that Canada has not a charter, and has not implemented it, that is part of the law of Canada now, *mutatis mutandis*?

I regard it as an obligation of Canada internationally.

Mr. FULTON: I think it is an open question as to whether or not it is part of the domestic law. I think the safer view to take is that of Mr. Justice Keiller Mackay, that by subscribing to it, and recognizing it as an international obligation, Canada has declared that it is our public policy to abide by these principles.

Mr. COHEN: Every state is bound to make its domestic law conform to its international obligations. This is perfectly sound international law.

I would think that if one is to be consistent here one should do justice to this sound idea which you have in clause (*b*), but which you have not carried sufficiently far enough to give the courts something to hang on to, because clause (*a*) does not do it.

Mr. FULTON: You do have constitutional difficulty here, you say?

Mr. COHEN: Yes.

Mr. FULTON: Would you feel that if you directed your non-discriminatory clause to the field which you suggested should be covered, you are pointing almost directly at matters which are within the federal field of jurisdiction?

Mr. COHEN: I would have said yes, 25 years ago, but I am less sure of that, in view of the emergence of the doctrine of national policy in the field of civil liberties in the six or seven cases since 1950; and I would think that if this ever went to the Supreme Court by way of a reference, that the Supreme Court would be very hard put to it to eliminate it on grounds of ultra vires—I mean this statement of national policy.

I would think that they would be very hard put, in view of what they have done in other cases, because it conforms to the atmosphere of other cases.

It seems to me that if you do this, you would be giving the judges the suggestion to move in areas where nobody is moving well now.

Mr. FULTON: That is true, but is it a proper stand to take, when you said yourself you cannot specifically agree to everything?

Mr. COHEN: Yes.

Mr. FULTON: And in areas where the courts are moving, it is perhaps more advisable for parliament not to move in by a specific legislative provision, but to give the right of protection by recourse to the courts, without discrimination, realizing that the courts will, in hearing litigants before them, apply, as the courts have, and as generally they are prepared to do—their views of public policy?

Therefore, for a time it might be safer to let this matter be developed by judicial interpretation and by interpretation of public policy rather than to try now to define the thing in such a way that you would be almost inevitably passing directly on something which was in the provincial field?

Mr. COHEN: It depends entirely on the judiciary and the technical wisdom with which you choose your words.

I think it could be so drafted to achieve that modicum of interpretation in the matter of policy of a direct kind without being so obtrusive as to be objectionable constitutionally. And I would like to think that some thought might be devoted to it.

This is a great opportunity. We are not going to come back here year after year on this matter; and if you do not do it, you will not get this quantum of debate on it, and you cannot stir up this interest every year among the people.

Mr. FULTON: Would you not concede that the courts, having their attention directed by clause (*b*) specifically, to the right of a person to have access to the courts without discrimination, would be influenced by the feeling that if parliament has directed their attention towards non-discrimination, it must have done so for a purpose?

And then, to argue that by making it easy for them to apply it, it would mean an assumption that parliament must have intended that they have the right to be protected, and that the right is one of non-discrimination.

Mr. COHEN: I would like to say that if I could be sure that we have developed judges as wise and perceptive as you are, that perhaps we would not need any more inference than this clause (*b*) now gives to them. I would like to have a little more than you give them here, a little more than that.

I would like to give them a little more than you give them here and, I suggest, this, perhaps, is a place to try a bit of creative draftsmanship.

Mr. FULTON: You say we have a pointer here, but it is short and you would like to see it longer.

Mr. COHEN: Yes, and a little more practical.

Mr. DESCHATELETS: Do you think the way clause 2 (*b*) is drafted, in its present form, it could have been a great help to the courts in the Christie case?

Mr. COHEN: I do not think so. That is my difference with the minister. I do not think the Christie case would have been different if this clause was here.

Mr. DORION: It is probably because the Christie case was a question of civil law.

Mr. COHEN: Except, if this were put, in positive terms, of a national policy against discrimination, then the Quebec civil court would have to ask itself: is this transaction not against public order to refuse to sell to "B".

Mr. DORION: But there is such a thing as federal public order and provincial order as well.

Mr. COHEN: The Supreme Court of Canada has been trying to assimilate them. If you take the case we are talking about, I suggest we are developing a very great closeness between the civil law idea of ordre publique and the common law idea of public order.

Mr. DORION: I have in mind two cases—the Baskin case, where Mr. Justice Rivard made a very interesting history of the provincial public law, and then there is the Bouchard case, where it was decided that a lake shore, exploited by a proprietor, was a private place, even if there are a lot of people going there every Sunday, because it was his own business and he had no obligation at all to accept everybody.

Mr. COHEN: Yes.

Mr. DORION: In consequence, it would have been possible to act with discrimination.

Mr. COHEN: Yes.

Mr. DORION: And it was decided that it was a civil law. Consequently, the proprietor had absolute right not to accept everyone in his place.

Mr. COHEN: Well, I do not wish to be dogmatic. It is a difficult problem. You may remember how the court treated the question in the Roncarelli case. The position that Duplessis took in the case was if there was any damage here, it must be damage measured by the civil law. The court said that the content would be determined by that policy which we say is a policy which you ought not to offend again and, consequently, they said: to use the power of attorney general in this way, to encourage the cancellation of a licence, creates a harm, and a person should not be faced with this kind of harm, and should not be faced with it in the civil law of Quebec. They took a general concept of what is harmful from their general philosophy of harm, and put it into the civil law of Quebec.

Mr. DESCHATELETS: In summing up, do you have any practical views in connection with 2(*b*)?

Mr. COHEN: It seems to me, in its present form, it is essentially a restatement of the doctrine of equality before the law—and that is not a bad thing.

Mr. DESCHATELETS: Could it bring relief to any Canadian citizen who would suffer from this?

Mr. COHEN: I think one must answer your question in two ways. The whole of section 2 is intended not as the creator of new rights, but a restatement of what is in some very succinct form. One must start with that premise, therefore, that to a very large extent clause (b) is really a re-statement of the doctrine of equality before the law which now exists. But if one takes the minister's position, that the climate in Canada is favourable to the elimination of discrimination, and that courts would be happy to find reasons to eliminate discrimination, e.g., in contract matters, this might be a hint to the courts, "Go further than you have gone". But that is about as far as I am prepared to go.

I think that Mr. Fulton, the Minister, is optimistic that the courts would take the hint. It is difficult to know whether or not the courts would take the hint; certainly the presence of the words:

> discrimination by reason of race, national origin, color, sex—

et cetera, tend to create the impression that this bill was anxious about the problem of discrimination.

Mr. FULTON: Yes.

Mr. COHEN: But whether or not it would create a new norm of law is another matter.

Mr. DORION: It would have, surely, a very high educational value, even for the provinces—or for every case?

Mr. COHEN: I have to ask myself a question put to me a moment ago: would the Christie and York case have been decided differently if this had been on the books? What do you think, Mr. Dorion?

Mr. DORION: I do not believe it would.

Mr. COHEN: There you are.

Mr. DORION: Because in the Christie case I believe there was taken into consideration the civil right of the property, of the private ownership.

Mr. COHEN: And it raised the case of the right of a man to make a contract and sell to whomever he will, and said there is no public policy against it. Would this have changed the public policy—that is the question? That is a nice question, is it not?

Mr. FULTON: Yes; but I was wondering whether there are not two types of case. It is one thing to say a man shall have the right to sell to whomever he will; because if you say that he must sell to anyone who wants to buy, you are taking away a right from the present owner. But it is a very different thing to say that you shall not create covenants running with the land, which perpetuates your present distinction for future generations. I think you are only taking a right away from the individual—you cannot tie up lands in the future on a discriminatory basis.

Mr. COHEN: Yes; but I thought you were on a different line. I thought you were going to say that covenants running with the land presents an easier administration problem for the court than the ordinary contract for the sale of goods. I think this is true; but I do not see that, in principle, the difference in discrimination is any less harmful.

Mr. FULTON: I quite agree with you.

Mr. COHEN: Now, if I may, Mr. Chairman, leave (*b*) and come to (*c*), (*d*), (*e*) and (*f*).

These are four clauses which use the word "freedom", which clearly is somewhat unfamiliar ground to the Anglo-American legal tradition. We do not use the word "freedom" in a juridical document as such; we talk about liberties, franchises, immunities, powers, rights. But "freedom" is a political science term. It is a great term, and I am not minimizing it; but one has to remember that this is something new in the terminology of our law.

I want to point out, however, that the word "freedom", as I said before, in all four instances is a relative term—by no means absolute: freedom of religion is bound by certain restrictions of what constitutes the proper ambit of religious belief. If we had a sect in Canada that decided to go in for genocide on religious grounds, we would regard that as going too far. Similarly, freedom of speech—restricted by defamation, libel, et cetera. Similarly, freedom of assembly—restricted by the Criminal Code, unlawful assembly. Similarly, freedom of the press—restricted by the laws of libel and by other civil impediments that may from time to time be discovered, although there are very few in the case of freedom of the press.

So they are not absolute and I therefore have to ask myself this question about section 2: does section 2 make any contribution to the problem of freedom of the press in this country? I have three yes's and one no. I say "yes" as to general policy. I think it is helpful to the general climate in this country. Secondly, I would say "yes" as to pungency of statement. Most of these are defined in the Criminal Code and in the common law, and in the case law dealing with contracts, torts, constitutional law, and so on. This bill has certain brevity and certain pungency. The third "yes" is this: it makes a contribution on the likely affect of the interpretation of the statutes. I will come to this again when I discuss section 3. No judge looking

at clause (*a*), or looking at (*c*), (*d*), (*e*) and (*f*) can avoid asking himself: if these are the stated policies, are they intra vires of the policy of Canada? It must mean something more than mere interpretation of documents coming hereafter. For the liberal judge seeking the protection of the citizen these are pegs to hang onto, something that is a little more than the uncrystallized case law and the diffused criminal law; but they are relative. My one "no" is that one cannot find here the specific creation of any new right. There is no specific creation of any new right, unless one goes along with the minister and says under "*b*" there should be a new policy of discrimination inferentially drawn—in a way in which liberal courts reading and looking at it in the course of years can evolve ideas with some differences of opinion.

The CHAIRMAN: That "l" in liberal is a small "l".

Mr. COHEN: Always a small "l".

Now, section 3 in some respects presents many difficult problems. Section 3, in my opinion, represents a very substantial and interesting question of interpretation. I would like to suggest that there are eight ideas in section 3. I hope, again, that you are not burdened by the duration of this effort, but since I assumed the invitation was a serious one I took it seriously.

Mr. RAPP: That is what we are here for.

Mr. COHEN: I am trying to do this as carefully as I possibly can. The first idea, in my opinion, about section 3 is that it is a direction to the Canadian court for the interpretation in the passing of future statutes and regulations, in particular the application of section 2 to such statutes and regulations and the application of clauses (*a*) to (*f*) to all such statutes and regulations. The question is: how will this operate on statutes already in force which may authorize arbitrary detention or degrading punishments, or which statutes do not provide for promptly informing a person of the reason for his arrest or his right to counsel, or which statutes do not provide for protection against self-incrimination, or for a public hearing? How will this work? In my opinion we are taking, and should take an open-eyed risk here. I would assume that the Minister of Justice and his staff have already looked at the major statutes passed by the parliament of Canada, and the relevant regulations, and asked themselves the precise question I am asking here. I would assume that they have said to themselves that, where certain statutes, such as the Customs and Excise Act, the Official Secrets Act, the Narcotics Act, and perhaps the Income Tax Act, and perhaps the Expropriation Act—where these acts by long tradition have involved a high degree of direct and sometimes quasi-administrative action by inspection and because you have to search a person at the airport in respect of the Customs and Excise Act without telling him he is entitled to counsel, and you have to detain someone under the Narcotics Act, and search him, or in some other way under the Official Secrets Act. I would assume that what the proponents of this measure expected, is that the courts will read these provisions in section 2 and section 3, subclauses (*a*) to (*f*) into these measures, save where, in the opinion of the courts, it leads to an absurdity in administration. I warn you, that if I am right in this particular case, it is a passing of the buck, to some extent, to the courts, to decide the particular relevance of this language to these existing statutes and regulations. The courts may make mistakes, because the courts are sometimes inexperienced with respect to regulations and administration. So you have the possibility that, having passed the buck to the courts and say: please relate section 2, or subclauses (*a*) to (*f*) to these particular sections, to these particular statutes; please take this responsibility—you may be having a result which, in the end, is administratively awkward. Of course, the way out of it is, if the deparment finds they cannot administer the Customs Excise Act, or they cannot administer the Income Tax Act with this particular judgment because it forces on them this particular type of new standard of

behaviour, you come back to parliament, and a new act will provide that you can specifically exempt yourself from it. Parliament can debate it, and parliament can say, this particular statute shall now be exempt, and this particular activity shall now be exempt from these particular provisions. However, should you impose this burden on courts? You are asking the courts for a fairly high degree of administrative wisdom. I would guess that some courts will do well by it, but some courts may do poorly. The question is, whether the risk is worth it. I think, on balance, it is. I think that, in terms of the confusions of interpretation, on balance—after all is said and done, who loses and who gains here by bad judgments? A bad judgment here means that the court is making it more difficult for the government in some way. That is what a bad judgment means from the government's point of view. It makes it more awkward, so that if there is a net gain it is a gain to the individual. It may be a gain to a bad individual. Somebody may get off, but that is the risk you take. I would say that offsetting that is the fact that under modern conditions you have to have a lot of delegated authority to customs, to excise, to income tax, to the police; one way or another you have to have it. You cannot run an efficient operation without it.

This being so, is the risk worth it? What are to be the results? And my net view is that probably the risk is worth it, and that after some experience, the courts may do a reasonably good job of seeing where it applies, and where it does not apply; and where they make mistakes, you can be sure that the minister will come back to the house, and that the house will have a chance to debate whatever amendments are required.

So while there is a risk, I think we should enter into this experiment with an open eye, for the price that you have to pay.

Mr. DORION: I would like to put to you a concrete case.

Mr. COHEN: I am much better at abstract cases.

Mr. DORION: Suppose a man is arrested and suppose he asks for a lawyer or counsel, and suppose that counsel is refused to him.

Then suppose he made a statement that could be used before a court in the case of an accomplice; and suppose that in giving his testimony before the court he is not informed of the privilege given by article 5 of the law?

Mr. COHEN: Yes, quite.

Mr. DORION: Do you believe that the process of the officers of the courts, or the process of the police agents would vitiate the testimony given in another case? Do you think it would vitiate it, and that it would be impossible to use that testimony against the witness himself?

Mr. COHEN: I would say that it is a possible interpretation of clause (d), that the failure to advise a person that he has the benefit of section 5 of the Canada Evidence Act—I would say that it is a possible interpretation of that, and that it would be a ground for setting aside a conviction, and I would not be surprised if it took place.

Mr. DORION: That would be under the Canada Evidence Act?

Mr. COHEN: Yes, because of their having not told him, or bringing it to his attention, and an appellate tribunal, on this clause being brought to the attention of the tribunal—I would say it would be grounds upon which the court would set aside the conviction.

Mr. DORION: But in the case of a confession, for example, given by a person detained, and to whom counsel was refused, what would you say?

Mr. COHEN: Do not press me too hard on this, because I would say that the courts are going to have very great difficulty on the question of counsel; but they will have less difficulty on the question of arbitrary detention. And they may even have less difficulty on the question of self-incrimination.

But on the question of counsel there are so many situations in it, such as that of an actual inquiry taking place in five minutes, when questions are asked, and there is no time to go through this formality, that the courts may say to themselves: "How far are we to apply this in a relative situation?"

It may take years and years of experience to evolve a jurisprudence which construes the law particularly with respect to old statutes; but with respect to new statutes, I assume this will reflect it somehow or other immediately.

Mr. FULTON: Clause 3 merely says that a statute shall be interpreted so as not to deprive a person arrested of the right to obtain and instruct counsel without delay. That is the object of a bill of rights, that no one shall be deprived of his rights, and I submit it would be interpreted so as not to deprive him of his rights to obtain and instruct counsel.

Surely the question asked of you should be read in the light of the actual wording of the bill of rights, but I do not think that it goes to the question of whether or not a confession given without counsel being there, is admissible or not. I do not think that the question is changed by a bill of rights.

What we are getting at in the bill of rights is when an arrested person asks for counsel, he must be given the right to counsel, right away. But suppose he does not ask for it, or suppose that before counsel can reach him, he is asked a question and gives an answer?

In my submission, the bill of rights does not affect the admissibility or otherwise of that situation.

Mr. COHEN: Do not push that too far.

Mr. DORION: Except that it would be surely a factor admissible by a judge?

Mr. COHEN: Quite right.

Mr. FULTON: A factor, yes.

Mr. COHEN: Quite right.

Mr. DORION: In order to determine if the confession is true and voluntary?

Mr. COHEN: Quite right. The court will be far more favourable to a confession where the man has had the chance to consult counsel than without it; particularly if this document intends to make public knowledge the right of the availability of counsel, and that there will be no steps, past, present or future, which in any way prevent that.

Mr. DESCHATELETS: Will these provisions apply to any cases proceeding under the Criminal Code?

Mr. COHEN: I would think so.

Mr. DESCHATELETS: Because it is a federal statute?

Mr. COHEN: I think this applies to every federal statute having penal consequences.

Mr. DESCHATELETS: Would the Minister of Justice agree to that?

Mr. FULTON: Every federal statute, yes.

Mr. DESCHATELETS: Under the Criminal Code the protection given here would apply to any person accused on a charge under the Criminal Code?

Mr. FULTON: That is my view.

Mr. DESCHATELETS: Because it is a federal statute?

Mr. COHEN: Yes, I think so.

Mr. FULTON: That will be one of the main facts.

Mr. COHEN: I assure you the minister's opinion is worth much more than mine in this matter.

Turning to the other three matters I want to raise with respect to section 3—

Mr. AIKEN: Without wishing to interrupt you—

Mr. COHEN: I am coming to more details, and I am really anticipating myself.

Mr. AIKEN: In view of the time, perhaps Professor Cohen might conclude his seven remaining propositions, because we may run out of time at 6 o'clock and he will not have completed his remarks. I would much rather hear his propositions than only hear half of them.

Mr. COHEN: I then have some constructive suggestions, or I hope they are constructive, with respect to sections 4 and 6; and I will go through the rest of my views on the second point.

Mr. AIKEN: Yes.

Mr. COHEN: My second view is that the section is intended to alert draftsmen as well as parliament. My friend Mr. Driedger here will not take this too much to heart. As our most experienced draftsman in this field he will know what I mean. As I say, it is intended to alert draftsmen and parliament to avoid infringing on the rights and freedoms of section 2, and to provide specifically for the matters listed in (*a*) to (*f*). This is an attempt specifically to alert all draftsmen and parliament itself. How far this will be possible in respect of many statutes which cannot be administered with quite this elaborate series of safeguards is going to be one of the most interesting questions for the future. How do you run this kind of show with respect to the Official Secrets Act; how do you run this kind of show at Dorval airport with respect to customs matters, with people coming in with diamonds in their nose and ears, and you have to wash them out? How do you do many things that are necessary in government? It seems to me one has to ask that question, and I think it will take a very high degree of skill, as well as a high degree of administrative knowledge on the part of the draftsmen, to balance the needs of the administration and the directions of the statute—a very sophisticated degree of skill and knowledge.

Mr. FULTON: I have not the Prime Minister's exact words before me, but he said, in effect, that it will require great drafting skill indeed to accomplish some of the desirable administrative results we wish to see within the framework of the bill of rights. So your view and his are common on that point.

Mr. COHEN: Yes, we agree on that.

My third point is with respect to the phrase the right to exile. I think this is a vastly overblown problem. We have no right to exile, because while you have it by your domestic law you have not got it by international law. The thing to remember is you may decide, by the parliament of Canada, to send "X", who has been convicted of a crime, to Tasmania. Tasmania does not have to accept him. Every part of the world except Antarctica is under some sovereignty, and even Antarctica cannot be opted. So, there is no right of exile, because there is no obligation, in international law, on the part of any state, to accept a national of another state, whether they are denationalized or not. Consequently, the expression "exile" in relating the domestic law to the international law, really performs no technical service other than, perhaps, clearing the air following the Japanese-Canadian case. I should say, if it does clear the air as far as the Japanese-Canadian case is concerned, perhaps we might leave it in. But, that case—if you read the judgment—failed to examine the international law. I have read that many times, and written on it, and I have never understood why the court paid no attention to the inability of Canada to send its own nationals to any other country. They sent them to Japan, and Japan was a defeated and occupied country. Her rights as a sovereign state were "in escrow" temporarily. Therefore, there was no effort to legally assert here the international right to reject the nationals

of another state. This is the only explanation, but the privy council did not pay any attention to it. As a matter of fact, there is no right to exile, except under domestic law, because international law prevents it.

Mr. FULTON: Are there not cases of dual nationality, and would it not be applicable where you have a case of somebody in Canada retaining the nationality or citizenship of another country? I know there are a limited number, but there are some cases where there is dual nationality and, in this case, would you not say there is a protection?

Mr. COHEN: But even in those cases the state to which you wish to send that person who has dual nationally might, by its own domestic law, refuse to accept that person who has dual nationality.

Mr. FULTON: Therefore, it would have to be the nationality, as far as a foreign state is concerned, which is recognized by the domestic law of that state.

Mr. COHEN: By the domestic law of that receiving state that person can be received into. So, it seems to me you cannot do much about this expression "exile", and I would say that it is not to be taken too seriously, except to clear the air in regard to the Japanese-Canadian case.

My fourth point concerns the question of clause (*b*). Will clause (*b*) affect any of the punishments, including hanging, flogging and solitary confinement regulations now provided for in the present laws and regulations? The words here are "cruel, inhuman or degrading treatment or punishment". It is very hard to know how the courts are going to treat the existence of a positive law that there shall be hanging, that there shall be flogging, and a regulation which permits the penitentiary warden to order solitary confinement. Here, I am going to do some predicting,—and I have been predicting all afternoon. My own opinion is that the courts are not likely to interfere with the positive law specifically set out in the Criminal Code, because they will regard this as too well established—that it is a question of substance, a question of equally important national policy on one level as the Bill of Rights is on another level. Consequently, I do not think that the existing modes of punishment as set out in the Criminal Code will be affected by this particular document, other than the exceptional case where you might find a judge who will say: we do not like floggings and hangings, and he may find this as a way in which to bypass capital punishment, because they will say that hanging is a cruel punishment and an inhuman punishment—and they will get a lot of witnesses to support them, including myself. Clause (*c*) (iii)—will (*c*) (iii) affect any detention where the return on the writ is based upon an enabling statute providing for such detention? This raises the whole question of, what does *habeas corpus* do?

I once wrote a small book on the subject, so I feel I can speak a little on the matter.

Mr. FULTON: Would you re-state your question?

Mr. COHEN: Yes. Will clause (*c*) (iii) affect any detention where the return on the writ is based on an enabling statute providing for such detention? My answer is no, *Habeas corpus* is not designed as an appellate procedure, per se; habeas corpus is designed to determine whether or not the detention is valid, based upon some appropriate rule of positive law. If a man is held pursuant to the Immigration Act, where the act is clear about the right to hold him, or if he is held pursuant to the order of a court following upon a criminal conviction and detained under the warrant of this court by a prison, this is a return which the courts will have to recognize and from which there would be no appeal on the merits of the issue itself.

The question is: what is the purpose, then, of clause (*c*) (iii)? I would presume that the draftsmen had something more in mind than merely declaring the existence of habeas corpus, and if they did have something more

in mind, are they concerned about those cases where there may be evidence of a defect in the reasons for detention, allowing a discharge even though the return from the warden or from the minister says, "Hold him pursuant to this conviction", or "to this order, which I make"? In short, does this open the door to a new method of appeals on the merits?

On the surface, I do not think so, and I would be interested to know whether or not the minister had in mind something more than the usual process of habeas corpus to determine the lawfulness of a detention.

Mr. FULTON: The answer is this: I would agree with you in the two answers you have given to your own questions. The main purpose we had in mind in including this is, I think, indicated by a reading of the bill together with the general words of the first part of the clause:

> —no such act, order, rule, regulation or law shall be construed or applied so as to:
>
> (*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;
>
> (*b*) impose or authorize the imposition of torture or cruel, inhuman, or degrading treatment or punishment;
>
> (*c*) deprive a person who has been arrested or detained
>
> (i) of the right to be informed promptly of the reason for his arrest or detention,
>
> (ii) of the right to retain and instruct counsel without delay, or
>
> (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful.

In other words, what we are getting at there is to prohibit, as far as we can, within the limits of parliamentary authority, the passing of any statute or the making of any order in council under any statute which takes away an existing right to apply for a writ of habeas corpus.

Mr. COHEN: I do not think you can do it anyway, because the problem of the rules of law under which habeas corpus is issued is a problem over which the parliament of Canada, per se, has no jurisdiction.

Mr. FULTON: Supposing, under the existing Immigration Act, for instance, or the Customs and Excise Act, we put in a provision—I am not sure whether or not it is there now—that "a person who is arrested or detained under the provisions of this act shall not have the right to apply for a writ of habeas corpus. Supposing parliament passed that statute, or supposing the minister elected, under the Excise Act, to pass a regulation having that effect—then our view was that the bill of rights would overcome that provision, and with respect to future statutes, unless they said "notwithstanding the bill of rights", such a provision would be of no effect. With regard to a regulation made under a statute, it would have no effect in any event, because the bill of rights says that no act, order, rule, regulation or law shall be construed so as to deprive a person of his right to habeas corpus.

Mr. COHEN: This goes back to the nature of the jurisdiction of a Superior Court, a court of record, and our law with respect to prerogative rights, one of which is habeas corpus. My humble view is that the organization and the administration of the courts under the B.N.A. Act is for the province. The body of law is both federal and provincial, but so far as the nature of the inherent jurisdiction of a superior court is concerned that inherent jurisdiction includes the right to issue a writ of habeas corpus, and if the parliament of Canada were to pass a law pursuant to the Customs and Excise Act that no habeas corpus should be issued for anyone—

Mr. FULTON: I used the words to describe the effect of what you were trying to strike down. Those actual words would be in general that the detention would be deemed to be lawful. I think that would be the objective sought to be accomplished. The use of such words, that is "detention hereunder shall be deemed to be lawful" would have the effect of depriving him of the right of the writ.

Mr. COHEN: That is a different matter.

Mr. FULTON: Depriving him of the use of that writ for the determination of the validity of his detention and for his release if the detention is not lawful. You have replaced part of the words by the words "the right to review the legality of his detention", and therefore, you have made the writ of habeas corpus a nullity.

Mr. COHEN: I do not think so. I think if the province and the federal government wished to pass joint legislation to get rid of the writ of habeas corpus they could do so. But I think the existence of a superior court of record gives it the power to issue a writ of habeas corpus unless the total sovereignty which creates the total body of law gets rid of the habeas corpus.

Mr. FULTON: I suggest that a statute of the federal parliament authorizing the arrest or detention of an individual can then go on to say that every arrest or detention made under his act shall be deemed to be lawful, and then the arrested person can seek a writ of habeas corpus and can go to the court, but the court must say "I have no power to review your arrest because the right to review it has been taken away".

Mr. COHEN: You have no right to review anyway. As matters now stand if the warden of Stoney Mountain penitentiary says "I hold him pursuant to conviction", and so on, that is all there is to it.

Mr. FULTON: What we are getting at is a case where parliament seeks to place upon the power of the courts the right to review whether in fact the person who made the arrest exceeded his authority so that the arrest is not lawful. The form of the words by which that is set down is "every arrest or detention shall be deemed to be lawful". That seems to be an attempt to place it beyond the power of the courts to review the lawfulness of the custody.

Mr. COHEN: It may be that you are trying to safeguard against a possible attempt to narrow even the present narrow scope in which habeas corpus can be employed. Bear in mind that in the United States there is quite a difference. In the United States some courts have used habeas corpus as another appellate procedure. They have gone partially into the merits in many cases in many states. In a study I made many years ago of this, it was often notorious. For example, Wisconsin, for a long time had habeas corpus writs, upon which discharges were made virtually on the merits. I do not want to push this too far, Mr. Minister. I think there are problems here.

I want to leave one last thought. The thought is this: if this is not necessary, if I am right that it is redundant, its one danger is that it raises the question of habeas corpus. Whereas now the classic position of habeas corpus is that it is a writ which issues, as of course, in our courts, to everyone who wants it to test the validity of a detention. By putting it in here you immediately raise some doubts as to whether the right to it exists or not.

Mr. FULTON: There are cases of common law jurisdiction, where, by one device or another, a writ of habeas corpus has in fact been nullified and the power of the court to review the legality of a detention has been nullified. I will put it this way: I would not want to discuss this any further with you, Professor Cohen, without an advisor from the criminal law section here. I expect we may well enter into such a discussion when the committee comes to its consideration clause by clause.

Mr. COHEN: I do not want to push it too far.

Mr. FULTON: We were satisfied that there have been cases where there is a potential area in which an executive, or indeed, even a parliament might act in the heat of passion, and by a devious and skillful form of words, might nullify a writ of habeas corpus. We were concerned with placing that possibility, so far as we could, beyond their reach.

Mr. COHEN: I think that that is admirable, but I just wondered about the problem I have raised with you.

Mr. FULTON: I am grateful for it. We will have a look at it, and we will be prepared to discuss it with you.

Mr. COHEN: My sixth point, Mr. Chairman, is: how will subclause (*d*) apply to your simple police inquiry? Will this mean that a simple police investigation, which does not make all the safeguards in respect to counsel, protection against self discrimination, and so on, vitiate the effect of information gathered by a police inquiry?

Secondly, what will be the effect on a royal commission, such as the 1945 espionage commission; the royal commission on espionage? They did not inform all of the persons before it that there was such a thing as section 5 of the Canada Evidence Act. The result of which was that some of the information before that commission was then used in proceedings in criminal courts, in which some of these people were prosecuted. I have always thought that there was a very difficult dilemma for the royal commission there. On the one hand they had a real, almost urgent national security duty to perform—one should not minimize that. On the other hand, here we may have a man who was denied counsel, coming before the royal commission at the preliminary only. They were given counsel afterwards. In the preliminary Commission inquiries they were denied counsel, and often before they knew their way around, the material was on the record. They did not ask for the protection of section 5. The material was then used in courts against them. If you look at the article in the Canadian Bar Review, 1946, I think by Maurice Fyfe, you will see there a very sharp criticism of this whole process, and the Canadian bar association itself, in respect to the administration of civil and criminal justice, raised this question between 1945 and 1947 more than once. So, I ask the question: how is this going to work out in practice?

Mr. DESCHATELETS: In other words, your question refers to how this will apply to royal commissions?

Mr. COHEN: Will it apply to royal commissions where it does not inform the parties of their rights? Will they in any case have the rights, and when it comes to trial they will say: I am sorry, I was not informed, and therefore I have the protection of this, because I claim this particular bill of rights provision?

Mr. DORION: But section 5 of the Canada Evidence Act does not place an obligation on the judge.

Mr. COHEN: Of course not. That is one of its weaknesses. It very well may be that that should have been amended years ago. If it were amended, it would save some of the problems I raised here.

Mr. DORION: The accused must ask for that protection.

Mr. FULTON: Was that not the case where an order in council deprived a man of his right in respect of habeas corpus when there was a bad arrest and bad detention by providing that the arrest and detention made pursuant to it were to be deemed to be lawful? I think that is the sort of case we had in mind.

Mr. COHEN: That still would not have prevented the superior court judge from issuing the writ and bringing that man to the court, and then having this particular order in council reported.

The CHAIRMAN: He could issue a writ, but he could not get the benefit of it.

Mr. COHEN: He could get the benefit by giving this man his rights to be brought before the court.

Mr. FULTON: That would seem to us to be the case.

Mr. COHEN: You probably have a point there.

My next point, my seventh point, is well known. I have raised the question as to whether this creates new standards of administrative law for federally delegated legislation. But what would be the comparable effect on provincial administrative law?

And as a subsidiary question I ask myself: "Does clause (*d*) not raise in a very interesting way, indirectly, the possible need to examine the creation in Canada of a system of federal administrative tribunals, with a kind of federal administrative procedure act comparable to the United States Act?"

In short, I wish to ask should we not clarify the whole question of what happens before administrative tribunals, at least in the federal sphere. This may be the beginning of a movement toward codification or standardization, and it is to that extent extremely interesting and very useful, but it is only the beginning of a longer and more necessary process.

My eighth point is that of the problem of a fair public hearing, which may not be possible under many of our statutes. It may not be possible to have public hearings with respect to matters dealing with the Official Secrets Act, or it may not be possible to have public hearings where the courts, now under the Criminal Code, have a discretion not to hold public hearings in cases involving pornographic materials. What would be the onus on the court under those provisions?

My view is that the court would have to use common sense and discretion here, and that over the years a body of experience would develop, and that it is not likely to interfere with the present judicial pattern of approaches to the Criminal Code.

Mr. FULTON: You notice that the time element is involved with respect to the criminal charge?

Mr. COHEN: I now come to section 4. This section, as some people have pointed out, seems to be slightly weaker than the first draft of the bill, as the minister pointed out, and that the first draft had the phrase "to insure". While "to ascertain" is the phrase here. You might ascertain whether any information here was inconsistent with the purpose of this act.

It seems to me that there is really not much to choose between the two languages. I see no major difficulty if one uses the verb "to ascertain" because one cannot expect the Minister of Justice to administer these things. The courts are going to have to administer them.

There is a two-level process. First, there is the drafting process, where the minister will have his eye on it, and then there is the interpretation process, on which he will also have his eye for the purpose of seeing if further amendments are required.

But I would like to suggest two techniques for the consideration of the minister. I would like to suggest that if this bill is to do a serious job in the field of draftsmanship, and a serious job in the field of supervising what is happening, then I think the government should promise to establish, or attempt to establish a civil rights section, or some appropriately named section in the department, where the functions of drafting and supervision would go on, and would develop a body of expertise.

Professor Scott mentioned it, and I think it makes very good sense. But I do not want to push it too far.

The minister will, in any case, have to develop some draftsmanship or skills, and the department may be given a supervisory organization as well.

I would like to see also the possible establishment of a National Rights Commission to be comprised of a group of respected laymen, to which complaints could be made with respect to infringement of what is believed to be rights, so far as these rights are protected by this particular legislation. There is no *ultra vires* problem here, because they would be dealing only with these federal matters. This national rights commission, it seems to me, would be comparable to the device in Denmark, where there is an officer to whom grievances of all kinds are sent. Of course, that is a unitary state, and it does not present the problems we have here. It would not be entirely unlike what is now established in the United Kingdom with the Inquiries Act there. I think it would make extremely good sense to create a national rights commission, to which the average person might feel he had recourse by way of correspondence or by way of personal representation, if he felt aggrieved, if he felt the ordinary procedures of the court did not give him the kind of redress he felt he was entitled to.

Mr. RAPP: Under the Department of Justice?

Mr. COHEN: I would say it should be under the Department of Justice, reporting to the minister. I would make it a commission of laymen, serviced by the Department of Justice's permanent staff—but a commission of laymen, of senior citizens perhaps, working on a part-time basis. And, as Mr. Aiken probably cringes at the amount of time that is going to be needed—

Mr. AIKEN: I am concerned about setting up a commission of inquiry and not the time factor; or a commission of investigation.

Mr. COHEN: Not "investigation," but a commission to receive complaints.

Mr. AIKEN: I am afraid it would develop into a grand inquiry, a large grand jury.

Mr. COHEN: Bear in mind, Mr. Aiken, that something far more elaborate now exists in a far more suspicious environment in Europe. There the European Human Rights Commission does precisely that for the states members of that commission, for the seven or eight states who have now signed that treaty. If you can do it for a heterogeneous, suspicious-minded group of European states, surely we can do it for "homogeneous" Canada?

Mr. FULTON: May I ask one question?

Mr. COHEN: Yes?

Mr. FULTON: Would your view of the national rights committee—

Mr. COHEN: "Commission."

Mr. FULTON: —the national rights commission be that its hearings and those matters referred to it should be confined to the administrative actions of the federal government and the administrative boards and tribunals, or inquiries also relating to proceedings under the Criminal Code?

Mr. COHEN: I grant you there is a difficulty there, but really, Mr. Minister, I am inclined to think my answer is it is a kind of grievance committee, and if someone feels aggrieved under the administrative procedures which impinge upon his personal or private rights, it is easy to see it would do a job. In regard to the Criminal Code it would be harder to see. I would not like to be pressed on this at the moment, but for the time being, perhaps, it could be confined to the area of administrative redress and not to the Criminal Code as such.

Mr. DESCHATELETS: Do you have in mind such a commission could improve the bill of rights?

Mr. COHEN: Not "improve," but I would have certainly the feeling they would recommend, from time to time, to the minister certain procedures experience may teach them.

Mr. DESCHATELETS: And some improvements?

Mr. COHEN: Yes. I skip section 5. Section 5 raises no question for me. It is a saving clause, and I have no problems with it.

Section 6 raises very important problems in relation to the War Measures Act, to the general question, of course, of personal liberty. The revisions here, in my opinion, clearly improve the role of parliament in considering the appropriateness of a proclamation bringing the act into force. But these provisions do nothing to provide for a situation where there is a strong parliamentary majority willing to support the proclamation, or where parliament itself does not meet for a long time.

It seems to me that the world situation must change our perspective about the War Measures Act.

If a war were to break out today between the great powers, we do not want a War Measures Act, but a "survival" act and, therefore, we must think not in the 1914 and 1939 War Measures Act terms; we must surely think in terms of emergency legislation for purposes of survival under thermo-nuclear warfare conditions. It seems to me we would have here three things: one, we would have to control the movement of all civilian population; two, we would have to control and institute the building of emergency shelters and health arrangements and, three, we would have to control all food supplies and industrial effort. Now, for these reasons, I think two new pieces of machinery are urgently required in any consideration of the War Measures Act.

Mr. AIKEN: What was the third one?

Mr. COHEN: The control of all food supplies and industrial effort.

Now, for these reasons, two new pieces of machinery are required in any reconsideration of the War Measures Act as a survival act. It seems to me when war and invasion, real or apprehended, is before us, parliament should sit continuously, once a proclamation is made. It seems to me that it is inconceivable that parliament should disband under these conditions of thermo-nuclear warfare, and I suggest we must have a completely new perspective on the role of parliament because, under these conditions, if parliament sat continuously, while the proclamation was in force, it would become a daily reviewing body over the curtailment of all phases of our life, including liberty.

Now, since parliament has, and will have, much other business, there should be established under such survival act an Emergency Appeal Court staffed by judges from superior courts in the various parts of Canada, perhaps, to hear appeals dealing with arrests and detentions, and problems in connection with property seizure. These could be referred to it for very early review. It seems to me that the fact that we will still have to detain people, the advice given by the minister to that court, under such regulations as we had before, under Regulation 21 (c) of the last war—between the time the review takes place and the previous time of the detention the minister might have changed his mind or had new advice and the man would have a quick recourse and, perhaps, a release.

The CHAIRMAN: Are not those, matters that should be embodied in the War Measures Act itself by way of an amendment to the Act?

Mr. COHEN: Yes, quite right.

The CHAIRMAN: And it has been suggested, or indicated, by the Prime Minister, that it is the intention, if this act is passed, to look at the War Measures Act.

Mr. COHEN: Yes.

The CHAIRMAN: And I was suggesting to you—

Mr. COHEN: I am through with that phase of it.

The CHAIRMAN: —that you may be very helpful to us when the time comes to review the War Measures Act.

Mr. COHEN: I have no intention of taking up more time, but merely wish to say that quite rightly, thoughout the country, people are asking what is the relationship between liberty in peacetime and liberty in wartime, in view of the War Measures Act. It seems to me we need a survival act and this kind of an Emergency Appeal Court.

Might I give you my conclusion in two seconds?

Mr. DOIRON: By the defence regulations we had during the last war, the writ of habeas corpus was not suspended.

Mr. COHEN: No.

Mr. DORION: And it was possible to invoke that writ to determine if a detention was proper or not.

Mr. COHEN: Yes.

Mr. DORION: In consequence, it was not necessary—

Mr. COHEN: The emergency appeal court—except for one more thing: that on the return of those writs, when as Liversage versus Anderson stated, the minister stated, "I have reasonable cause to believe that "X" is a threat to security—that is the end of the case.

Mr. FULTON: I have one other question. You are not suggesting it would require an amendment to the War Measures Act for parliament to sit in continuous session?

Mr. COHEN: No. It is a suggestion as a matter of policy.

May I give you my conclusions in two seconds, Mr. Chairman. Let me draw my balance sheet about this bill.

The points against the bill: first, the possibility that the bill raises very difficult questions of interpretation of past and future statutes under clauses 2 and 3. Secondly, the inadequate consideration of the role of the War Measures Act. Thirdly, the need to expand the function of the Ministry of Justice and the establishment of better machinery, such as a national rights commission. Fourth, the absence of sufficiently clear language on the discrimination question of clauses 2 and 5.

We are faced always with the possibility of too easy an amendment by subsequent parliament; but this is true of section 91 as well. My own private opinion is this, that if a bill like this is passed, it likely will not be touched for years, and will be treated with great respect—and we ought not to be too careless about it.

For the Bill: it seems to me it is a major policy statement of our rights and freedoms in clause 2. Secondly, there is a possible creative contribution, I think, open to the courts given in clause 2, particularly in view of the lines taken by the Supreme Court in recent years in the six or seven cases to which I have referred. But it gives them more encouragement to go along those lines.

Thirdly, I think the bill represents, in clause 3—and perhaps in clause 2—a sharp attack on the occasionally excessive executive-mindedness of our judges in interpreting statutes dealing with delegated powers—they have been a little too much on the side of the executive.

Fourthly, it re-introduces with frankness ideas of natural justice and natural law into our doctrinal approach to our affairs. Fifth, the statute is a reminder of some of the essential problems of our criminal justice and problems of criminal procedure; it reminds us how important procedure is in the administration of criminal justice, which procedure often tends to be abused, particularly in the urban administration of criminal justice, under modern, big-city conditions.

Finally, it provides, it seems to me, a helpful, if not profound approach to parliament reviewing proclamations in respect to the War Measures Act better than we had before.

The bill, surely, must be acceptable to everyone, Mr. Chairman, in principle. It may be need the changes in language and machinery, to which I have referred, to make it a document that can serve the high purposes its draftsmen had in mind. There may be a long period of difficulty as the courts work out the relationship of the bill to old statutes. There may be difficulties for draftsmen to reconcile its provisions to the requirements of effective administration in imimgration, taxation, official secrets, and other fields. But, in general, this bill is a step along the right road. Thank you very much, Mr. Chairman.

Mr. FULTON: Mr. Chairman, may I ask one final question? You did not put it in your summary, but I thought it was included in the answers you gave in your testimony.

Would you agree, or not, that the bill already imposes upon the executive, both with respect to the drafting of its statutes and with respect to its actions, and the regulations which are drafted under statutes, the obligation to bear in mind the concept of human rights and fundamental freedoms in everything that it does?

Mr. COHEN: Yes, I would certainly think that one of the consequences ought to be to create a kind of administration conscious of these facts.

The CHAIRMAN: Professor, I am sure that we have all listened with great interest, and we have gained a great deal from this very learned discussion which you have led here this afternoon. I am sure that I will be echoing the feelings of all the members in this committee when I say to you that we appreciate very much your coming to us, and we extend to you our sincere thanks.

Some Hon. MEMBERS: Hear, hear.

Mr. COHEN: It was a great pleasure to come here, Mr. Chairman.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 6

FRIDAY, JULY 22, 1960

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Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESS:

The Honourable E. D. Fulton, Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23572-1—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer Esq.

Vice-Chairman: Noël Dorion Esq.

and Messrs.

Aiken	Deschatelets	Weichel
Argue	Jung	Winkler.
Badanai	[1]Mandziuk	
Batten	Martin (*Essex-East*)	
Browne (*Vancouver-Kingsway*)	Rapp	
	Stewart	

J. E. O'Connor,
Clerk of the Committee.

[1] Replaced by Mr. Stefanson on Friday, July 22, 1960.

ORDER OF REFERENCE

FRIDAY, July 22, 1960

Ordered: That the name of Mr. Stefanson be substituted for that of Mr. Mandziuk on the Special Committee on the Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

Attest.

LEON J. RAYMOND,
Clerk of the House.

23572-1—1½

MINUTES OF PROCEEDINGS

FRIDAY, July 22, 1960.
(13)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.40 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Mandziuk, Rapp, Spencer, Stewart and Weichel—10.

In attendance: The Honourable E. D. Fulton, Minister of Justice, and Mr. E. A. Driedger, Deputy Minister of Justice.

The Chairman read a list of those persons appearing before the Committee and briefs and letters received, in addition to a list of those persons whom the Committee had canvassed.

A report from the Subcommittee on Agenda and Procedure was read, as follows:

THURSDAY, July 21, 1960.

The Subcommittee on Agenda and Procedure met at 9.10 p.m. this day. The following Members were present: Messrs. Badanai, Dorion, Spencer, Stewart (and in the absence of Mr. Argue, Mr. Winch, as an observer).

The Subcommittee arrived at the following unanimous decision:

There being no further witnesses to appear before the Committee, except Mr. David Mundell who will appear Saturday morning, July 23rd and the Minister of Justice, Mr. E. D. Fulton and members of his department, the Subcommittee on Agenda and Procedure recommends that no further representations on Bill C-79 be solicited.

On motion of Mr. Stewart, seconded by Mr. Dorion, the said report was unanimously adopted.

The Chairman introduced Mr. Fulton who, assisted by Mr. Driedger, reviewed statements of certain witnesses previously heard before the Committee and advanced and explained opposing views.

At 10.55 a.m., Mr. Fulton's questioning continuing, the Committee adjourned to meet againt at 2.30 p.m. this day.

AFTERNOON SITTING

(14)

The Committee reconvened at 2.32 p.m. The Chairman, Mr. Spencer, presided.

Members present: Messrs. Aiken, Badanai, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Martin (*Essex East*), Rapp, Spencer, Stefanson, and Stewart—10.

In attendance: Same personnel present as at the morning sitting with the addition of Mr. D. H. W. Henry, Director, Advisory Section, Legal Branch, Department of Justice.

Following discussion of the question of calling further witnesses before the Committee, Mr. Fulton was permitted to continue his comments on the Bill.

Members proceeded to question the Minister following a Clause-by-Clause procedure.

Mr. Aiken read to the Committee a suggested wording for a preamble to the Bill.

The Chairman read a suggested preamble to the Bill provided by Mr. John Drysdale.

On motion of Mr. Brown (*Vancouver-Kingsway*), seconded by Mr. Rapp,

Resolved,—That when the Committee rises on Saturday, July 23, it stands adjourned until Monday morning at 9.30 a.m.

At 6.10 p.m. the Committee adjourned to meet againt at 9.30 a.m., Saturday, July 23, 1960.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

FRIDAY, July 22, 1960.
9.30 a.m.

The CHAIRMAN: Gentlemen, first of all I would like to welcome to the committee Mr. Browne (Vancouver-Kingsway). I believe also Mr. Weichel has been added to the committee. I hope he will arrive shortly.

I wish to present a recommendation of the steering committee. The steering committee met last night. Before doing so, I would like to review for a moment the proceedings of the committee thus far. We have heard orally from Professor F. R. Scott, McGill university; Professor C. P. Wright of Ottawa; Professor C. R. Dehler of St. Eustache-sur-le-lac; Mr. D. L. Michael, representing the Seventh Day Adventist church in Canada; Mr. Saul Hayes, Q.C., representing the Canadian Jewish congress; Mr. D. McInnes, Q.C., vice-president of the Canadian bar association, representing that association; Professor Bowker, dean of law, university of Alberta; Mr. Irving Himel, Q.C., of Toronto, executive secretary of the association of civil liberties, and with him also Dr. E. A. Corbett; Mr. Claude Jodoin and with him Dr. Forsey, Mr. Stanley Knowles, Mr. Kaplanski and Mr. Andras, representing the Canadian labour congress; Mr. F. P. Varcoe, Q.C., former deputy attorney general for Canada; Professor A. R Lower of Queen's university; Professor O. E. Lang of the university of Saskatchewan; Professor Maxwell Cohen, McGill university; Mr. L. A. Tufts, representing the Christian Science church of Canada. In addition we have received either briefs or letters making submissions to the committee from the Canadian chamber of commerce, the Canadian construction association, the Canadian daily newspaper publishers association, the Waterloo chamber of commerce, Mr. A. N. Carter who, I believe, was on the advisory committee to the Canadian bar association—I may not be accurate there, but I believe that was his position; the Y.W.C.A.; Associated Investors of Canada Limited, and Mr. Frank O'Hearne, security and reform director.

In addition to hearing from those individuals and organizations, we have contacted so far as possible the following individuals and organizations: Charles B. Bourne, professor of law of the university of British Columbia; Mr. F. Andrew Brewin, Q.C., of the university of Toronto; the Canadian citizenship council; the Canadian federation of agriculture; the Canadian association of adult education; the Canadian Catholic conference of labour; the Chinese community centre of Ontario; the Canadian welfare council; Professor Murray Donnelly of the university of Manitoba; Monsignor Paul E. Gosselin; Mr. John Louis Gagnon of La Presse, Montreal; the human rights celebration committee; Mr. W. R. Packett, Q.C., former deputy minister of justice; Miss Pauline Jewitt; Professor Bora Laskin; Mr. G. Eamon Park, representing, I believe, the united steelworkers; Professor Louis Phillip Pigeon, Q.C., of Laval university; Mr. John E. Read; Miss Agnes Roy, representing the Y.W.C.A.; Dr. Frank Vallee, of McMaster university; Mr. H. D. Woods, of McGill university; Mr. Ed. McWhinney, faculty of law of the university of Toronto, and Mr. Justice J. T. Thorson.

I believe that list is complete. There may have been an omission.

None of those, whom I last mentioned, who have been contacted, expressed any particular desire to appear before the committee. Various reasons have been

assigned for this lack of desire, including some views expressed that their ideas have been satisfactorily presented to the committee by others who have appeared before the committee.

In respect to Mr. Justice Thorson, you will recall that his appearance was considered by the steering committee, and for the reasons assigned namely, the maintanence of the independence, dignity, and inviolability of the judiciary. we considered that his expressed willingness to appear before the committee ought not to be entertained.

In addition to those that I have mentioned, your committee contacted Mr. David W. Mundell, Q.C., and arrangements have been made with him to appear before this committee tomorrow morning.

I believe you will agree that was a rather imposing array of talent that has been contacted by the committee, and we have already heard from a great many of them. If I may be bold enough to say so, I can hardly conceive of any point of view which can be advanced by anyone that we have not had submitted to us.

In consequence, I have this report:

> The subcommittee on agenda and procedure met at 10 p.m. yesterday, July 21. The following members were present: Messrs. Badanai, Dorion, Stewart, Spencer and, in the absence of Mr. Argue, Mr. Harold Winch, as an observer.
>
> The subcommittee arrived at the following unanimous decision, which is recommended to this committee:
>
> There being no further witnesses to appear before the committee, except Mr. David Mundell, who will appear on Saturday morning, July 23, and the Minister of Justice, the Hon. E. D. Fulton, and the members of his department, the subcommittee on agenda and procedure recommends that no further representations on bill C-79 be solicited.

I consider it now in order to accept a motion for the adoption of that report.

Mr. STEWART: I so move.

Mr. DORION: I second that.

The CHAIRMAN: Moved by Mr. Stewart, seconded by Mr. Dorion. Is there any discussion, gentlemen?

Mr. DESCHATELETS: I would like to know, does the list of names you have already mentioned include the list of names that have been handed to you by Mr. Paul Martin?

The CHAIRMAN: I think I can reliably inform you it includes everyone who was mentioned by Mr. Martin.

Motion agreed to.

The CHAIRMAN: I think it has been customary for the departmental officials and the minister primarily concerned to appear before committees only after all the representations have been heard by the committee. As I indicated, that has been done here, with the exception of Mr. Mundell. However, he did make a contribution which was published in the *Canadian Bar Review* relating to the former bill that was introduced in September, 1958, and it is fundamentally the same as the bill that is now before the committee. So, his views, in general, are already known to those of us who have read that article; and I presume, that includes most, if not all of the members of the committee. In the circumstances, as the Minister of Justice is available today, I am of the opinion that we should now proceed to hear from the minister, and those of his officials he

feels can be helpful to the committee, and deal with this bill specifically, but withhold any final decision in regard to the bill until we shall have heard from Mr. Mundell tomorrow.

If that is agreeable to the committee, as I assume it is, I shall now ask Mr. Fulton to comment upon the representations which have been made before the committee, and to give us the benefit of his study of the present bill.

Mr. BATTEN: I know that it is usual for the minister to appear last before the committee, but under the present circumstances I do not see any reason the minister should not proceed this morning, and we could hear from Mr. Mundell tomorrow.

The CHAIRMAN: Thank you.

Hon. E. D. FULTON (*Minister of Justice*): Thank you, Mr. Chairman, and gentlemen. I appreciate the opportunity to be here. I have with me Mr. Driedger, Q.C., deputy minister of the Department of Justice. Mr. Driedger, as you know, has become deputy minister just recently, but he, and Mr. Jackett, the former deputy minister, were the two officials of the department who had the primary task of drafting the bill of rights.

I would like to express my appreciation of the work that has been put into it.

You know that the problem of a bill of rights in Canada, in a federal state, is not an easy one to solve; and I know also that it is not customary to single out civil servants for commendation. I take the responsibility for any weaknesses which may be in the bill. That is my responsibility, but I would like to give them credit for most of the good things that are in the bill.

I am much impressed, and I would like to record before this committee my feelings of gratification of the way in which they have been able to produce a bill, as they were asked to do, which does, as I see it, solve this difficult problem of the division of legislative authority in Canada.

It is, Mr. Chairman, as I understand it, customary at this stage to go through the bill clause by clause and to direct questions to the minister and the departmental officials on those clauses before they are carried.

I would imagine that you would want to follow the same general approach this morning, but, as you have said, because Mr. Mundell will not appear as a witness until tomorrow morning, it would not be appropriate actually to carry the clauses, because it would seem to be discourteous to do so, since we still have a witness to hear from.

But I would like to suggest for your consideration, therefore, that I might be permitted to proceed as if the clauses were being called clause by clause, and, perhaps, if you would care to call them we could consider them, and I would be glad to deal with questions on the clauses until all the questions that you want to ask have been asked and answered.

At that stage, if there are no more questions, I would suggest, without formally carrying the clause, that you would let them stand to save going all through the same process again. So, in effect, you will have gone through the bill clause by clause, and after hearing from Mr. Mundell it should be possible to carry each clause seriatim, if that is agreeable to you.

The CHAIRMAN: I wonder if you have any preliminary observations to make before I call them? I think I should call them in their order, clause 1 first, and proceed from that point to the next one.

Mr. FULTON: Yes, I thing it would be more helpful to the committee if I confined all my comments to the clauses by way of reply to questions. But I would like to make some general observations, and I shall keep them as brief as I can.

Perhaps I should make some in the light of the variety of suggestions, comments, and indeed criticisms which have been made. I would like to

emphasize first that the scheme of this bill of rights is to have a piece of legislation which will be applicable only to the federal field of jurisdiction. Within that scheme we have designed a bill of rights which will provide complete coverage, and not only complete coverage with respect to all the rights and freedoms that it is designed specifically to protect, but also complete coverage with respect to all branches of government.

It is well known to you that under our constitution and our constitutional system there are three branches of government and I am not including the crown as such. There is the legislative branch; there is the judicial branch, and there is the executive branch. It was our design to see that our bill of rights affected the whole ambit of all parts of government, as I have outlined them. If you look at the bill, you will see this is done.

Clause 2 affects the legislature, and it is a declaration by the legislature of the rights and freedoms that exist in Canada.

Clause 3 is an enactment by the legislature by way of a direction to the judiciary as to how the judiciary will interpret all status of the legislature heretofore or hereinafter to be enacted, as well as the orders and regulations made under those statutes.

Clause 4 affects the executive. This is a directive to the Minister of Justice, as a member of the executive, having the primary responsibility in this field. It is a specific directive to him, imposing upon him certain obligations with respect to ensuring that all subsequent bills and regulations decided upon shall be, in so far as they lie within the power of the minister to do it, in conformity with the bill of rights. When I say "in so far as they lie within the power of the minister to do it," I mean in so far as it is within his power, preserving still the principle he is not a dictator over parliament, and that his powers are exercised subject to the overriding rights of parliament, and control by parliament over the executive. The scheme is as comprehensive as we can make it, not only with respect to the field or rights, but with respect to all branches and parts of the government within the federal field of jurisdiction. Then, with respect to the question whether or not it is better to have the bill, as it is now—a statute, not related specifically to the B.N.A. Act, or whether it should be by way of a constitutional amendment, meaning an amendment to the British North America Act, I do not think I should say much more than has been said about the problem of an amendment covering both provincial and federal fields of jurisdiction. The difficulties in that area have been discussed. Some witnesses have said that it would be desirable, but I agree with those who have also said that however desirable it might be, it does not seem to be possible at the present time; so, let us get on with the bill of rights we can have.

I would like to deal with some of the arguments put forward as to the proposal to amend the British North America Act, whether a comprehensive amendment, or confined to section 91—to those within federal jurisdiction. Those who put forward the view that it should be by way of a British North America Act amendment do so under the impression that the bill of rights would become entrenched and beyond the reach of any legislative authority in parliament.

May I comment first on that, by saying the law is not entrenched, because it happens to be contained within the British North America Act. There are a number of laws have been passed by provincial legislatures and by the parliament of Canada which, althought perhaps not always expressed as amendments to the British North America Act, have nevertheless changed the law as contained in the British North America Act. So that it is on that basis, first, that I say that merely putting something in the British North America Act does not mean that it is entrenched, in the sense that it is beyond the reach of parliament.

The suggestion has been made that we might put it beyond the reach of parliament by adding a section or subsection to the British North America Act providing that "notwithstanding anything in this act" the parliament of Canada should not have power to legislate in derogation of fundamental rights and freedoms. But, again, I say that an amendment even in these terms would not accomplish the desired result.

In the first place, section 91 of the British North America Act—and it is here that the proponents of this point of view suggest it should go—confers legislative authority "notwithstanding anything in this act." Trat is right in the opening words of section 91. Those words themselves would be sufficient to give parliament power to override an additional clause that might be inserted in section 91. So, if you wanted to put it in section 91 and do what you could to entrench it there, no only would you have to amend section 91 by adding the clause containing the bill of rights; but you would have to amend section 91 much further than that: you would have to delete, or alter the words now appearing in section 91, "notwithstanding anything in this act."

I would be very doubtful whether those who advocate this course would really think that it was safe, desirable or proper to delete or alter those words where they appear in the introductory words of section 91, because that would, it seems to me, have the tendency of changing even what authority parliament now has with respect to section 91 itself, the field of federal jurisdiction.

But even though it were argued that we should accept that course and cut out the words where they now appear in section 91, "notwithstanding anything in this act," in order to entrench the bill of rights, I suggest that even this would not place the bill of rights beyond the reach of the parliament of Canada, because of the existence and effect of the Statute of Westminster.

Subsection (2) of section 2 of the Statute of Westminster, 1931, provides as follows:

> (2) No law and no provision of any law made after the commencement of this act by the parliament of a dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future act of parliament of the United Kingdom, or to any order, rule or regulation made under any such act, and the powers of the parliament of a dominion shall include the power to repeal or amend any such act, order, rule or regulation in so far as the same is part of the law of the dominion.

The foregoing provision has been extended to the provincial legislatures by subsection (2) of section 7 of the Statute of Westminster, 1931, which reads as follows:

> (2) The provisions of section two of this act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces.

So that a statute of the United Kingdom adding a new section to the British North America Act would be subject to repeal or amendment by parliament; and if the bill of rights in the British North America Act covered the provincial field, it would also be subject to repeal by the provincial legislatures.

Subsection (1) of section 7 of the Statute of Westminster excepts from the operation of the foregoing provisions "the British North America acts, 1867 to 1930." Any subsequent amendment to the British North America Act is not included in the collection of acts known as the British North America acts, 197 to 1930.

So that to entrench the bill of rights it would be necessary to amend also the Statute of Westminster. This raises at least two problems, one of which is political and the other legal. If you sought to put an amendment to the

British North America Act beyond the reach of the parliament of Canada, you could, as I see it, do it only by providing that that amendment incorporating the bill of rights, which in this case I think would have to be done by the United Kingdom parliament and could not be repealed or amended by the parliament of Canada. As I say, it seems to me that to do this would involve an amendment of the statute of Westminster, because that amendment to the British North America Act would not be included in the group of enactments known as the B.N.A. acts, 1867-1930 mentioned therein. In other words although the statute of Westminster gives us power in Canada to amend any statute of the United Kingdom having application in Canada, except the B.N.A. Acts of 1867-1930, we would be seeking an amendment to provide that a statute of the United Kingdom having effect in Canada cannot be amended by the parliament of Canada. So that, notwithstanding that the statute of Westminster gives us the jurisdicition to amend statutes of the United Kingdom, affectng Canada except within the group of B.N.A. Acts, 1867-1930, we would be holding back that jurisdiction and depriving ourselves of the right to amend such statutes of the parliament of the United Kingdom, thus transferring jurisdiction and control of Canada, in a sense, back to the United Kingdom parliament.

I am quite certain that even those who vehemently advocate the course of constitutional amendment would not on reflection wish to take their argument so far as to suggest that we amend the statute of Westminster to deprive ourselves of the power of amending statutes of the United Kingdom parliament having application in Canada.

I would like to turn, Mr. Chairman, to the question of uncertainty. It has been suggested that our bill is uncertain, particularly in respect of clause 2. The implication of these arguments is that it has so many uncertainties that it should not be enacted. I think that everything that was said as criticism along these lines has largely been answered by what was said by Professor Lower, by Professor Cohen, and some others as well. I thought that their submissions were a pretty complete refutation of the criticism that the bill should not be proceeded with because it is so full of uncertainties.

May I make one or two points in addition. The words used in classe 2 are, as Professor Cohen pointed out, the traditional ones which one finds in bills of rights—some of the classical ones, to use his expression, and some of the modern ones, but the ones normally found in bills of rights. Why it should be suggested that these words mean so much when they are contained in the laws of other countries or when they are contained in international documents, and mean so little when in our own law, is difficult for me to understand. Furthermore, every law has uncertainties. If statutes could be written without uncertainties we would no longer need the courts. Take the main statute which forms the basis of our constitution itself, the British North America Act. This act has been full of uncertainties. Is it any the less valuable as a constitutional document? I submit it is not, although it probably has been the subject of more major litigation than any other statute in Canada.

Many volumes of judicial decisions have been rendered on questions that arose under the British North America Act. Each of these decisions dealt with some uncertainty and, in retrospect, we would have to say that at the time of the passing of the British North America Act it was full of uncertainties; but would anyone now suggest that the British North America Act should not on that account have been enacted in 1867? There have been thousands of judicial decisions on the United States bill of rights. Surely this is not an argument that it should not have been enacted. We are again here dealing with the question of uncertainties. We are comparing it with the B.N.A. Act in that regard and we say that the fact that there are uncertainties does not render the statute any less valuable or essential.

I would like to say a word or two about whether it should become part of the constitution. A good many of the arguments that have been made—or the criticisms that have been made of our bill because it is, to use their words, a mere statute instead of an amendment to the B.N.A. Act—have proceeded on what I regard as the false assumption that only amendments to the B.N.A. Act can be described as constitutional amendments and that only statutes containing those amendments could be therefore described as constitutional statutes. In my view this is quite erroneous. The constitution of Canada is not only made up of the B.N.A. Act and its various amendments; it is made up in addition of a large number of statutes, of conventions, customs and usages. While I do not for a moment suggest that the basis of our constitution is not the B.N.A. Act, I do suggest it is a very invalid assumption to say that only the B.N.A. Act and its amendments can be properly described as our constitution. It is certainly not a valid assumption to say that because this bill is only a statute it will not form a part of the constitution of Canada, and a very important part of the constitution of Canada when passed.

May I refer you to other statutes which are in the same category, and I do not claim that this list is exhaustive. These are provisions affecting our constitutional arrangements and affecting them vitally. I have never heard it argued that they are of less solemnity, les validity, or are to be deemed of lesser account by parliament or by the courts, because they are mere statutes, than would be the case if they were Senate and House of Commons Act, the Supreme Court Act, the Exchequer Court Act, the Canada Elections Act, the Representation Act, the Judges Act. The Governor General's Act is a statute of parliament under which the Governor General is made a corporation sole and under which it is provided he may be sued in the name of his office, that succession falls not to his special representative, and which fixes his salary. This enactment outlining the terms under which the head of our state, the representative of the crown in Canada, holds his office, is a mere statute; but it would be absurd to say that because it is a mere statute it is not part of the constitution of Canada. I should doubt that that argument would be maintained. Other such statutes are the Northwest Territories Act, the Yukon Act, the Royal Style and Titles Act, the Speaker of the House of Commons Act, the speaker of the Senate Act, and the Succession to the Throne Act.

When you take these, which I say is not by any means an exhaustive list, and put them all together, it seems to me that it is an absurdity, in the light of that, for anyone to say that the constitution of Canada is contained only in the British North America Act and its amendments. It follows that it is, I think, amply demonstrated, that vital and fundamental parts of our constitutional arrangement are contained in the B.N.A. act, and others of these other statutes, such as I have listed, which are mere statutes of the parliament of Canada,—if you want to call them mere statutes, as the critics of this bill have called them. So the fact that our bill of rights recognizes the division of constitutional authority in Canada is not embodied in the B.N.A. act, but is submitted to parliament for enactment as a statute of parliament, does not in any way vitiate its validity, its solemnity, or its effectiveness as part of the constitution of Canada which, in my submission, it will be after its enactment.

The other point that I thought I might refer to briefly is the question whether or not the bill, particularly clause 2, encroaches on provincial rights.

In my view, this might almost be said to be a legal impossibility. No statute passed by the parliament of Canada can encroach on provincial rights which are vested to the provinces under the B.N.A. act. The B.N.A. act makes that impossible. If the clause is valid, it does not encroach, and if it is not valid,

it certainly cannot encroach in that case either. This argument, it seems to me, is based again upon misconception, and that is the misconception that property and civil rights, and the entire jurisdiction over property and civil rights, is vested in the provinces. This is not the case. Practically every aspect of section 91 involves some aspect of property and civil rights, but this is the property and civil rights aspect under the jurisdiction of the dominion. If you look at section 92, you will see that jurisdiction of the province, with respect to property and civil rights, under head 13, is with respect to property and civil rights in the province. Since property and civil rights are so inextricably interwoven with many of the heads in section 91, where property and civil rights are affected under the heads of section 91, it is property and civil rights in the dominion field that are under the jurisdiction of the dominion parliament. Property and civil rights in the provincial field, however, are exclusively under the jurisdiction of the provinces. So, of course, our bill may have some effect with regard to property and civil rights, but it can only have effect with regard to these aspects of property and civil rights which are held within federal jurisdiction.

Mr. MACDONNELL: Would you give us an illustration?

Mr. FULTON: Yes, bankruptcy and insolvency; patents on inventions and discovery; copyrights; Indian land reserved for Indians; navigation and shipping; bills of exchange and promissory notes, and so on.

There has also been some discussion in regard to the meaning of the words "in Canada' in this clause. I would say that the declaration in clause 2 is effective throughout the whole area, geographical and legal, over which the parliament of Canada has jurisdiction. Thus, in relation to all of the enumerated heads of section 91, the law extends over the whole geographical area of Canada, and over the whole field of jurisdiction in relation to the subject matter. But, as I said at the beginning of this part of my remarks, the law does not have, and cannot have, since it is a law of the parliament of Canada and is expressed to be confined to matters and statutes under the legislative jurisdiction of the parliament of Canada, any effect of encroachment on provincial jurisdiction. It is possible, as Professor Cohen, I think, particularly, argued, that it may have a persuasive effect, and it may have an indirect effect, in that it may tend to lead provinces or those administering and interpreting provincial laws, along certain lines which are said be in the bill of rights. That may be so; but believing, as I do, in the bill of rights, I think that would be a result not to be complained of. But it can only do it by indirection; it can only do it by attraction. In my view it cannot do it directly, or by compulsion.

Mr. DORION: It cannot be a judicial result, but can only be by indirection, you are saying.

Mr. FULTON: Yes. I am not referring to the discussion in regard to what the Supreme Court of Canada may continue to do by way of development of policy, or a policy respecting fundamental rights in Canada. I am referring to the criticism that this Bill impinges on provincial jurisdiction.

M. MACDONNELL: Would it be an exaggeration to say that it would be practically a contradiction in terms? The dominion cannot do it, and therefore, if it purports to do it, it is practically a contradiction in terms to say that it is an infringement?

Mr. FULTON: I agree with you.

The CHAIRMAN: May I just interrupt at this moment, to welcome Mr. Macdonnell May I ask the consent of the committee to afford Mr. Macdonnell, who has followed the proceedings of this committee very closely, and perhaps

as well as many of the members of the committee, the courtesy of being able to ask questions as we proceed?

Some Hon. MEMBERS: Agreed.

Mr. DESCHATELETS: Before we go on, Mr. Chairman, what is the procedure we are following now? Are we going to question as we go along, or are we going to wait until the minister has finished his statement? I would prefer that the minister finish before we question him.

Mr. FULTON: I shall not be much longer, Mr. Deschatelets. I wanted to conclude with some general remarks, and I understood we would then proceed with a clause by clause consideration.

Mr. DESCHATELETS: I would have liked to make another suggestion, Mr. Chairman, that as soon as the minister is over with this statement or exposition, perhaps we could have the time to think it over before putting questions, or maybe at another sitting.

Mr. FULTON: I would like, Mr. Chairman, to turn to the question of whether anything hinges on the fact that clause 2 is in the form of a declaration. It has been suggested that as clause 2 is only a declaration it does not operate as law. May I direct your attention, and that of those persons who make this criticism, to section 91 of the British North America Act, which is only a declaration. That section in its introductory paragraph, contains these words:

> —and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated—

So as not to make a partial or apparently misleading argument, I should put it on the record, that in the earlier part of the introductory paragraph it is stated:

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces;—

But when it comes to defining what are those classes of subjects, in so far as it is desired to define them in the statute, it is declared that these are the classes of subjects coming exclusively within the jurisdiction of the federal parliament. It seems to me that a purported criticism, based on the fact that ours is expressed to be a declaration of the rights and freedoms existing in Canada, is met completely and answered fully by the fact that our basic constitutional document defines those things which fall exclusively within federal jurisdiction by way of a declaration. That declaration has the force of law in the B.N.A. Act, and, in my submission, the declaration in the bill of rights would have equally the force of law.

Also objection is taken to the fact that we declare that these rights have always existed. May I just outline to you some of our thinking behind that provision?

It is my view that one of the primary purposes of parliament—one of them —is to protect the rights and freedoms of the citizens of Canada. It seemed to me it would be a presumption, if not for parliament itself, then, certainly, for the government, to suggest that parliament should create the very rights and freedoms which it is our obligation to protect. It seems to me it would be a presumption for us to say that now, by this bill of rights, we are creating the rights and freedoms enumerated thereunder. It seems to me, not only would it

be a presumption, but I believe it would be an absurdity. These rights and freedoms have existed in Canada. They are our traditional rights and freedoms; and it was on that basis that we used the words:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms—

Mr. Chairman, I am quite prepared to admit that there is room within that general approach for a difference of opinion as to whether we are going too far when we use the word "always". I do not apologize for the use of the word, because it is a word, I think, which does give expression to the principle which I have enunciated, namely, that these rights and freedoms do not come into existence today, but they have existed in Canada.

I have an open mind as to whether we should solve that problem of expression by the deletion of the word "always", or by substitution therefor of the word "heretofore" or "hitherto", or some such word.

As a personal opinion, I am inclined to think that if you wish to make a change—if you think the word "always" goes too far—the word "hitherto" would probably be as good a word as you could find in substitution.

It would also have—and I say this for those of my friends who think we should use ringing language—a nice sonorous effect:

> It is hereby recognized and declared that in Canada there have *hitherto* existed and shall continue to exist—

But I put that out as a personal opinion only, and wish to make it clear that we shall be glad to have representations of the committee as to whether, in fact, you think we should take out the word "always," or whether you think we should substitute something for it; and, if so, what word you think would be the best word to use under the circumstances.

There is one other criticism that I want to deal with; and then I have two more general observations to make.

The one I refer to now is that there are no sanctions so described in the bill. Again, I think the suggestion that the bill of rights should contain sanctions is a misconception of the purpose and functions of a bill of rights. A bill of rights constitutes the framework within which the legislature, the judiciary and executive must operate. If there is a violation by a legislative body the courts will not enforce or give effect to that violation. If there is a violation by a state official or an individual against another individual, the remedy lies in the field of substantive law. And we are creating, or are declaring substantive law.

In this respect the bill of rights, as it stands today, is no different from many other statutes in that it leaves it to the courts to protect or to restore to an individual any rights, as defined in the bill of rights, which he may be able to establish have been taken away from him or have been abused or infringed. In this respect, in leaving it to the courts, we are but following the sound, well established legal and jurisprudential tradition within the field of what Professor Cohen described as Anglo-Canadian tradition.

I simply draw the parallel with civil actions for assault, trespass, and other torts, and with the recourse to the courts for alleged infringements of the Criminal Code, and the procedures followed there. You do not have a government official saying, "You have committed an assault," or "You have committed an infraction of the Criminal Code and, therefore, I will subject you to certain penalties." That would be an atrocious departure from the principle of our law, which is based upon the inviolable principle or a principle that should be inviolate, that it is not the executive that decides whether infractions have been committed, but it is the courts which interpret our laws and decide whether or not they have been breached or violated.

Finally the question has been raised as to the effect of the bill of rights on statutes already enacted. May I say, in passing, that one of the reasons why we determined against an amendment to the BNA Act is that we did desire, and I believe we have succeeded, to give this bill of rights an effect with respect to statutes previously enacted.

This is one case where the government is prepared, and indeed advocates, the enactment of a statute having a retroactive effect.

It does seem to me and to the two or three witnesses I have questioned on this point who agreed wih my point of view, that it is inappropriate to make a constitutional amendment in the sense of amending the British North America Act having a retroactive effect.

First of all it would create a great problem of draftsmanship, and we have enough problems of draftsmanship here. I do not want to retreat from my argument that this bill, when enacted, will be a constitutional document or statute of Canada; but I want to talk about the appropriateness of a measure having a retroactive effect being inserted in the British North America Act itself.

It seems to me that it is neither appropriate nor is it really feasible from the drafting point of view.

Now, with regard to the question of the extent of this effect on statutes previously enacted, this we quite admit does create a problem. I was entirely in agreement with the point of view expressed yesterday by Professor Cohen, that it posed a grave risk; but we believe that the problems, difficulties and risks which may be encountered are worth taking, because of the effect, and that they are justified by the effect we desire to produce.

We do desire, so far as we can, to present a provision which will have the maximum effect of bringing past statutes into line, and bringing the practices thereunder into line with the spirit and principle of the bill of rights.

While we did not examine minutely every existing act and section on our statute books, we did go through the whole of our statute law and we selected those which seemed to be most likely to be affected, and we considered the effect that the bill of rights would have.

We saw that there would be some risks, some problems, and perhaps some accomplishments, but we thought that it would work out all to the good. If the courts should hold on a subsequent occasion when this bill has been enacted that the practices carried on under existing statutes are in contravention of the spirit or letter of the bill of rights, it is entirely desirable that that effect should be brought out, and that we should then face it, and that parliament should then have an opportunity to decide whether those practices should be continued.

Parliament should decide whether it poses such administrative problems for the government that in the view of parliament the practice should be sanctioned anew, or whether administrative inconvenience should be accepted in order that the practices which are contrary to the spirit of the bill of rights shall cease to be followed.

We shall be quite happy to have that situation prevail, once this bill becomes law, and the final decision as to what will be done as a result of the opinions of the courts or the findings of the courts will rest in the hands of parliament.

The government will not have any authority to give the dicision of the courts for the sake of administrative convenience; it will rest with parliament to decide whether the executive may or may not carry on the impugned practice, and whether or not the legislation is to be amended to permit it. And that is the result that we desire to produce.

Mr. Chairman, I think that that concludes the general observations that I thought it would be appropriate for me to make.

Mr. DESCHATELETS: Have you any observations to make on the War Measures Act?

The CHAIRMAN: I wonder if I could direct your attention to a suggestion that came from more than one source. I think it is something which would be appropriate to be dealt with by way of a general observation. It is the suggestion that either there should be set up in your department as a section or branch, a committee to deal with grievances of individuals and organizations, or that a committee of laymen might be set up. I know that is not covered under the present bill, but that suggestion was made, and I think, if you are prepared at the moment to deal with the matter, the committee would be interested to have your comment.

Mr. FULTON: I would be glad to deal with it in general at this time, but I have not got all my material ready, and I would appreciate not being pressed into too much detail until we come to clause 4. However I would be glad to deal with it in general, and to deal with the question which Mr. Deschatelets asked me about the Wear Measures Act.

There are some areas, I think, Mr. Chairman, where we do have to proceed by slow steps, if you like, by the process of trial and error.

Frankly, I think this is an area of the authority and the responsibility that should be imposed upon the minister of justice or upon the department of Justice. It is one of those areas.

We have, as minister, and in the department, overall responsibility for drafting all government legislation; and we draft a good many of the regulations made under those statutes, and we scrutinize all that are drafted, whether or not we do the drafting ourselves; so that without any change at all it could be argued that the desire to ensure that all subsequent statutes and regulations are in conformity with the bill of rights is covered, simply because of the present system and responsibility of the department, as I have outlined it.

We felt that we should go a little further, however, and not leave it as an unwritten arrangement which happens to be in effect now, but that there should be a specific repsonsibility given to the Minister of Justice to ascertain that all subsequent statutes and so on are in conformity with the bill of rights.

I have already alluded to the difficulty which we felt arose from the use of the words in the earlier draft bill "to ensure"; "the Minister of Justice shall ensure", and it seemed to us that this carried with it a necessity to have the Minister of Justice ensure.

Now, if you are going to use the words "shall ensure", you must also accept the fact that he must make it absolutely certain that nothing contravenes the bill of rights in a statute or regulation, and that he has that responsibility.

And if you want to go that far, then I think that parliament should face the concurrent question of what steps you are prepared to take to give the Minister of Justice authority to do that which you have instructed him to do, because he cannot discharge a responsibility as far-reaching as that, without, in my view, some addition, and some appreciable addition to his authority. And, as I said yesterday, I doubt very much if parliament would want to go so far as to say the Minister of Justice shall have the right to say what bills and in what form they will be introduced into parliament; that is to say, particularly, with respect to bills which may be introduced by private members—non-governmental bills. It was for that reason we took out the word "ensure" and substituted the word "ascertain"—and I discussed, either yesterday, or the day before, how I visualized the minister and his department acting under those words, by way of a report to parliament, as to whether or not, in his view, the legislative proposals introduced did conform to the bill of rights. And then, of course, it will be the duty—and, now, a statutory duty—imposed on the minister to ascertain and, I believe, to report to the same effect, with respect

to government legislative proposals and regulations. Now, the machinery by which that report to parliament is presented is one which, quite frankly, we have not attempted to cover in this bill. This is one on which I say we have to proceed by trial and error—step by step. It may be that it will be desired that the minister present a written report at the time the bill is given first reading, or that he should make an oral report, or that it be deferred until the bill comes up for second reading, when the principle is under debate. These are questions on which I have no closed mind. It seems to me it will be my responsibility to work out the steps—the proceedings, by which the duty placed upon me under section 4 is discharged, and how parliament is informed as to my discharge of those responsibilities. But, I have felt that it would not be desirable at the present time to cover that in detail in a statute.

With regard to the commission of laymen, as suggested by Professor Cohen, and with regard to the ombudsman approach which others have referred to, we have studied these matters. You will recall that when I questioned Professor Cohen as to whether his commission of laymen would review proceedings under the Criminal Code or would confine its review to reviews of administrative actions, he felt that the latter, initially, at any rate, would be the proper course. And, I agreed with him. I am not certain that you should set up this commission. I think, again, we should see how things develop before we commit ourselves to too many steps along this line. And, I do that for this reason—and this applies either to the suggestion of a commission or an ombudsman; we do have divided constitutional jurisdictions in Canada, and we have divided responsibilities with respect to even criminal law. Our pattern—and I believe it is now so firmly established it can be called a constitutional pattern—is: whereas parliament has exclusive jurisdiction to enact and amend the criminal law, the provinces have the responsibility for enforcing that law. It has been universally admitted that a great deal of territory covered by the bill of rights is embraced within the provisions and procedures of criminal law. Therefore, you have the position that much of what the bill of rights is concerned with is with respect to enforcement. Much of the field covered by the bill of rights in so far as it is included in the Criminal Code, or in so far as it impinges on the Criminal Code, is within a field where the enforcement of the Criminal Code is the responsibility of the provinces. And, I am thinking it would create very grave difficulties now, if parliament were to set up a reviewing body—at least on such terms that persons, who find themselves proceeded against under the Criminal Code could then appeal to a body under the jurisdiction of parliament for review or suggested redress, because you would have a position where the provincial authorities responsible for the enforcement of the Criminal Code have taken certain action, and you really would be in a position where what they had done, or the results of what they had done, as applied by the courts, was then appealed to a federal reviewing authority outside the courts, but set up under the jurisdiction of the federal parliament. And, in addition to that, may I remind you again that our principle and tradition, with regard to criminal law, in so far as its enforcement is concerned, is that the provinces have the initial responsibility for this enforcement. The courts, in the first instance, have the responsibility of deciding whether there has been a contravention—a breach, of the Criminal Code; and then if it is alleged there has been an error—that a person is improperly convicted,—the remedy is provided by way of an appeal to the provincial court of appeal and, ultimately, under certain conditions, to the Supreme Court of Canada. That is a well established and very well worked out system and, in my submission, a system which is very effective in protecting the rights of individuals in accordance with the provisions and traditions of our criminal law. And, I would think we must be very careful not to get ourselves in the position of setting up a tribunal—a

non-judicial tribunal, under the authority of the parliament of Canada, which would find itself, in effect, being asked to review the decisions, and findings of the court. I think this has in it so much danger of subverting our principle of criminal justice, in so far as the independence of the judiciary is concerned, and the courts, that it is a step I would recommend only after very lengthy consideration, and then it would be a step that must be hedged about, with the greatest of care, and circumspection, to ensure, in fact, it is not an attack upon courts and an attempt to substitute the judgment of a non-judicial body set up by parliament for the judgment of the courts. That is, therefore, one of the difficulties which has persuaded us that we should not, at the moment, go specifically into a legislative enactment providing for a reviewing tribunal. Having said that however, and having in effect, suggested that we could not reserve the area of the Criminal Code, at least for the time being, I am prepared to consider any suggestions that may be made with respect to establishing a process of review for administering acts within the field of the federal government although I remind you, ministers have a responsibility now to see that their acts and the acts of their officials are in accord with the law which gives them their authority.

Those laws will now be in accord with the bill of rights, and I remind you, in addition, that where there is a complaint of an infraction, we now have a bill of rights under which the person complaining could have recourse to the courts. This is one of the great objects and accomplishments of the bill of rights, which makes it, shall I say, less essential to have an additional review authority set up by parliament.

However, I said I wanted only to discuss this in general at the moment, and I think I should conclude my discussion at this point and say that we shall review carefully what was said by the various witnesses and shall, of course, consider and review extremely carefully anything that may be suggested by this committee.

The CHAIRMAN: Mr. Minister, I wonder if you would say a word or two about the War Measures Act?

Mr. FULTON: Yes. I will now deal with the War Measures Act. I do not think, Mr. Chairman, that I can add very much to what I said when questioning Professor Lower the day before yesterday, when I pointed out to him that the main purpose for which we introduced this provision in clause 6 of the bill was so as to make it impossible for any government to set aside and set at naught a bill of rights by a declaration that there exists a state of war, invasion or insurrection, real or apprehended, thus invoking the War Measures Act, with all its sweeping emergency powers, and thus setting aside the bill of rights, in circumstances where in fact there was no proper foundation for such a declaration.

What we have been prepared to do, in other words, is to prevent a government from circumventing the bill of rights, by invoking the War Measures Act when there existed no real emergency justifying that invocation.

When I pointed this out to Professor Lower, he modified his stand, if you will recall, in which he said that really we were doing nothing in this field at all. He admitted this was an important step forward. He also agreed with me that it is a responsibility of government to have available certain emergency powers which they can rely upon and use in times of real emergency, such as would be represented by a real state of war or a really imminent state of war.

That being the case, we have felt that it is the proper course to provide, first, that no government can rely upon a "phony" declaration of emergency, if I may use that word, so as to circumvent the bill of rights, because parliament is now to be given the right to review that declaration. Having done that,

having thus ensured that the bill of rights cannot be set aside except on justifiable grounds, the justification being a real state of emergency, we then feel that we can take more leisure to review the War Measures Act itself and to take into account the various suggestions made to us as to the changes and the direction of the changes in the War Measures Act.

The CHAIRMAN: I think, gentlemen, we should adjourn at this point. The minister has indicated that it would suit his convenience to return to the committee at 2.30. Might I suggest, sir, that nothing has been said yet about a preamble, and perhaps you could deal with that when we return at 2.30.

Mr. FULTON: Yes, I will be glad to.

Mr. AIKEN: With a suggested draft.

AFTERNOON SESSION

FRIDAY, July 22, 1960.
2:30 p.m.

The CHAIRMAN: We now have a quorum.
Will you continue, Mr. Minister.

Mr. MARTIN (*Essex East*): Before we proceed, I regret that I was not here this morning. It was due to a misunderstanding. Mr. Badanai and I understood there was no meeting. I understand that certain business matters were dealt with. I do not want to interrupt the Minister of Justice in his interrogation. I am anxious to participate in that myself. I am, however, a little concerned about the decision taken this morning about having no further representations. Will we have an opportunity in the full committee to discuss the business of the committee either today or tomorrow morning rather than hold up the Minister of Justice at this stage? For instance, I would like to know the kind of invitation which was sent. One witness who has been on the telephone to me explained that he was asked to be here on a certain day. I do not think he had any time to be ready.

My primary concern now is when we should discuss the business of the committee as a whole.

The CHAIRMAN: I think it is most unfortunate, Mr. Martin, that you were not here this morning. If there was a misunderstanding I regret it very much; but I myself feel there was no cause for misunderstanding. Two other members of your party were here. A decision had to be reached yesterday in as much as we had meetings scheduled for today and had no one desiring to appear before the committee. We did have one person who indicated a desire to appear but he could not do so yesterday. He indicated he would be able to appear before the committee tomorrow morning.

Mr. MARTIN (*Essex East*): That is Mr. Mundell. I just saw him upstairs and he told me that.

The CHAIRMAN: We had to decide whether we were going to be idle with nothing to do today or whether it might be possible to proceed to hear the minister.

Mr. MARTIN (*Essex East*): I am not objecting to that.

The CHAIRMAN: Naturally, the minister does not wish to appear before this committee until it has exhausted hearing all those who wish to appear before the committee. The matter was left in abeyance until the steering committee determined whether or not there was any feeling that an effort should be made to interest others in appearing before the committee, apart

from those who had come forward and the very lengthy number of individuals and organizations which you had suggested should be contacted in order to determine whether or not they cared to appear. I made a report in that respect this morning. I do not recall the number, but I would guess offhand that there must have been forty individuals or organizations canvassed. Certainly, speaking for myself, I cannot conceive of any viewpoint which has not already been advanced to the committee in connection with this bill; there might be, but I do not see any reason why this committee should be held up while we scurry around to see whether or not there is anybody else who might come before this committee. We have eighteen million people in this country and I have no doubt that we could find many who would express a desire to appear before this committee. I think this committee has gone a long way in hearing representations by individuals who represent nobody but themselves. We have contacted a great many organizations. There is considerable feeling that representations in any event should be confined to national organizations and not even provincial organizations. I think it is a matter of reasonableness. I am sure that if we wanted to pursue the matter and each individual member of the committee made it his business to go out and induce people to come before the committee we could very well prolong these sittings for the rest of the summer.

The CHAIRMAN: I do not think any useful purpose would be served.

Mr. MARTIN (*Essex East*): I think we should deal with this after the meeting. I would ask if you will be good enough to tell me what you told the committee this morning. I was not here. I did not know of the meeting. Mr. Badanai, who is our representative on the steering committee, was not at the meeting.

The CHAIRMAN: Mr. Badanai was at the committee meeting last night.

Mr. MARTIN (*Essex East*): I am not challenging that, but the fact is that we are meeting with great difficulty with our many preoccupations in the House of Commons. I do not want to go over that argument again, but that is the fact. I would be content, for the moment, if after this meeting you and I could review the matter so that I could see what the situation is. For instance, I have a wire from the Catholic syndicates, an organization of labour in the province of Quebec. I have several others. I think the best way for us to solve the problem is for you and I to meet and review the situation after the meeting. I want to do this in the most reasonable way possible. I do not think this committee has taken too long a time in examining this bill. There are people who think that they should come before this committee and I would like to know, for instance, the people who have made representations during the past two years in respect of this bill of rights, and how many of them have been given an opportunity to attend. I do not say we should have them all, but there are one or two I would like to discuss with you.

I just raise this question now because I would like to ask you if we could meet at the end of the meeting to review this matter, and then you could report back to the committee.

The CHAIRMAN: I think it is very unfair to the minister to ask him to deal with this bill, as he proposed to deal with it, and then leave it open to have you, or anybody else, go out and solicit somebody to come before the committee, especially when the purpose of calling the minister was to finalize this.

Mr. MARTIN (*Essex East*): I do not think it will affect his judgment.

The CHAIRMAN: I feel that it is very strange in view of all the publicity that this bill has received, and when it was debated three days in the House of Commons, that there should be persons interested in appearing before the committee who have not contacted the committee in any way.

Mr. MARTIN (*Essex East*): I do not agree with that at all.

The CHAIRMAN: Other organizations have contacted the committee. There was no difficulty in that regard. I have received letters, as well as the secretary, and I am rather surprised that someone is going out of his way to solicit individuals to appear before the committee.

Mr. MARTIN (*Essex East*): I can only take that remark as meaning you yourself possibly had that in mind. I do not think anybody else did. There certainly is nothing inappropriate in trying to bring witnesses in refutation of particular points of the bill. I am not referring to the minister's statement, but I think it is open for any member of this committee to suggest, after we have heard the minister, after he has proceeded now to review the bill clause by clause, that other individuals should be called to deal with this. I understand that the plan this afternoon, after we have interrogated the minister in respect of the statement which I understand he made this morning, and which I have got a full report of, he proposes to examine the bill clause by clause.

The CHAIRMAN: Exactly.

Mr. MARTIN (*Essex East*): That is not our arrangement. That is an arrangement that has been suggested. If your argument is sound, it certainly should not be open to the minister to do this until Mr. Mundell has appeared before the committee. He is coming tomorrow morning. If the minister feels that he is in any way prejudiced on that account, he ought to review the bill clause by clause after all witnesses have appeared.

Mr. RAPP: Mr. Chairman, we approved of this procedure unanimously this morning. We approved of the order which we are to follow today and tomorrow. There was no objection made by anyone present. This procedure was agreed to unanimously.

Mr. MARTIN (*Essex East*): I may say that I did not know of this meeting this morning.

Mr. RAPP: Yes, but members present here agreed to this procedure unanimously.

The CHAIRMAN: Pardon me, gentlemen.

Mr. Martin, may I say that if you did not know about the meeting, I am sure you were not advised that the meeting was cancelled.

Mr. MARTIN (*Essex East*): No.

The CHAIRMAN: A notice was sent out to every member of the committee yesterday that this committee would meet this morning at 9.30. What disturbs me is: how long are members of this committee going to be permitted to continue to bring before this committee names of people to be contacted?

The hon. member himself, Mr. Martin, presented a list of some 40 individuals, as I recall it, a week ago Thursday. All these people were contacted. After we made all the arrangements, in order to accommodate them, this committee was kept idle last Saturday, when—

Mr. MARTIN (*Essex East*): This committee should not have been called for last Saturday.

The CHAIRMAN: —when we had set up a meeting for Saturday. So we carried on into this week, and we exhausted that panel.

Now, after we exhausted the panel you, Mr. Martin, come in to the committee, and even today you have not mentioned anyone specifically, but indicate you had some kind of conversation or letter.

Mr. MARTIN (*Essex East*): I told you I had a telephone call from someone on behalf of the Catholic syndicate, a very large labour organization. They want to know if they are going to have an opportunity of appearing before the committee.

Mr. BROWNE (*Vancouver-Kingsway*): On a point of order, Mr. Chairman, it seems to me that this is a question that has already been decided on today; and we are going to be repetitious if we are going to open it up again. It was the unanimous decision of the committee this morning to get the matter closed, and we are wasting time if we discuss it again.

Mr. MARTIN (*Essex East*): No matter is closed by the committee, and the committee, at any time, has the right to reverse its decision. If we are going to have an exhaustive examination of the bill, we should have an open mind on it.

I would like to know, for instance, when the wire was sent to individuals when they were told they had to appear by such and such a day, within such and such a time.

The CHAIRMAN: May I say, in the spirit of cooperation, Mr. Martin, I would like to give you the information. I do think there were other occasions when it could have been obtained.

Mr. MARTIN (*Essex East*): I suggest you and I might meet after this meeting.

The CHAIRMAN: Long before this meeting today.

Mr. MARTIN (*Essex East*): I am not looking for anything unusual, but merely my rights as a member of this committee.

The CHAIRMAN: Your party has a representative on the steering committee, and I think that everything done by the steering committee was done to the satisfaction of the representative of your party on that committee.

I have no objection to wasting a little more time, giving you these details, which I think you could have obtained from your representative on the subcommittee.

Mr. MARTIN (*Essex East*): You are not wasting any time to recognize the rights of a member.

The CHAIRMAN: In my opinion you are; and you and I do not agree on that point.

Mr. MARTIN (*Essex East*): That is just one of the many things.

The CHAIRMAN: What the subcommittee did, after this list was submitted by you—and not in the steering committee, but the open committee, which I think is not the proper procedure—

Mr. MARTIN (*Essex East*): That is the right place.

The CHAIRMAN: That is your opinion, not mine.

Mr. MARTIN (*Essex East*): That is the practice.

The CHAIRMAN: I do not know what purpose the steering committee has, because we appointed a subcommittee on agenda and procedure. If that means anything at all it means exactly the thing we are discussing now.

Mr. MARTIN (*Essex East*): I will bow to your greater experience in this matter, Mr. Chairman, but let me tell you it has always been the practice in parliamentary committees that a steering committee is set up for the purpose of arranging the agenda. It then discusses the agenda with the whole committee, which makes the decision. It is not the steering committee that makes the decision.

The CHAIRMAN: Of course, and that is exactly the way in which the steering committee conducted itself. It considered these things and came to a conclusion and brought its recommendations to the general committee, and that recommendation has been adopted. That is the only manner in which this committee operated.

Mr. MARTIN (*Essex East*): The only time business was discussed in open committee was this morning.

The CHAIRMAN: I beg to differ with that.

Mr. STEWART: That is not so. We discussed it for two meetings when we met in the Senate room.

Mr. BADANAI: Perhaps I should say a word, being the representative on the steering committee.

Last night we met and decided, after we had adjusted all those who wished to appear before the committee. I agreed, we having no one else to appear with the exception of Mr. Mundell, who will appear here on Saturday morning, that we would hear from the Minister of Justice.

My misunderstanding was I did not know the minister was appearing this morning, and I conveyed to Mr. Martin the wrong information this morning, unknowingly of course. But, on the other hand, I fully agree that we can hear all those who agree to appear before this committee, after they were all invited.

We invited a lot of people who did not wish to appear. Therefore I am in full agreement with the committee.

The CHAIRMAN: May I just give Mr. Martin the additional information. As I indicated, the committee first of all set up meetings for Thursday, Friday and Saturday of last week, and sent out wires to numberless individuals and organizations advising them that committee meetings were presently set up for those three days, and inquiring as to whether or not they wished to make representations, and as to the time that would meet their convenience.

As a result of that, we did have meetings on Thursday and Friday, but we did not have anybody available for Saturday.

Mr. MARTIN (*Essex East*): That is the very point I am making.

The CHAIRMAN: After you brought in your list, we sent wires to the ones which you listed. They read as follows:

> Special committee on human rights and fundamental freedoms will continue consideration of Bill C-70 next week.

This is dated July 18, and that would be this week.

> Do you wish to make representations to the committee stop If so please wire by Monday noon and indicate convenient date.

We set Monday noon because we had set up a meeting of the steering committee for Monday afternoon, and we hoped to have answers to those wires available for the steering committee meeting by Monday noon.

We did receive replies from a great many of them, some expressing a willingness to come, some expressing a lack of interest, and some expressing the opinion that since others had advanced their points, they therefore saw no need to come.

Some sent in written briefs only which were received by the steering committee and reported to the main committee and dealt with.

This was the wire, and I am sure there was nowhere in that wire an indication that the committee had set any limitation as to the time of the sittings of the committee.

It was simply a request to give indication to this committee as to whether or not they desired to come before the committee.

Therefore I do not know what more the steering committee or this committee, or I as chairman, could do.

Mr. DESCHATELETS: If you will permit me, Mr. Chairman, I do not think we have had any serious discussion about what happened this morning; but we are facing a new development here, when Mr. Martin informs us that so large an organization, and so important a one, would be ready to appear before this committee.

This is something we were not aware of this morning; so, that being the case, what is the decision of the committee. Is there any possibility that we could invite these people who, apparently, are ready to appear before us, apparently within a few days?

Mr. STEWART: They do not indicate that.

Mr. DORION: I would like to know from Mr. Martin if he received from that organization representations to the effect that they wished to appear before the committee.

Mr. MARTIN (*Essex East*): I was asked whether or not there would still be an opportunity; I had indicated two days ago to them that I thought there was, and I had no idea we were going to conclude our sittings so immediately.

It was only when I heard that the minister wanted to go over the bill clause by clause before any representations were made that I thought I had better deal with the situation.

I simply want to put on the record now the fact that I register my opposition to these wires. This bill was brought in, in the dying days of the session, and this committee was set up at a time when people are away on holidays. I think on that account we have to extend to bodies who would like to make representations a greater opportunity for doing so than we have done.

I am not criticizing the chairman. He was acting within the time limits under which we are all working. But, for the time being, I want to register that objection.

Mr. DORION: Am I to understand that that organization did not make a request at all to appear?

Mr. MARTIN (*Essex East*): I was asked if there would be an opportunity for them to come, and I am going to convey to them now the decision in this matter.

The CHAIRMAN: Why did you not ask them if they desired to appear, instead of leaving it suspended in the air?

Mr. BROWNE (*Vancouver-Kingsway*): I would like to know whether this organization is a member of the Canadian labour congress?

Mr. MARTIN (*Essex East*): No.

Mr. BROWNE (*Vancouver-Kingsway*): What is the organization again?

Mr. MARTIN (*Essex East*): Syndicats Catholiques.

The CHAIRMAN: Is the organization to which you have referred the Canadian Catholic conference of labour?

Mr. MARTIN (*Essex East*): I know them as Syndicats Catholiques.

Mr. DORION: Their real name is Confédération des Travailleurs Catholiques du Canada.

The CHAIRMAN: I believe they were sent a wire.

Mr. DORION: It is the Catholic federation of Canadian workers.

Mr. FULTON: Is that the same thing as the Canadian Catholic conference?

Mr. STEWART: The same thing.

The CHAIRMAN: We sent a wire to Mr. Gerard Pelletier.

Mr. MARTIN (*Essex East*): At what address?

The CHAIRMAN: Of the Canadian Catholic conference of labour, Montreal: Is that the same?

Mr. MARTIN (*Essex East*): What date was that wire?

The CHAIRMAN: July 18.

Mr. DORION: He is one of their legal counsel.

Mr. STEWART: Just for clarification, did we receive any wires asking for any time in advance for submissions?

The CHAIRMAN: You mean for any additional time?

Mr. STEWART: Yes.

The CHAIRMAN: Did you receive an answer?

The CLERK OF THE COMMITTEE: No.

Mr. MARTIN (*Essex East*): You did not receive an answer?

The CLERK OF THE COMMITTEE: No.

Mr. MARTIN (*Essex East*): Was Mr. Pigeon asked to come?

Mr. DORION: Yes, and he was not interested.

The CHAIRMAN: I want to make a correction on the date. It was certainly prior to the eighteenth. It was sent out—

Mr. BADANAI: With the first batch of wires we sent.

Mr. MARTIN (*Essex East*): You said he had written to you, Mr. Dorion.

Mr. DORION: Yes, and I have a letter I can show you.

The CHAIRMAN: It was sent out on Friday, which would be—what is the date of last Friday?

Mr. STEWART: Seventeenth.

Mr. BROWNE (*Vancouver-Kingsway*): July 15.

Mr. BADANAI: July 15.

The CHAIRMAN: That is the correct date. We asked for an answer by Monday noon, and we felt if they did not get it Friday or Saturday, they would at least have it by Monday morning, and have time to have a wire in our hands by Monday noon.

Gentlemen, the only comment I have to make is that it obviously would be unfair to the Minister of Justice for the committee to ask him to go over this bill, as we intend to go over it, clause by clause, and have him present his views, if the committee is going to keep open, for what appears to be an indefinite period of time, its hearings, in the expectation that one or more might wish to appear. And certainly, the steerling committee, in its recommendation does not, absolutely preclude the committee from changing its mind. But certainly there ought to be a very good reason for the committee accepting representations from anybody other than Mr. Mundell, after proceeding with the minister's testimony. So I think we have to decide whether we are going to adjourn now, or whether we proceed.

Mr. MARTIN (*Essex East*): I understand, Mr. Chairman, that Mr. Fulton made a general statement this morning. I know what he said; I have had an opportunity of considering it. I want to ask him some questions on his basic statement. I am sure that others do too.

The CHAIRMAN: I would say, Mr. Martin, that there certainly will be no restriction on the asking of question when we come to dealing with the clauses, or, as far as that is concerned, on any general matter, if you wish to—as long as it is relevant to the bill.

Mr. MARTIN (*Essex East*): Mr. Fulton made a statement this morning, and a rather important statement, and I would like clarification of some of the things that he said, that is all. Then, after that—

The CHAIRMAN: That is quite all right. As a matter of fact, he did not quite conclude his general references.

Mr. MARTIN (*Essex East*): Of course not. Well, he ought to be allowed to.

The CHAIRMAN: I think I might indicate to you, Mr. Martin, that it was just a general review, in a general way, of the points that have been raised by some of those who have appeared before the committee, all of which will come up again when we come to consider the clauses in the bill.

Mr. MARTIN (*Essex East*): No, a lot of them will not come up.

The CHAIRMAN: Would you be satisfied, then, if the matter were left open to you now to ask any question you want?

Mr. MARTIN (*Essex East*): Yes. I think Mr. Fulton ought to finish his statement first.

Mr. AIKEN: Mr. Chairman, before we do anything further, I think we have not settled the question that was raised, and we must settle that. If we are going to go on and struggle along this afternoon, and then come back tomorrow morning and have the same subject raised, and do the same thing Monday and Tuesday, we will never reasonably conclude our sessions, and the minister will be brought back. I think we must decide now.

If we are going to call another witness, or give another witness this opportunity, we should decide to do that and set a time. If we are not going to call any more witnesses except the one tomorrow morning, we could perhaps go on on the same basis that we did this morning. But I do not think it should wait in the air.

The CHAIRMAN: I think your point is well taken, Mr. Aiken, and inasmuch as the committee has already adopted the resolution, I think the only manner in which it can be dealt with, is by way of a motion to rescind the motion by which this recommendation was adopted.

So I will now call for any motion to rescind the action of the committee this morning.

Mr. MARTIN (*Essex East*): Mr. Chairman, I have stated my position, and the record will be there. The members will have to judge accordingly.

Mr. BADANAI: I suggest that we carry on, Mr. Chairman.

The CHAIRMAN: Thank you.

Mr. AIKEN: Can we settle this question?

The CHAIRMAN: That is as far as we can go. I am willing to entertain a motion to rescind the decision of the committee this morning, and no such motion is forthcoming, so I presume it is at an end.

Mr. Minister, would you care to continue, please.

Mr. FULTON: Yes. Mr. Chairman, this morning I had made some general comments on some of the points that had been raised by witnesses appearing before the committee and I had pretty well concluded what I had to say, with the exception of one point that you raised, and asked me to comment on—and that was the question of a preamble.

With respect to a preamble, we have made considerable efforts in the department to draft a satisfactory preamble. We were not very satisfied with anything which we had produced. I do not think I need to go in detail into the problem of drafting a preamble to a bill of this nature. It is a question, really, of what you put in and what you leave out. I suppose that, just as what is in the bill here does not appear to be satisfactory to everybody, and there are those who have differing views to the effect that we have left some things out, so, I think, would the same thing be true of a preamble.

I admit at once that a bill of rights of this sort is not the same thing as an ordinary statute, and that therefore perhaps not all the arguments with regard to drafting apply to a bill of this sort. I would not attempt to argue too strongly that way.

Subject to that general reservation, I think I should say that the present drafting practice, not just since 1957, but a good many years before that in Canada at any rate, and I think universally has been to get away from preambles and to have a statute speak for itself without any preamble in it. We therefore felt, in the light of this drafting practice, the tradition which is growing, and in the light of the difficulty of framing a satisfactory preamble, that this bill would be satisfactory without a preamble. We were reinforced in that view in large part in that this bill is expressed to be in declaratory form. If you look at clause 2 you will realize this is the basic declaration of human rights and fundamental freedoms that exist in Canada. It does seem to us, therefore, that with that declaration in it much of the purpose which would be served by a preamble—which those who are interested in having a preamble would like to see served—is in fact made. A good deal of what ought to go into a preamble in a particular bill of this sort is in any event in clause 2. One additional reason is we did want to produce a document in short compass which is nevertheless complete, which being complete is still short enough or almost short enough to lend itself readily to reprinting and framing or mounting in such a way that it could be posted up on the walls of schools, assembly halls, courtrooms if you wish, and in similar locations all across the country. This perhaps is not a major point, but it is a point to be taken into account. We had in mind the question of keeping it within a short compass for that purpose. The adoption of a preamble was simply one other factor which would make that more difficult to accomplish.

For those reasons we decided we would not present a bill with a preamble in it. A good deal has been said, however, here about a preamble. I do not want to take an arbitrary position and say we are absolutely right and anybody else is absolutely wrong. However, although indications were given that we would appreciate the advice and assistance of others in submitting a draft preamble, I think I am correct in saying that only Professor Cohen, at least amongst those who appeared before the committee, gave us a concrete suggestion.

The CHAIRMAN: You are quite correct—of those who appeared before the committee.

Mr. MARTIN (*Essex East*): So far.

The CHAIRMAN: Mr. Gordon has a preamble.

Mr. MARTIN (*Essex East*): I hope to propose one in this committee at some stage.

The CHAIRMAN: I was going to suggest that the hon. member might find himself possessive of that fluency and embellishment that might be desirable in so far as a preamble to this bill is concerned.

Mr. FULTON: All I can say on that point is that the government and I personally as minister are still prepared to take under consideration any preamble, perhaps not a particular one, but any one that might be submitted, to see whether, in that form or in some modified form, and also considering points which may arise out of other preambles suggested, we might be able to find a preamble which is satisfactory, which does not destroy the desire for brievity, and does not run counter to the other considerations that I put forward. That is, those which, up to this moment at any rate, had influenced our decision against the inclusion of a preamble.

We would be very glad to receive and to hear the suggestions, and study them to see if we can produce a preamble that is in keeping with the bill.

That concludes all that I had thought it appropriate to say by way of general remarks, Mr. Chairman. I understand that it is the desire of the committee to go through the bill clause by clause. I understood this morning that

the intention was that at that stage I would be questioned either with particular reference to the clause itself, or with reference to any part of my statement that I have made, which is relevant to the clause under consideration.

It was again my understanding of your decision this morning that the clauses should not be carried formally but rather that questions should be exhausted in respect of a clause, and then we would move on to the next clause, out of courtesy to Mr. Mundell who it was decided would appear as a witness before the committee tomorrow. I think the feeling was that it would not have been courteous to carry the bill and still have another witness come before the committee.

Mr. MARTIN (*Essex East*): I think that is the only procedure we can follow because of amendments that any of us wish to propose. We have some that we are considering, but we are not ready to put them as yet. We want to hear the minister, and we want to hear Mr. Mundell. I take it at some stage we will either carry the bill as it is, or with whatever modifications are agreed upon.

Mr. FULTON: The general practice is that the minister is present at the time when the bill is considered clause by clause, and has the opportunity to comment on amendments.

Mr. MARTIN (*Essex East*): Certainly.

Mr. FULTON: I would have thought that the amendments could be put forward this afternoon in that same way so that I might have had the opportunity this afternoon of commenting on them.

Mr. MARTIN (*Essex East*): As far as I am concerned I am in that position now because I want to hear you. We may be wrong in some of these things. In any event, we are not quite ready in that regard. I did not think we were going to finish so quickly. It is a very difficult matter, as you know. However, the procedure you have outlined, as far as I am concerned, is all right.

Mr. FULTON: That would mean then, would it not, that I would come back at the time when the bill is finally being put to the committee?

The CHAIRMAN: Exactly.

Mr. MARTIN (*Essex East*): Yes. It would not take very long.

The CHAIRMAN: Mr. Martin says he is not prepared to submit amendments that he has in mind this afternoon. I think that the committee should have the minister back before this committee whenever those amendments are presented.

I think I should draw to your attention some difficulty that might be involved in that respect, and that is that the combines bill has been reported out of the banking and commerce committee, and I would anticipate that it would be before the House of Commons on Monday. I would expect the minister, who will be sponsoring that bill, will be required to be present in the House of Commons at all times during that debate.

Mr. AIKEN: I think Mr. Martin would like to be there too.

Mr. MARTIN (*Essex East*): I think the minister, in fairness to this committee should be here when amendments are discussed. I would want to accord to the minister the treatment, which I believe every member of this committee feels should be accorded to him in respect of a matter of this importance. I certainly would not proceed with an amendment unless the Minister of Justice was here.

We all have heavy obligations. If we are in this mess, it is not the little groupers sitting at this end of the table who are responsible for it.

The CHAIRMAN: I think what the committee should do then is, in view of the fact that those amendments will not be available today, have the minister come back before the committee on Monday morning.

Mr. MARTIN (*Essex East*): There might not be any amendments, I do not know.

The CHAIRMAN: If we do not conclude on Monday morning we will continue on the mornings after that until we have completed our consideration of the bill.

Mr. MARTIN (*Essex East*): Always bearing in mind what the Prime Minister said, that our primary obligation may be in the House of Commons at a given moment.

Mr. BROWNE (*Vancouver-Kingsway*): I understand we are hearing Mr. Mundell tomorrow morning?

The CHAIRMAN: Yes, tomorrow morning.

Mr. BROWNE (*Vancouver-Kingsway*): Could we not continue on, after Mr. Mundell has been heard?

The CHAIRMAN: The minister will not be here.

Mr. FULTON: I will be in Washington on the Columbia river negotiations tomorrow and Sunday.

The CHAIRMAN: Even the minister will be working on Sunday, in any event.

Mr. FULTON: Unless we reach agreement on Saturday.

The CHAIRMAN: May I suggest, Mr. Martin, that you may wish to question Mr. Fulton generally, before we proceed to the clauses?

Mr. MARTIN (*Essex East*): As far as I am concerned, the procedure he suggested is acceptable, if he wishes to take it clause by clause; and then I will endeavour to relate whatever I have in mind to that clause. It may be that some matters are not identifiable in that way. I think Mr. Deschatelets has some questions, too.

The CHAIRMAN: I think that would expedite it. Then I will call clause 2 of the bill.

Mr. DESCHATELETS: Can we start with the title?

Mr. MARTIN (*Essex East*): We had better have clause 1 first.

Mr. AIKEN: That is the preamble.

Mr. DESCHATELETS: Could we start with the title?

The CHAIRMAN: The title is usually dealt with last.

Mr. FULTON: That is all right, if you want to start with it.

Mr. DESCHATELETS: Then, on the title, I think everybody will agree the rights and freedoms enumerated in clause 2 only apply within the federal jurisdiction. This is a fact that is being admitted, I think. I do not see anything in this bill or title or anywhere suggesting that. I think this was a cause for some uncertainties, described by certain briefs, that we are suggesting that we are touching here some rights, property and civil rights, which belong in certain aspects of the legislature.

I was wondering if we should add to the title something which would clearly indicate that we are dealing here with matters concerning federal jurisdiction.

Mr. DORION: Mr. Chairman, before having your answer, on this particular point I have suggested that because there is uncertainty for certain of our members of the bar about the significance or meaning of "in Canada,"—you have the article of Mr. Pigeon, and I received from Mr. Pigeon a letter after long discussions with him on it. I received a letter; and it was his main objection to the bill that "in Canada" would not be sufficiently clear.

I suggested that after "in Canada" it would be possible, maybe, to add some words—

The CHAIRMAN: Excuse me, Mr. Dorion, but you are dealing with clause 2, and I understand Mr. Deschatelets was dealing with the title.

Mr. DORION: But it is an answer to the question raised by Mr. Deschatelets.

Mr. STEWART: It is the same point.

Mr. DORION: If we had something like this after the words "in Canada," "in so far as within federal jurisdiction," I believe, because the evidence brought before us indicated that certain civil rights keep appearing, even in any act of parliament, because in certain aspects it is within the federal jurisdiction to deal with such a problem. The most clear example of it is, surely, the Criminal Code, which affects the liberty and certain civil rights of the subject. In consequence, if we add these words, "in so far as within federal jurisdiction," I would agree that it would be so in order to clarify the text and to answer the objections raised about this matter.

Mr. FULTON: Perhaps I could deal with those two points of Mr. Deschatelets' and Mr. Dorion together.

Mr. MARTIN (*Essex East*): I have quite a series of questions on this very point. I do not know if you want to deal with them now.

The CHAIRMAN: Do you feel that your questions could be conveniently dealt with at this time?

Mr. MARTIN (*Essex East*): I was going to deal with that point when I came to clause 2; and I have another point on the preamble, and still another point on clause 1.

The CHAIRMAN: You may put your questions now if it is agreeable to the minister.

Mr. FULTON: It is perfectly agreeable to me. I do not mind when they come.

Mr. MARTIN (*Essex East*): With regard to the title or preamble, has the minister given consideration to the valuable point made by Mr. Dorion and Mr. Deschatelets, that it could be dealt with in the preamble? Because there is, I suggest, a grave doubt as to the meaning of clause 2 in so far as sections 91 and 92 are concerned; and in the preamble it would be possible to use phrases which could clearly indicate that this bill in its actual terms is as parliament intended, namely, only to deal with those matters which are within federal competence.

Mr. FULTON: It is true that that could be stated in the preamble, or it could be stated in clause 1, or even in clause 2. But it seems to me to do that is, firstly, not necessary; and secondly, it might be establishing an undesirable precedent. It is, as I understand it, a principle of legislation that every statute enacted by the parliament of Canada deals only with those matters which are within the legislative jurisdiction of the parliament of Canada. Therefore you do not need to state that in the bill. To adopt the practice of stating it in the legislation would, I think, be unsound, because it would create, certainly by inference, the suggestion that some of our other legislation which was not stated to be so restricted but was intended to have effect outside the jurisdiction of the parliament of Canada.

The parliament of Canada only has jurisdiction to legislate over those matters which are assigned to it under the relevant sections of the British North America Act; and it seems to me that it is unnecessary, and I would say undesirable to include in our statutes a provision which can only have the effect of saying that we are not trying to contradict the law or distort the constitution.

That, surely, is a fundamental principle which is not only a legal principle, but also a principle in the construction of statutes themselves.

Mr. DORION: Mr. Minister, I understand well your point of view, but may I recall that we have had many or some federal laws which were not within the federal jurisdiction. The result was that we had to have recourse to the

courts in order to decide it; and the best example I can think of is surely that rule of law which was enacted in 1934.

Mr. MARTIN (*Essex East*): Yes, the Unemployment Insurance Act.

Mr. DORION: Yes, and I suppose when the legislators at that moment enacted this law, they intended that it should be within federal jurisdiction; but it was tested after, and it was the cause of litigation.

I think it would be fairer if it were of a nature to avoid any litigation.

Mr. FULTON: Mr. Dorion—

Mr. DORION: Excuse me.

Mr. FULTON: But, Mr. Dorion, it is, I understand, a principle established by—

Mr. DORION: Just a word to finish, Mr. Minister.

Mr. FULTON: I am sorry, proceed.

Mr. DORION: I may remind you that actually we have, in Quebec, before the courts, a case where the question of liberty of religion is being discussed precisely on the point as to whether or not it is within the provincial jurisdiction. Although I do not know, I presume that the judgment will decide it because, in the Supreme Court, in another case, there are some judges who made it clear that it was within the federal jurisdiction. However, it was not a precise decision and, I suppose a decision eventually will come which will be contrary to our bill.

My own view is that in certain respects, freedom of religion is within the federal jurisdiction. But, in the police regulations, for example, they have a revision—but only in our province—and there are some very interesting cases on this particular point. I believe, also, there is a provincial aspect in the matter of using a street to hold a religious service meeting.

Mr. FULTON: I think I must come back to the point that if the statute, in fact, trenches upon provincial jurisdiction, the addition of these words would not, in itself, make that provision valid; it is the situation as interpreted by the courts, which sets the limits of federal and provincial jurisdiction. As I understand it, Parliament cannot simply by declaring something to be within federal jurisdiction, give itself the right to legislate—or, by saying: this statute is confined to federal jurisdiction, and we offer provisions which, in fact, go beyond federal jurisdiction. Therefore, as I understand it, the addition of the words suggested would not change the situation. If, in fact, our bill trenches on things reserved exclusively to the provinces, the courts will decide whether or not it is valid and, in making that decision, they will not have reference to whether or not we have put in a phrase "this affects Canadians only within the jurisdiction of the parliament of Canada".

Mr. DORION: But, at least, it would indicate a good intention.

Mr. MARTIN (*Essex East*): This is one of the very points, I have your words of this morning. I feel that the point which Mr. Dorion has raised—the first one he raised today—is on sound ground, and his suggested reservations were applied to the words "Canada" and "property", and the suggested words, which he used "within the competence of the federal government" would satisfy me.

I was just suggesting, for the minister's further consideration, that the preamble might be the way in which to do that, in order to keep the language of section 2 as simple as possible. But, on the point in issue, as I understood, the minister said this morning—and correct me if these words are incorrect; they were taken down by an associate of mine:

> The bill of rights does not encroach upon provincial rights, because any such encroachment would be a legal impossibility. The bill of rights is enacted by the parliament of Canada and, if valid, cannot encroach.

Then:

> If the possibility of encroachment exists, that would be prevented by judicial interpretation.

Mr. MARTIN (*Essex East*): But, surely, we must avoid, to the fullest extent, going to the courts, and also we must avoid the sensibilities of the provinces in this matter. Now, it seems to me, that unless you can argue that section 3 of this bill provides the limited interpretation to the words "Canada" and "property" I would not agree with that construction. I do not think a judicial interpretation would permit that.

Then the words "Canada" and "property", not being defined, will be regarded by the courts ultimately as something that is *ultra vires* the federal parliament. Why should we run the risk, where there is doubt? Here you have Mr. Louis Philippe Pigeon, who is an eminent jurist and teacher of law, who wrote the article in the *Canadian Bar Review*, who expresses himself pretty strongly on this point. You have the view expressed by Mr. Dorion, who is an eminent lawyer, and others. It just seems to me, why run the risk of running into this situation, raising the whole constitutional problem that exists in Canada?

The minister further stated that the Canadian bill will have an effect with regard to property and civil rights in so far as the federal aspects of these subjects are concerned. I have no doubt that is what the minister intends. There is no doubt that is what we all intend. That is what parliament intended—the Prime Minister said this is only to apply. But that is not what the clause says.

Mr. FULTON: Whether we intended to go beyond that or not, it is a fundamental rule of construction that parliament can only legislate concerning, and the statute can only be interpreted as covering those matters in relation to which parliament has jurisdiction to legislate.

Mr. MARTIN (*Essex East*): I quite agree with that. Of course, that is going to be the only effect on the courts. But I say at once that I am sure that the argument of Mr. Pigeon and the argument of Mr. Dorion is sound.

Supposing, in the case Mr. Dorion mentioned a moment ago, the case of religious freedom—I am not familiar with that case.

Mr. DORION: It is on the question of an amendment brought to chapter 307 of the provincial statute, which is the reproduction—the reference of the statute of 1852.

Mr. FULTON: Yes. Is that not the Freedom of Worship Act?

Mr. MARTIN (*Essex East*): Supposing that case began *de novo*, and supposing there was a new case entirely, and this bill was passed. People would rely on this, and people taking one position would argue, "Oh, no, this is a matter which the legislature in Quebec cannot legislate on; this is a matter that comes under the bill of rights passed by the parliament of Canada. The act says that we shall have freedom of religion in Canada".

That would be the argument. True, as the minister said, the courts would have to declare whether or not this was *ultra vires;* but all we are arguing now is that, since there is some doubt, let us avoid that. And this was mentioned by the Canadian bar.

Mr. FULTON: It seems to me that we are overlooking another fact too, and that is that what will actually come before the courts, as I see it, is some action in which it is complained that there is interference with the freedom of religion, which deprives somebody of his right to freedom of religion.

The courts will then have to look at that action and see whether the statute or any other authority under which that action is taken is within the competence of the authority which passed the statute to enact.

So that the mere fact that we have a Canadian bill of rights declaring that there is freedom of religion in Canada, does not in any way take away the authority given to a province, which it now has under the constitution—

Mr. MARTIN (*Essex East*): Agreed.

Mr. FULTON: —to legislate with regard to the circumstances under which, and the places at which churches may be built—things of that sort. If they have the authority to legislate in relation to that subject matter, now, that authority is not abridged by the declaration in the bill of rights.

Mr. MARTIN (*Essex East*): Agreed.

Mr. FULTON: And it will not be made any clearer, or any safer, by our putting into the statute the words, in clause 2, "within the jurisdiction of the parliament of Canada", because of the fundamental rule of construction that I have referred to. Indeed, even if we did have some special words in here I doubt very much if we would have removed the conflict of opinion as to whether what was done in the Boucher case was within federal or provincial jurisdiction. I think I would be in a very peculiar position as Minister of Justice, and I think any Minister of Justice would be in a most peculiar position, if any statute started out by saying "here, we are not trying to subvert the constitution; that is *ipso facto*—we cannot legislate except in fields where we have the authority to legislate".

Mr. DORION: If we follow your own reasoning it would be possible to change article III and tell in respect of all the acts of Canada enacted before or after that we thought of having these words, and that it would be a good thing. I believe that we have to create a good atmosphere in order to avoid any fear. I know that in Quebec there is fear about this bill. Perhaps it is not a reasonable fear, but there is a fear. That is a sound reason why I believe it is very important to have something in order to determine that it is not the intention of the legislators to act outside of the federal jurisdiction. That is probably the main reason why I make that suggestion. I believe that with the bill of rights it is very important to create a good atmosphere in every part of Canada. This is probably the main reason why we have to put something in the bill in order to determine it is not the intention of the legislators to go outside of our jurisdiction.

Mr. DESCHATELETS: Moreover, I do not think it is a good thing that we create a false impression. We were told this bill of rights will be given much publicity—will be posted in schools and so forth everywhere in the country. Anybody who would read that would think at first sight that with this bill there would be no more racial discrimination in Canada. Well, this is not true. There could be racial discrimination after the adoption of this bill without any hope of redress by this bill if it happened outside the federal jurisdiction between two private parties. So I think it creates a false impression. I do not think it is a good thing, especially with a bill of rights.

Mr. DORION: I am not jealous of my own suggestion. I have no objection to something like that at all.

Mr. MARTIN (*Essex East*): I had some more questions on this very point. I had dropped away from one in order to give others a chance. I think the minister wishes to comment on Mr. Dorion and Mr. Deschatelet's questions.

Mr. FULTON: I do not think I can do much more than repeat what I said previously, that the mere insertion of a declaration or a provision that the legislation is confined within the federal jurisdiction does not alter the effect of the law. If there be valid grounds for the fears expressed, that this does go beyond the federal jurisdiction, then would we not be creating a false impression to say, by mere phrasing, that we are trying to keep it within federal jurisdiction. I think we are better with a law which is based upon

and really within the fundamental principle of legal application that parliament cannot arrogate to itself the right to legislate beyond its jurisdiction, whatever form or words it may use.

Mr. DESCHATELETS: Of course, in doing that, we do not add anything, but we would limit the application of this bill. In doing so, we do not get anything out of this bill. The powers of this bill are limited; the freedoms and the rights, and the applications are limited. I do not see any reason why we should not state that.

Mr. FULTON: I wonder if this might be the way of meeting the point: Mr. Martin has suggested that we consider putting some expression of limits in a preamble so as to make it clear what our intention was. I think you would agree with me, Mr. Martin, that a preamble does not have valid legal effect.

Mr. MARTIN (*Essex East*): No.

Mr. FULTON: I admit if it will give reassurance as to our intention, it might well be useful to consider putting some such expression of intention in a preamble, but I think, in honesty, I would have to make it clear that I am not pretending that by putting it in the preamble it would do more than make a declaration of intention, any more than, putting it in the bill would give it legal effect if, in fact, the bill went beyond federal jurisdiction.

Mr. MARTIN (*Essex East*): I am not sure that is wrong, but I think the rules of the Interpretation Act allow a court to look at a preamble to determine the meaning of a section.

Some Hon. MEMBERS: If it is ambiguous.

Mr. MARTIN (*Essex East*): Yes.

Mr. DORION: We have a good example of that in the Westminster statute for succession.

Mr. MARTIN (*Essex East*): I will be frank with you. A number of us have tried to create a preamble and it is a very difficult thing to do. There is no doubt about that. If it was ready you would have it before you now. It is not. It is partially in being, and it seeks to meet this point. We can submit it for your consideration, and that is all we can do.

What disturbs me about this point that we have been discussing, and I think it is a very important point which Mr. Dorion and Mr. Deschatelets have expressed, is because I am sure there will be more uncertainty about this clause unless we clear this point up. I did not appreciate until I was told this morning what the minister said, when he said that clause 2, which is a declaration, will have the effect of law. I understood you to say that. You said this will have the effect of law?

Mr. DORION: Surely, as in the interpretation of other federal laws.

Mr. FULTON: It certainly has the effect of declaring law, yes. I would not quarrel with you that it has legislative effect.

Mr. MARTIN (*Essex East*): Yes. I did not fully appreciate that that was the effect of it because of some of the preliminary words dealing with what is, or is not, an historical fact. The words "there have always existed—", and so on I thought were purely declaratory, and it was intended to be nothing else. Now, if this has the effect of law, and I presume the law officers of the crown are of that view, then we do declare in a federal statute, in the face of this discussion in respect of the word "Canada", to use the minister's own expression which he used this morning, has geographical application as well as legal meaning. We do, clearly with regard to that word, create—surely without doubt—the ambiguity that is in the mind of those who are concerned about this. Likewise with the word "property". The minister said on that point this morning that the word "property", was, of course, only that property which

comes within the competence of the federal government. That is not what the clause says. The clause just says "property".

Mr. FULTON: But we cannot legislate with respect to property and civil rights within provincial jurisdiction.

Mr. MARTIN (*Essex East*): Of course not.

Mr. FULTON: And therefore we would not be taken as doing so.

Mr. MARTIN (*Essex East*): Take the question of interpretation with respect of what is now the national park. Mr. Dorion would know a good deal about this, and Mr. Deschatelets, too, because are Quebec lawyers.

The crown—and I am not blaming this government, because it was done under the former government and, I suppose, it continues under the present government—took over certain lands as part of the national park across the river. At the time there was some protest made by the head of the government of Quebec, on the ground that this was an invasion of the rights of the province under the property and civil rights clause of section 92. We do know—I think in two of the expropriation cases—the tenor of the judge's observations with regard to that. But suppose these cases were up for consideration now, or others arise in the future, an individual will argue in law, on the basis of this statute, that the bill of rights gives the federal government the right to take property that is domiciled within the province.

Mr. FULTON: I do not think the individual's argument would be listened to very long by the courts because, as I have said before, the bill of rights, especially in its present form, cannot affect the fundamental division of authority between the parliament of Canada and the legislatures of the provinces. That is the particular reason why I do not think the argument would stand up, and I do not think it would be raised seriously that the bill of rights gives any federal government rights which it did not otherwise have to go in and expropriate property.

The question of the authority of the federal government to expropriate property would be settled by the courts by applying the law they have always applied under the Expropriation Act, by determining whether there was any federal authority to enact such a statute, which particular authority the federal government would be relying on when it went in to expropriate property.

After all, to elaborate a little bit on that point, it is suggested that the bill of rights, by clause 2, creates uncertainty. Well, I have tried to meet that by saying I think everyone will understand the parliament of Canada not being able, by its own unilateral action, to alter the division of constitutional authority. This statute cannot enlarge the field of our jurisdiction. I do not see how the bill can be alleged to create uncertainty in that way.

There is uncertainty, or has been certainly a good deal of uncertainty as to the B.N.A. Act itself; an almost infinite number of cases have been brought before the courts to clarify the limits of the jurisdiction which the B.N.A. Act was supposed to set. But it is the B.N.A. Act that sets them, and the bill of rights does not purport to alter them. I am unable to see how it can be suggested that the bill of rights, therefore, creates uncertainty.

Mr. MARTIN (*Essex East*): I appreciate your point, and with everything you said, I agreed with that, that the courts would give their interpretation. But we have to think in terms of situations that might arise, where there are opposite opinions and a lawyer, or someone else, seeking to assert a right would, in my judgment, in view of the generality of the language in this statute, conclude that this bill gave him rights which he thought, or would argue, were being guaranteed by the federal parliament, notwithstanding the limitations in section 92.

It seems to me when we are dealing with legislation at the beginning, and when we are confronted with a situation that has been exposed as this is being now exposed, it is our duty, as legislators, and, I say with great respect to you, as Minister of Justice, it is our duty and yours to see to it that there is no possible ambiguity, if we can avoid it.

Mr. Dorion mentioned a few moments ago the so-called legislation of 1933, 1934 and 1935—acts that were proposed with regard to unemployment insurance; and then there were two others, I forget what they were, which were submitted later, by the succeeding government, to the Supreme Court of Canada. They were found to be *ultra vires,* and it was pointed out—and I am not raising that argument for the purpose of reviving that discussion, but just to further complete the point that Mr. Dorion mentioned and to argue it logically—it was pointed out in parliament that it was obvious that for a federal statute to impose contributions on an employee or on an employer was contrary to the British North America Act.

The reply was given: well, the courts will decide that. It was clearly contrary at the time to the property and civil rights section, and it is true that the province gave the constitutional power to the dominion government when that kind of legislation was enacted. That is the kind of situation which confronts us now; and some argue that the word property, in the same form, is open to the interpretation that we give. You have eminent people who argue that, and it seems to me that that point ought to be met, and that there would be no difficulty in an addition in this section in the kind of words that Mr. Dorion has mentioned, or a rephrasing of them in the preamble which would clearly establish that as far as we are concerned, we want to remove the ambiguity.

I think this was in the minds of the Canadian bar association when Mr. McInnes appeared before us. And he said on page 4:

> To sum up, there is uncertainty whether parliament or the legislatures of the provinces may deal directly with human rights and fundamental freedoms.

Then he said:

> It has even been suggested that the imposition of serious restrictions would be beyond the power of parliament as well.

Now, this was in the mind of a section of the Canadian bar association, and it is in our minds, and we will do—or at least I will do no more, as far as I am personally concerned, than to point out what I think is a real point.

I was impressed with it the first time, when looking at the section, and I was confirmed in my impression after I read Mr. Pigeon's article.

Mr. FULTON: I do not think what you have said alters whatever force there may be in what you said earlier.

Mr. MARTIN (*Essex East*): That is right.

Mr. FULTON: You referred to the words I used this morning with regard to the effect of the words "in Canada", and what I said then perhaps I might repeat in connection with this particular context. I said that the declaration in clause 2 referred to the words "in Canada" and would be effective throughout the whole area geographical and legal over which the parliament of Canada has jurisdiction.

This language relates to the heads of Section 91 and it extends over the whole geographical area, and over the whole field in relation to the subject matter. I was careful to point out that there again it has an effect geographically and legally in Canada, and it has had an effect with respect to the heads which are within the jurisdiction of the parliament of Canada itself.

I have indicated that in my view the bill of rights creates no uncertainty, and I base that view on the legal principles that I have referred to. But I have said that in so far as one may argue, and in so far perhaps as I may recognize that there are those who suggest that it created uncertainty—whether I agree with their reasoning or not—that we would be prepared to take a look at a suggested preamble which you are going to put in; and if we can in that way, by appropriate wording in the preamble, display our intention concerning the laws which you and I have been discussing, then it should remove any uncertainty, and we will not be stubborn and say that we will not do it.

I would conclude this part by saying that you should bear in mind that with respect to clause 2 especially there is one difference; we declare that it is as clear and precise and effective as possible, and that is one place where we would want to do that in order to avoid being criticized elsewhere, that is, a cleaning up of the language of unnecessary legal phrases.

Here we felt there was no necessity of putting in such a phrase, and we felt it would read better without it. Now, if we could resolve the uncertainty, and take care of the point in the peamble, I would sooner do it that way than do what I believe would be unnecessary to do in this clause.

Mr. MARTIN (*Essex East*): You can argue it more than that, but you are going to consider it. I have some other points on this section.

I understood, this morning—

The CHAIRMAN: Is your question on the same point?

Mr. STEWART: It is not on the question of the geography part of it. I was wondering if, by setting out the two rights and four freedoms in clause 2 we are not, in effect, restricting the declaration to those freedoms, and there may be others not covered.

Mr. FULTON: I think clause 5 in part II, on page 3 of the bill, takes care of any danger there may be there. Do you wish me to read clause 5?

Mr. STEWART: No; that is the saving clause.

Mr. FULTON: Yes.

Mr. STEWART: I think it might be better to go in there, and put it in this way:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist certain human rights and fundamental freedoms and, without restricting the generality of the foregoing, the following human rights—

and so on.

Mr. FULTON: But, would you accept from me that that might be to insert legalism, and we were trying to avoid it. We recognize it should be in the bill but, to avoid the danger, we thought it would be better to keep it out of here, and that is why we put a separate clause in 2.

Mr. DORION: The word "namely" would indicate it is only an enumeration.

Mr. STEWART: "Existed and shall continue to exist"—and then you name them specifically.

Mr. FULTON: Yes, and I recognize that the normal way of ensuring the courts shall not interpret an enumeration as being exclusive is to say "not restricting the generality of the foregoing", or words to that effect. Normally, you would put it in there but, in order to avoid introducing that particular legalism at this particular point, we inserted it, rather, in clause 5. I feel the inclusion of clause 5 counters the danger you have in mind, and it is more in keeping with the object we have in mind—to get a simple, clear and effective declaration of rights in this clause.

Mr. MARTIN (*Essex East*): Yes.

I was going to deal with the first paragraph of clause 2, but I notice that you leave out the word "always".

I understood that the minister said this morning:

> The use of the expression "have always existed" was appropriate because it would be sheer presumption in a statute to create, as it were, rights and freedoms which parliament has been historically obligated to protect.

That was one of the reasons.

Do I understand now you have agreed to take out the word "always"?

Mr. FULTON: Yes. What I was saying, when I used those words, was to try and outline the reasoning, on the basis of which we included these words, indicating these rights have existed previously in Canada. I recognize there is an opinion that holds that we have gone too far by the inclusion of the word "always", and there is a decided opinion—at least from some—as to what we should do about it. There are those who hold it does not go too far; there are those who hold it should be taken out and nothing substituted—and, that is the word "always"; and there are those who hold it should be taken out and some other expression, or words, substituted such as the words "heretofore" or "hitherto".

I have said, as far as I am concerned, a good argument could be made that "always" does not go too far, but this is one of those cases again where I think one must not be arbitrary and seek to impose what may be a personal opinion on others. I have said that we would appreciate the expression of opinion of this committee as to whether the word "always" should come out. If so, whether nothing should be substituted or whether some other word should be substituted therefor.

Mr. MARTIN (*Essex East*): I agree that it should come out. We all take the view, I hope, that these rights have always existed in Canada; but as there is argument, of some persuasion, that that has not always been the case, it seems to me the more accurate thing to do.

I do not want to argue the point, because you have accepted it; but it seems to me that this is rather doubtful, if this can be construed, if left in, as a reflection on the present and past parliaments. That was a criticism which I understand you made this morning, and one of the reasons why you thought it should be included.

Mr. FULTON: Not quite, Mr. Martin. My point this morning was that I doubt if anyone says these rights are only going to come into existence when this bill passes. These rights have existed heretofore and, therefore, it seems to me to be presumptuous of a government to suggest to parliament at this time that we, by this bill, are creating particular rights which it has always been one of the duties of parliament to protect.

That would seem to be the presumption on the part of the government, and parliament, if it accepted the government's point of view. I said that it was on the basis of that sort of reasoning that the word "always" was included.

Quite frankly, in my view, when I looked at it I felt these words:

> It is hereby recognized and declared that in Canada there have always existed—

and so on, would be interpreted as meaning in Canada, in the legal sense in which that name is used, and I thought that would apply to the British North America Act of 1867, or the point of time when the British North America Act of 1867 was enacted, which said that four provinces "shall form and be one dominion under the name of Canada". That was the way in which I had thought these words would be interpreted. That is what we had in mind when we used them.

Certainly, I do not think anyone would argue that these human rights and fundamental freedoms have always existed since 1867 in Canada; but there are those who say that "Canada" has a connotation going back behind 1867, and I would not argue with that; I would not take an arbitrary position on it. That is why I say that we are open to suggestion with regard to the elimination, and substitution of some other word for "always".

Mr. MARTIN (*Essex East*): That is fine; but I would not think it would be a sound argument to take the position that parliament now could not, by a statutory declaration, say that previous acts were undesirable, on the part of previous parliaments.

Mr. FULTON: It could—and it could repeal them, indeed.

Mr. MARTIN (*Essex East*): Legally, yes. But I understood you had said that to say they had existed at all times would be to suggest that parliament in the past had been derelict.

Mr. FULTON: No.

Mr. MARTIN (*Essex East*): Then I misunderstood you. With regard to the four freedoms that have been mentioned, I think that your comment is right, that we would be restricting them if we were to accept this suggestion. But it seems to me that now that you say this clause 2 is going to have legal effect, we ought to examine carefully what we are saying here. We say:

> It is hereby recognized and declared that in Canada there have always existed—

etcetera, etcetera;

> freedom of religion;
> freedom of speech;
> freedom of assembly and association; and
> freedom of the press.

I certainly agree that we want to have freedom of religion, and these other freedoms, in our country. But the way they are stated there is in absolute form. The law that this clause is now enacting is freedom of religion, freedom of speech and, particularly, freedom of the press, which it is said now exists in Canada. You have absolute freedoms.

Now, that is not the fact. Freedom of the press does not exist in Canada. Freedom of the press—under the Switzman case, and the Alberta case—has been established to be inherent in our parliamentary system and to be outside the competence of provincial governments. There is some doubt as to whether or not parliament itself can abridge that freedom. But freedom of the press is qualified under the law as it exists today—in acts of sedition; in acts of defamation of character. And, that being the case, we do not carry out here those qualifications that are now existing in the law. What we are saying is that freedom of the press exists.

Mr. FULTON: Mr. Martin, I think that probably you are pressing a point to an illogical conclusion. Freedom does not mean licence, and it never has meant licence; and certainly it would not be so interpreted here. Freedom is freedom under the law, and what is happening here now is that parliament is declaring those freedoms and is also laying down rules of construction and interpretation so that these freedoms may not be abridged beyond the point which parliament itself has authorized in the subsequent clause. But to argue as you are that by inference freedom means licence, to my mind is to miss the point entirely.

Mr. MARTIN (*Essex East*): I am not arguing that freedom means licence. I am simply saying, having in mind what we are doing now is enacting a law—we are not merely making a declaration; we are saying what is the law—that we are stating something which is not the law.

Mr. FULTON: Do you say there is not freedom of the press?

Mr. MARTIN (*Essex East*): I say it has qualifications.

Mr. FULTON: Because it is not licence. Freedom does not mean something which is absolutely untrammeled.

Mr. MARTIN (*Essex East*): I can merely say that this is not an accurate expression of the section. If we said it is hereby recognized and declared that in Canada there has always existed and shall exist freedom of the press subject to the existing law, that would be an accurate statement. That qualification may not be acceptable language, but it would be a statement of the law as we intend it to be; but that is not what we are saying. What will arise if the freedom of the press is refused is that litigants will say "Oh, but look at the bill of rights. You cannot restrict us from saying in the press what we have said because this section says there is freedom of the press".

Mr. FULTON: Freedom does not mean licence. It is well understood to mean freedom under the law.

Mr. MARTIN (*Essex East*): I just make the point. I think you have given it consideration. I point out that Mr. Bora Laskin—is he coming here?

The CHAIRMAN: No.

Mr. MARTIN (*Essex East*): He argues this point pretty thoroughly and I thought rather impressively. There is another point in these proceedings. I presume that when you say these freedoms exist, the legal bases, apart from this bill, are mainly the decisions of our courts, and particularly in the last decade, the Supreme Court of Canada.

Mr. FULTON: I do not quite go along with that. These freedoms are inherent. We are declaring them now and giving them a legal basis. I would say the decisions of the courts are rather guide posts and interpretations of the extent of those freedoms and in some areas indicates whether they lie within the federal or the provincial jurisdiction. I do not think the judgments of the courts created them.

Mr. MARTIN (*Essex East*): No. They have confirmed their existence.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): But Mr. Dorion mentioned a case with which I am not familiar, which is now current in Quebec, where part of the argument surrounds the question of freedom of religion.

Mr. DORION: That exactly. That question was raised in the Saumur case in the Supreme Court. It was in connection with the municipal bylaws. The last case to which I alluded is in connection with an amendment brought by the legislature to chapter 307. This amendment was in order to determine that if there is a licence in the activity of any group it would be possible to have an injunction. The initiative in this case came from the Jehovah Witnesses. They asked that it be decided that this amendment and the chapter amended are without provincial jurisdiction.

The CHAIRMAN: Outside of it.

Mr. DORION: Yes, outside of it.

Mr. MARTIN (*Essex East*): I think this is of course desirable, to want to see freedom of religion in this country—absolute freedom. But the minister has perhaps met my point when he says that the basis for this is not basically the Supreme Court, because those decisions—the Jehovah Witnesses case is a good example—establish freedom of religion within the context of the particular facts that are before the court.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I do not think they go beyond that. You have said that what you are doing now is, you are dealing with the whole field comprehensively and you are saying, by this bill, there is freedom of religion. I am not in the position, nor would I want to be in the position, to argue that anyone can successfully contest that.

Mr. FULTON: One other reason that I think could be argued in favour of making a legislative declaration, Mr. Martin, is that some of the judges, in any event, in respect of that series of cases in the Supreme Court, have felt impelled to rest their reasoning and their conclusions in part on the preamble to the British North America Act which says that Canada shall have a constitution similar to that of the United Kingdom. As Professor Cohen said, this is because of our legal technique. Our judges would reach out for something, and they are happier when they can find some written statement of law on which to rest their conclusions rather than having to reach them from *a priori* reasoning. I think this is something which legislators have to take into account, and I think it would be a great help to the Supreme Court of Canada if they could find a statute of the parliament of Canada upon which they could rely rather than having to go to a preamble, which is of limited, at any rate, if not doubtful, legislative effect.

The CHAIRMAN: Mr. Stewart, would you like to interject at this point?

Mr. STEWART: I would like to have a comment from the minister on the suggested change to clause 2 (*b*). This might not improve it, but I would suggest this: "the right of the individual to equality under the law, and the right not to be discriminated against because of national origin, colour, religion, or sex".

Mr. FULTON: I just want to get those words down.

The CHAIRMAN: Would you repeat that, Mr. Stewart?

Mr. STEWART: "the right of the individual to equality under the law, and the right not to be discriminated against".

Mr. MARTIN (*Essex East*): You are suggesting that instead of the word "protection".

Mr. FULTON: Mr. Stewart, I think the answer was given in part in discussions I had with Professor Cohen yesterday. I am referring particularly to the last part of your suggestion; the right not to be discriminated against by reason of race, colour, religion, or sex. You will remember, we say we are enacting law here, and I am wondering whether that does not create more difficulties than the declaration in the present form. I gave the example of the man who advertised that he wanted to enlist persons to be part of a chorus in a stage show. If you said that everyone has the right not be discriminated against on the grounds of sex, you may be making it impossible for this man to say "only women need apply", because a man might say: "I am being discriminated against on grounds of sex". There were a couple of other illustrations which I gave.

The other point, and perhaps a more serious one, is that here is an area most certainly where most of the laws covering the point you have in mind are expressed under the heads of section 92. It would seem to me that to state it in that form, you are then certainly in danger of what has been discussed here earlier; namely, going beyond the limits of federal jurisdiction. You are certainly pointing pretty directly towards something which is under provincial jurisdiction. That is why we felt the present form of words is preferable, and they were adequate because of the scheme of this legislation.

Clause 2 (*a*) declares the rights of a person in a definitive sense; the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law. Here you have outlined an area of the great fundamental rights.

Now, I think we have mostly agreed, at any rate, that the ultimate protector of the rights of the individual, under our constitutional system, is the courts. So, having established those rights to apply to all individuals in Canada, we think we have given them adequate protection, not only when we say that he has those rights, but also under 2(*b*):

> the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion or sex.

We think that under that section, without any danger of infringing upon provincial jurisdiction, we have adequately defined the rights of the individual and have given him the means by which he may protect them.

Mr. AIKEN: Mr. Chairman, to refer back to the point raised by Mr. Martin, on the same objection to the words "have always existed" in the second line, I wonder if it would suit the purpose if we eliminated those three words and substitute "should have existed"?

Mr. FULTON: That would certainly be an almost direct statement they had not existed prior to this time; and I think that would be going too far in the other direction.

Mr. MARTIN (*Essex East*): I think the suggestion that "always" be deleted is the way to do it.

The CHAIRMAN: I think Mr. Aiken originally suggested "hitherto," and I wonder if he has retracted from that position?

Mr. MARTIN (*Essex East*): What about this point with regard to clause 2(*b*)? I raised in the house this question with the Minister of Public Works: a negro in my city, Mr. Spencer's city—

The CHAIRMAN: Do not forget I have a share of that city, quite a large share!

Mr. MARTIN (*Essex East*): —was denied the right to a loan under the Central Mortgage and Housing Act. His case was taken up, I think, by the U.A.W. There was considerable correspondence with the minister, who pointed out this was a matter that came under the property and civil rights clause of section 92, and while he sympathized with the point of view of the representations, the only remedy that he could see was one that lay with the provincial authority.

I raised the matter in the house, and it was suggested we would give further consideration to that. At that time he said that he would look into it and he would refer it to the Department of Justice. Later he told us that he had arrived at some formula, in consultation with Justice, whereby the federal government, as the guarantor of at least 75 per cent of the moneys loaned, would make it impossible for that kind of discrimination to exist.

Perhaps this is not the place to pursue it, I do not know; but are you familiar with that situation?

Mr. FULTON: Not in detail, Mr. Martin, and I would want to consult with my colleague before giving you a final and definitive answer. But I can certainly go so far as you have gone, and I can confirm that what you have said is the situation—namely, that my colleague has become concerned with the situation to which you refer and that his department and my department have been working together to produce a formula by which such a situation could not occur in the future with respect to contracts to which the Central Mortgage and Housing Corporation is a party, or in which it has an interest.

Mr. MARTIN (*Essex East*): The discrimination was on the basis of colour.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I should have added this, that he did say that after the bill of rights had passed he would introduce or announce the formula that he hoped it would be possible to work out. I suggested, as we were dealing with this matter in principle, at any rate, the formula he had in mind might be referred to this particular committee for consideration. However, it may be our terms of reference do not permit me actually to look into the matter, and I think that would satisfy me for the moment.

Mr. FULTON: Yes, and my understanding is that we have found a formula which is acceptable to public works, and C.M.H.C., and which we believe will produce the result of preventing such discrimination in the future in that field.

Mr. MARTIN (*Essex East*): I have one more question on this clause, and that is concerning the words "due process" in line 10. The words "due process" are not as current in use in our courts and in our legal discussions as they are in the United States. The interpretation of the phrase "due process" in the United States arises out of a particular section in the constitution of that country, and the line of judicial decision as to what "due process" implies is, of course, as we all know, very great. But in Canada this is not a phrase which is in current use. Are we not, by the use of this phrase, going to create a situation in our country which will be somewhat comparable to the situation which began in the United States when this particular phrase was first used in the constitution and create a whole series of definitions and refinements to fit particular circumstances?

I have a further observation to make that it is not clear what we mean by "due process" in this context. Is it "due process" according to natural justice, or is it "due process" according to law?

If it is the latter, would it not be much better just simply to say "shall not be deprived thereof except by law"?

Mr. FULTON: This question was raised in Professor Cohen's statement yesterday, and he pointed out something which I think you will be interested in, and it was, that "due process"—and I took his words down—"due process" as a phrase has a respectable lineage. And he traced it back as far as Coke, in the seventeenth century, and he admitted that it has not been a phrase of wide application and use in the common law tradition or the Anglo-Saxon constitutional tradition. But it has been a phrase which has existed in our law for all that time.

So it was our view that in trying to interpret this phrase our courts would refer to the American jurisprudence which has been built up around that phrase.

I am not for a moment suggesting that they would follow them as a precedent, but rather that they would refer to them as guides or illustrations, if you like, of the way in which these words should be interpreted and applied.

I have a note here on the basis of the study we made of the phrase when we decided to incorporate it to the effect that:

> In applying the due process clause to substantitive rights, the courts in the United States have interpreted the provision to mean that the government is without the right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. The due process clause is intended to protect against arbitrariness.

"Due process" is intended to protect against arbitrariness; and while it is quite true that the current or more recent trend of American jurisprudence is

following a line somewhat different from the earlier trend of their cases under the "due process" clause, as I have said, it is our view that the courts would look at the American experience as illustrative of the ways in which this phrase might be applied, that they would look at the whole of that experience, and would not necessarily tend to follow only the earlier part of that experience, but would apply the whole thing in a manner in which to them it seemed most apt to apply it in Canada.

Mr. MARTIN (*Essex East*): I suggest that you give consideration to the suggestion, if we do agree on a preamble and decide to incorporate it in this bill, because we want to make this bill as appealable in form as possible.

Mr. FULTON: As what?

Mr. MARTIN (*Essex East*): As appealable as possible.

Mr. FULTON: As appealing, you mean.

Mr. MARTIN (*Essex East*): Yes, as appealing as possible.

Mr. FULTON: I think "appealable" would mean that we would have cases and they would be appealed from court to court.

Mr. MARTIN (*Essex East*): Section 1 ought to be at the end of the act.

Mr. FULTON: At the end of part I or the whole act?

Mr. MARTIN (*Essex East*): The end of the whole act.

Mr. FULTON: Well, I pointed out to you we did that in order that it becomes clear it is part I that is a bill of rights. That is the part we wanted to be able to frame, or hang up on the wall.

Mr. MARTIN (*Essex East*): Or, part II.

Mr. FULTON: It is a more technical part and a more transitional clause, and affecting the War Measures Act. We did not want it as part of the bill of rights, and that is why we said part I might—

Mr. MARTIN (*Essex East*): Well, I will have something to say on that later on.

I had some other observations, not on sections, but on some of the points you made this morning. However, you want to go on to the sections, and then come back to the generalities later.

Mr. FULTON: As you wish.

The CHAIRMAN: Does that conclude clause 2? If so, may we now proceed to clause 3.

Mr. RAPP: In connection with clause 3, Mr. Chairman, I was going to ask a question of Mr. Cohen yesterday, but we did not have enough time. I would like to have some clarification on subsection (*a*) of clause 3:

> Authorize or effect the arbitrary detention, imprisonment or exile of any person.

Would the word "exile" mean those people who have no citizenship, or naturalized Canadians? How would that apply in relation to the War Measures Act, and how would it apply in relation to our existing Immigration Act?

Mr. FULTON: Well, to answer the first part of your question first, during a period within which the War Measures Act was in effect under a declaration that had not been revoked by parliament itself in the method provided in clause 6 of the bill, the powers given under the War Measures Act would be open for the use by the governor in council—by the government. But, as I say, the important thing to bear in mind here is that while we believe that a government must have emergency powers in wartime, we have made it clear that no government can resort to emergency powers as contained in the War Measures Act by an unjustified implementation of the War Measures

Act, and parliament itself has the right to review whether, under the circumstances, the government should have declared the War Measures Act in force. So, there is that protection given against the improper invocation of emergency powers by the government.

Now, with regard to the Immigration Act, I do not know that I can answer your question in quite the general form in which you asked it. I know it is dangerous to particularize on hypothetical cases, but if you could give me an example as to exactly what sort of a situation you have in mind, I will endeavor to answer it for you.

Mr. RAPP: Well, under the present Immigration Act, as it was amended, say last year, a person—a naturalized citizen, or a person who had not obtained his naturalization papers here, he can be exiled under certain regulations, or in certain cases.

Mr. FULTON: Forgive me for being technical, Mr. Rapp; but what you describe is deportation, not exile, because under the Immigration Act there is no power in the government to order the deportation from Canada of a person who is a naturalized or natural born Canadian citizen—no power whatsoever.

If I recall it correctly, the Immigration Act authorizes only the exclusion or the removal from Canada of persons who have not acquired rights either as landed immigrants or as Canadian citizens. And they are entitled to a hearing—so that, there, any order made against them would only be after a hearing, and they would only be deported in accordance with the law.

Mr. RAPP: Under the War Measures Act, that would apply much more so?

Mr. FULTON: Well, the powers of the government under the War Measures Act, are—

Mr. RAPP: Extensive?

Mr. FULTON: —are extensive. And, indeed, we have had witnesses here who have told us, in no uncertain terms, that in their view they are much too extensive; and the Prime Minister has declared it to be the intention of the government to have a review made of the War Measures Act at the appropriate time.

Mr. RAPP: What protection will this bill give, or what more protection will this bill give than there was before—in the enacting of this bill?

Mr. FULTON: With respect to what type of person?

Mr. RAPP: To naturalized citizens that would be deported. Would this give them more protection?

Mr. FULTON: As I have said, there is no right to deport a naturalized person, except under such powers as may be contained in the War Measures Act, and what protection those persons will have if this bill becomes law—with respect to the protection they have, in regard to the War Measures Act, is that parliament, for the first time, is given the right to review the declaration under which the powers of the War Measures Act were brought, or effected. If Parliament feels that the government is trying to create an imaginary emergency for the sake of getting these emergency powers, it can, by the procedure provided in clause 6 of the bill—can set aside the proclamation by which the War Measures Act was invoked, and then those emergency powers cease.

Mr. RAPP: I had in mind the Japanese case, in 1947 or 1946.

Mr. FULTON: I think that I have to answer that by saying that that Japanese deportation order was made under the War Measures Act. They would have a greater measure of protection now, in that parliament could, as I say, review the declaration under which the War Measures Act was brought into

effect. I would point out that in addition subsection 4 of clause 6 gives parliament the right at any time to revoke the proclamation, so that if parliament considers that a government was exercising its powers under the War Measures Act long after the emergency of war had passed it could revoke the proclamation and the War Measures Act would cease to be in force and effect.

Mr. RAPP: Thank you.

Mr. BROWNE (*Vancouver-Kingsway*): How could this be brought up in the first instance? It says if the proclamation is made it must be brought before parliament within ten days to determine whether the proclamation was proper or not.

Mr. FULTON: Yes.

Mr. BROWNE (*Vancouver-Kingsway*): Assuming that parliament then felt the need had passed, how would it be raised in parliament again? What provision is made to raise the matter again?

The CHAIRMAN: I do not think that is covered by subsection 4.

Mr. FULTON: I would rather wait until we get to clause 6 and study this in somewhat greater detail to check my answer to you on that point.

Mr. MARTIN (*Essex East*): I am told the minister said this morning that there was no doubt that section 3 would have a retroactive effect and that that was one of the reasons why you decided not to have an amendment to the B.N.A. Act, because that would present some difficulties. On the question of the retroactivity and the other side of the coin, if I may put it that way—the question as to whether or not this bill renders inoperative any existing inconsistent legislation—I suggest to the minister that the language of the section is so general that it cannot be deemed to have that effect, notwithstanding what is said in the operative part of the section. Now, in support of that, I point out to the minister something he well knows; that is, that the existing charters—the Habeas Corpus Act, the Act of Settlement, the Bill of Rights, the Magna Carta and so on—are part of our fundamental law and it is not very frequently that one finds decisions of the courts which are based upon direct reference to these charters. I suggest one of the reasons, as Mr. Laskin points out, is that these charters are in such general language that when the court is confronted with a particular set of circumstances on which it must make a judgment it invariably looks at the section of the act. I suggest in litigation that will ensue—and we are told by the vice president of the Canadian bar association that that body looks upon this as being capable of promoting much litigation—that the courts will not regard inconsistent acts, with the generality of this language, as inoperative or no longer in being.

Mr. FULTON: Of course, Mr. Martin, I speak with deference to the learned vice president of the Canadian bar association, but I think there is a difference between the effect of this bill of rights in its application to statutes past or future and the application of the great charters of the past to which you have referred. I think that difference arises in this way; the charters are all ancient constitutional documents. It is a principle of legislation and of the supremacy of parliament—it is also a principle of interpretation—that in looking at a statute the courts will look at the last enactment of parliament, and if there are inconsistencies between statutes the general principle is that it is the last enactment that speaks, because parliament does have the right to alter its previous enactments. Therefore, parliament is presumed, where there are inconsistencies, to have intended to alter the older statute. Therefore, supposing there was a statute in force which gives to an administrator operating under it—an officer acting under the authority of the statute—some arbitrary power which appears to be inconsistent with one of the old historic documents. Of

course, quite properly so, it must have been the intention of parliament to set aside the protection of the old historic document because here is an express statute, or a statute expressly authorizing the kind of action which has taken place.

Our bill of rights says explicitly that all previous statutes of the parliament of Canada, and all regulations and orders made thereunder, shall be interpreted in accordance with the bill of rights. Therefore, our bill of rights is expressly made applicable to those statutes. Therefore, with respect to past statutes the court is instructed to interpret them in accordance with the bill of rights, whereas, if the court had only to rely upon great historic documents which preceded in time by a very many hundreds of years, any statute of the parliament of Canada, the statute of the parliament of Canada in question would be the latest one, and the courts would properly hold that to override the Magna Carta, or any old historical documents.

Similarly with respect to federal statutes, we have made a provision in the bill of rights which we believe will carry forward the effect of this bill as a rule of construction and interpretation to be applied by the courts even in dealing with statutes passed after this bill of rights; because, we have provided that, unless a subsequent statute expressly set aside the bill of rights, the bill of rights will apply as a rule and a direction to the courts as to how to apply and interpret the subsequent statute. I think that those words speak for themselves, and I believe that the effect of them is as I have outlined them.

Mr. MARTIN (*Essex East*): You said this morning, without mentioning particular statutes, that a good number of them would become casualties.

Mr. FULTON: I said we anticipated that we may have a number of casualties. In the words I used, I said there would be some risk, some problems and perhaps some casualties.

Mr. MARTIN (*Essex East*): Have you had the opportunity, through your officials, of listing the statutes that will be amended to remove any doubt, or did you feel that there could be no doubt that this will override any existing statute, as you say, and that consequently you need not be concerned about going through the process of repealing them?

Mr. FULTON: We have, as I said this morning, made a general survey of the statute law of Canada, and we feel that, generally speaking, the bill of rights will override any statute now on the books in the respects covered by the bill of rights. I would not care to say there will never be any question of doubt, and that there will never be a case where the courts will give this bill of rights the full effect that we say might be given to it. Indeed, as Professor Cohen pointed out yesterday, judges could apply the bill of rights, and may be inclined—some judges may be inclined—to say: well, we have to take some account of administrative convenience; and some judges may tend not to give the bill of rights the wide application which it might otherwise have. If we find that to be the case, and on examination, feel that this is a case where the bill of rights should apply, then it will be for parliament to decide whether or not to amend the statute under which the action complained of has been taken, and has been upheld by the courts. Generally speaking we think the bill of rights will prevail. Where cases of doubt, or uncertainty arise on the part of the courts in applying the statute and in applying the bill of rights, or where indeed the courts take a contrary view to that which I have expressed, then we may have to deal, by legislation, with the particular case and particular statute in question.

Mr. MARTIN (*Essex East*): To be specific, if I could address myself to paragraphs (*e*) and (*f*):

> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; or

(*f*) deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

The bar association addressed itself to this problem at page 10, when Mr. McInnes asked:

> What is the difference between the requirements of sections 3 (*e*) and 3 (*f*), "a fair hearing in accordance with the principles of fundamental justice" and "a fair and public hearing by an independent and impartial tribunal"?

Mr. FULTON: Well, Mr. Martin, paragraph (*e*) deals with the determination of his rights and obligations generally, whereas paragraph (*f*) deals with the determination of matters in a specific field, namely criminal charges. So there is that difference between the two paragraphs. I think that answers your question.

Mr. MARTIN (*Essex East*): Yes, I think it is an answer, and I want to give consideration to it.

On the other point we were talking about a moment ago, that I was seeking to do but I diverted myself—as to whether or not this bill overrides inconsistent legislation, Mr. McInnes said:

> Is section 3 (*f*) intended to modify provisions of the Criminal Code and the Juvenile Delinquents Act which provide for hearings in camera, provisions which hitherto have been afforded primarily as a protection to the accused?

Mr. DORION: On this point, Mr. Chairman, I would like to make an observation—

Mr. FULTON: In answer to that specific question, Mr. Martin, the Criminal Code and the Juvenile Delinquents Act, strictly interpreted, do not deprive a person of the right to fair and public hearing. They provide that the court may, in places where it deems it appropriate, have a hearing in camera. I think it might be argued, as a result of this clause, if the accused insisted on a public hearing, if he himself wanted a public hearing and insisted upon it, then the court might have to grant it to him.

The CHAIRMAN: Is that your point, Mr. Dorion?

Mr. DORION: Yes, that is the essence of the observation I wanted to make.

Mr. MARTIN (*Essex East*): You think that covers it?

Mr. DORION: Yes, because it is a right of a person and not an obligation on the court.

Mr. MARTIN (*Essex East*): Take all these sections in the Immigration Act. I cannot name them by sections, but there are some of them that certainly would not be in keeping with these clauses. Once this bill is passed, will an individual be able to resort to these particular sections and argue, with success, that the department must give him a hearing?

Mr. FULTON: Yes, it must give him a hearing.

Mr. MARTIN (*Essex East*): In accordance with these and not in accordance with the Immigration Act?

Mr. FULTON: You would have to demonstrate some inconsistency between the provisions of the Immigration Act and the bill of rights. There may be some, and if there are, you might have to look at the Immigration Act, if a case arose.

But paragraph (*f*)—which says:

> (*f*) deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

—relates only to criminal charges.

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: Paragraph (*e*) says:

> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

The Immigration Act allows for a hearing, and certainly we think the hearing should be fair and should be in accordance with the principles of fundamental justice.

Mr. MARTIN (*Essex East*): What would happen in a case like this: an individual feels a particular right has been violated by a decision of a department of government. The decision of the department of government is communicated in a letter. There has been no face-to-face consultation between the departmental official and the individual, and the individual gets a letter and he says, "I want to have a hearing on this." He argues his rights have been violated.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I have a case right now where that has been denied. Will this individual, under this bill, be entitled—I do not mean to a hearing in court, but will he be able to go to someone and say that he wants to see this official and argue out his point of view?

Mr. FULTON: I would have to know first what the right was that he alleged he had been deprived of; secondly, under what statute or authority the departmental official purported to act, before I could give you an answer.

Mr. MARTIN (*Essex East*): This was a case of an assessment of a man's income tax; he was a farmer, and he was denied the opportunity.

Mr. FULTON: I would certainly have to have the facts of the case before I could give a satisfactory answer to your question.

Mr. MARTIN (*Essex East*): It was an individual—and I will show you the correspondence—this individual was a farmer, and he had been given an assessment.

Mr. FULTON: The Income Tax Act, so far as I am aware, provides for individuals to protest against their assessment, and there are procedures by which they can appeal; they can appeal from the decision of the department. I do not know if the statute itself could be said to deprive any person of a right to a hearing. However, I would have to know the facts of the case before I could give you a more definite answer. I know there are allegations of abuses of a statute, but I would have to see, to answer your question, as to whether the statute actually authorizes the course taken.

Mr. MARTIN (*Essex East*): Let us suppose that a man has been apprized by the immigration department that he must be deported. It is true that he has proceedings available to him in court, but he may not want to go to the courts. He may just want to go to the official and ascertain why he is being denied.

Mr. FULTON: My understanding of the Immigration Act is that an order to deport can only issue after a hearing; it can only be made after a hearing, and that the hearing must be conducted in accordance with the principles of fundamental justice, according to clause (*e*) in the bill of rights.

Mr. MARTIN (*Essex East*): That was just a hypothetical case I was projecting in my own mind.

Mr. FULTON: It does not give the right to have an unlimited number of hearings, but he must have had a hearing in accordance with the principles of fundamental justice.

Mr. MARTIN (*Essex East*): Does that apply to any person, be he a citizen or not?

Mr. FULTON: An order to deport a man cannot be issued against a citizen.

Mr. MARTIN (*Essex East*): Paragraphs (*e*) and (*f*) apply to any person?

Mr. FULTON: Yes, to any person, that is right.

Mr. MARTIN (*Essex East*): Let us suppose that a person is here as a visitor for six months and he feels he has good reason why that period should be extended. Would he be given, under this section, an opportunity to have a fair hearing? I do not mean a tribunal hearing.

Mr. FULTON: No person, under the construction we would apply, would be deprived of any right under subclauses (*e*) and (*f*).

Mr. MARTIN (*Essex East*): What would be your answer to the question which Mr. McInnes posed on page 10 of his brief, in the last sentence of the last complete paragraph:

> Will decisions of the Minister of National Revenue on taxation matters now be open to question by the courts before appeal to the tax appeal board?

Mr. FULTON: It is my impression where decisions of the minister are made which would have the effect of depriving a person of some of his alleged rights, for example, in connection with income tax, then I suppose that paragraphs (*e*) and (*f*) would apply. But it is also a fact that the Income Tax Act itself provides for appeals by taxpayers from assessments; and that is generally the way it is done.

Mr. MARTIN (*Essex East*): You admit that there are possibly some sections in the Immigration Act and possibly other cases which are inconsistent, and that at some point they would have to be reconciled. But I would point out to you that Mr. McInnes, in the middle of his page 11 said:

> The other interpretation is that a general declaration such as this will not affect existing provisions that are directly contradictory. . .

Mr. FULTON: What is the page?

Mr. MARTIN (*Essex East*): It is page 11, just before the middle of the page.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): Where Mr. McInnes points out as follows:

> The other interpretation is that a general declaration such as this will not affect existing provisions that are directly contradictory, for had parliament intended to repeal the contradictory provisions it would have done so explicitly.

Mr. FULTON: And, he goes on to say:

> If the latter interpretation prevails, the bill of rights will not substantially modify existing law.

I do not think I can quarrel with his statement, but with the modification that he put in in the last sentence which I have just read.

It is our view that a court really would not find much difficulty in holding that the bill of rights has explicitly repealed the contradictory provision, because it says:

> All the acts of the parliament of Canada enacted before or after the commencement of this part, all orders, rules and regulations thereunder, and all laws in force in Canada or in any part of Canada at the commencement of this part that are subject to be repealed, abolished or altered by the parliament of Canada, shall, unless it is otherwise expressly stated in any act of the parliament of Canada hereafter enacted, be so construed and applied as not to abrogate, abridge or infringe—

and so on.

I do not know how you could have words more specifically applying the bill of rights to the previous statutes.

Mr. MARTIN (*Essex East*): He goes on, and I quote:

> It would be a courageous judge who would rule the Lord Day's Act inoperative in a prosecution against a non-Christian member of our community who raised the bill of rights in his defence.

Mr. FULTON: Well, I am afraid I do not know exactly what he has in mind, and he does not elaborate.

Mr. MARTIN (*Essex East*): Well, the part of section 2 where we speak of freedom of religion will have a very definite implication in so far as the bill of rights is concerned.

Mr. FULTON: Well, of course, that would be a question where you have to see how the courts interpreted the activity with which the individual was charged, or rather, the activity giving rise to the charge under the Lord's Day Act, and the courts would have to decide whether what he was doing was really in the exercise of his freedom of religion or not.

Mr. MARTIN (*Essex East*): Well, those are illustrations of the kind of concern that exists. Of course, I have some trouble in being satisfied that the generality of this bill does negative operatively any existing inconsistent act.

Mr. FULTON: Well, what I have said before, and have said now, might be taken subject to the qualification I have expressed. If and where it is held by the courts it does not so negative the operation of an existing act, we will have to deal with that case on the basis of the situation thus disclosed.

Mr. MARTIN (*Essex East*): What we are doing is transferring to the courts a responsibility which I think belongs to parliament.

Mr. FULTON: Well, I think a logical inference to be drawn from your argument is that parliament should not seek to make the bill of rights applicable to statutes previously enacted. We hold a contrary view.

Mr. MARTIN (*Essex East*): I would say the bill of rights must apply to existing statutes, but must be worded so as to remove any doubt.

For instance, take paragraph (*b*):

> —shall be construed or applied so as to
>
> (*b*) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment.

Now, there will be a strong argument made by a lot of lawyers and people who think that means we, by this act, are removing capital punishment.

Mr. DORION: Or, whipping.

Mr. MARTIN (*Essex East*): Or whipping. I would say the words "cruel, inhuman or degrading"—"inhuman and cruel", and, for some, "degrading", would be construed in that way and, indeed, that is the submission of the Canadian bar association.

Mr. FULTON: All I can say to you is that if the courts should hold that hanging is "cruel, inhuman or degrading treatment or punishment" then we will have to deal with that situation. However, it is our opinion the courts would not so hold, provided the punishment was inflicted in the proper manner. I am not talking about abuse or carelessness in the manner of carrying it out. But if we were wrong, and the courts held that the bill of rights had the effect of abolition, which I think is beyond the realm of possibility, then we would have to deal with that situation.

Mr. DORION: If there was not the word "punishment" there, it would be quite different.

Mr. MARTIN (*Essex East*): What was that—I did not understand it?

Mr. DORION: If there was not the word "punishment", it would be different, because I believe that punishment has, surely, a legal meaning.

Mr. FULTON: Yes.

Mr. DORION: But with that word I believe it is dangerous, in that it is a contradiction of certain articles of the Criminal Code. Do you not believe that it would be sufficient to have all the phrase, but without the word "punishment"? It would be applied, for example, to treatment given by a police agent.

Mr. FULTON: I do not know, Mr. Dorion. When you are making a bill not only of retroactive but of prospective application, I think you should ensure that no statute hereafter enacted shall authorize the imposition of cruel, inhuman or degrading treatment or punishment. I think that should be in a bill of rights.

You say there is a danger that the courts, in interpreting it and applying it to the present provisions of the Criminal Code, which impose the sentence of death by hanging for a convicted murder, may hold that that provision is a provision imposing a cruel, inhuman or degrading punishment. I think that is a remote possibility.

As I have said, if the courts should so hold, we would have to deal with the situation thus created. But I think that the danger of such interpretation and application by the courts with respect to those provisions of the Criminal Code is so remote that we are justified in taking that risk in order to achieve the greater advantage of writing into our bill of rights a prohibition against statures being passed in the future that authorize cruel and inhuman punishment.

Mr. DORION: I believe that the only authority who has that right to impose punishment is a judge.

Mr. FULTON: But he can only impose it within the limits authorized by the statute.

Mr. DORION: He is obliged to impose it within the limits authorized by the statute. For treatment, it is different. Suppose a person is arrested and is ill-treated by the police: I understand that it would act against that provision.

But punishment is the privilege of a judge, and the right of a judge—and that right is defined by the code.

Mr. FULTON: Yes—and it is the duty of the judge.

Mr. DORION: Yes, and the duty. But punishment is not the duty of everyone, except of the judge. In consequence, I do not understand why "punishment" is there, when the punishment is defined and imposed in accordance with the law.

Mr. FULTON: But we are dealing here with statutes that may be passed in the future, as envisaged, and we want to prevent the passage of any statute which authorizes the imposition of torture, cruel, inhuman or degrading punishment.

It is the judge who is the agent, it is true—who applies and orders the punishment which the law provides. But it is his duty. He does not authorize the punishment; he merely imposes the punishment which the code itself requires him, as a duty, to impose.

The CHAIRMAN: I was just wondering, Mr. Dorion, if you are not slightly misapplying this clause. I rather gathered from you that you were thinking of the imposition of torture or inhuman treatment by individuals.

Mr. DORION: No—but individuals acting in their capacity as agents.

The CHAIRMAN: You mean, like a police officer?

Mr. DORION: Yes, as agents of the federal government.

The CHAIRMAN: I do not think, Mr. Minister, that this clause has anything to do with it, has it? I do not think it has anything to do with misconduct on the part of a police officer, such as beating somebody up, or something of that kind.

Mr. MARTIN (*Essex East*): Treatment or punishment.

The CHAIRMAN: But he is not acting under a statute.

Mr. FULTON: Then your remedy would be against the policeman himself, because the policeman could not claim that any statute—at least, any statute presently in force—authorized him to treat his prisoner brutally. Therefore, this does not add to or take away anything from the present law in that respect.

Mr. DORION: In a certain measure, this is a declaratory statute?

Mr. FULTON: Yes, and it simply declares that no statute, past or future, shall be so construed as to impose, or authorize the imposition of cruel or inhuman treatment or punishment.

The CHAIRMAN: It is a statute. Mr. Deschatelets, did you have a question?

Mr. DESCHATELETS: I was about to ask Mr. Fulton what is behind this section 3(*b*). I did not understand it very well. What is the purpose or aim of that?

Mr. FULTON: I do not think I could do better than to actually refer to the words of the subsection. Its purpose is to prevent the passage of any statute in future and to prevent the making of any regulation under any statute which would have the effect of imposing or authorizing the imposition of torture, or cruel, inhuman or degrading treatment or punishment.

Mr. DESCHATELETS: Would it add more strength or would it clarify the wording if we said "to prevent the illegal imposition of torture," and so on.

Mr. FULTON: I do not think so, because if you have a statute which says it is illegal, or a statute which says the court may—I will exaggerate—order a man to be flayed, it could be argued that it would be a legal punishment because it was authorized by statute. If you rested your case only on the use of the word "illegal" you would not be giving the prohibition we are trying to give. We are trying to prevent the imposition of any of these kinds of punishment. Therefore, we have tried to stop the passage of the statute itself. I do not think the word "illegal" is a sufficient safeguard.

Mr. DORION: If we have to construe the statute in such a manner I believe it would be the abolition of capital punishment.

Mr. FULTON: As I have said there are some who hold that view. I do not. I will find this for you, but I believe similar words are in the English bill of rights and they have continued with capital punishment and have it now.

Mr. DORION: But do you believe that they have an equivalent of article III of our draft bill of rights?

Mr. FULTON: I beg your pardon, Mr. Dorion?

Mr. DORION: You referred to the English bill of rights.

Mr. FULTON: Yes. I have just sent for it.

Mr. DORION: In order to determine if we can draw a conclusion in examining that bill of rights, we have to know if there is something similar to clause 3 of the present bill of rights, because clause 3 in the present bill of rights means that all these rules—new rules—are caused to be applied to every act.

Mr. FULTON: Yes. There is a rule of construction which the court is directed to follow in interpreting statutes presently in force.

Mr. DORION: In consequence, I believe the result is the abolition of capital punishment.

Mr. FULTON: If somebody should present, say, a writ of prohibition against the execution of a sentence of hanging and if the court before whom that is

heard should say that this is contrary to the bill of rights—that the bill of rights overrides the Criminal Code—then you would have a debate on capital punishment in a real sense because we would have to act to take care of that situation. My view is that there is only a very remote possibility that a court might so hold. Looking at the English bill of rights of 1689, and this is the relevant provision—I am afraid I will have to read the introductory words:

> An act declaring the rights and liberties of the subject, and settling the succession of the crown.

Mr. DORION: That was a preamble?

Mr. FULTON: Yes, I think that is a lengthy bill of particulars of complaints against the sovereign.

Then it goes on as follows, after the preamble:

> And thereupon the said Lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare:

It is interesting to note that this is a declaration.

Then we come to section 10, which says:

> That excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Mr. MARTIN (*Essex East*): It says "unusual punishments inflicted".

Mr. FULTON: Notwithstanding that provision in a solemn statute of the United Kingdom, they continue capital punishment.

Mr. MARTIN (*Essex East*): Yes, but it says, "unusual".

Mr. FULTON: It says, "cruel and unusual". I am quite certain that they have amended the reenactment of their capital punishment provision since 1689.

I am not saying this necessarily disposes of the case, but I am saying there is a strong argument, in support of my view, that the courts would not hold our bill of rights does abrogate capital punishment. In England, notwithstanding their bill of rights—the provision I have just read—they have continued capital punishment.

Mr. MARTIN (*Essex East*): I think the words in that bill of rights are not as comprehensive as they are in this particular subsection. As I stated to you at the outset, I concur with the possible interpretation that Mr. Dorion has placed on his subsection, and that will be placed on it by a lot of individuals, and I suggest, by a lot of judges, some of whom have expressed themselves in respect of capital punishment itself.

Mr. FULTON: Excuse me, Mr. Martin. You have just made an observation there. There may be a difference of opinion between us that we cannot reconcile, but I do not know on what you base your observation, or your conclusion, in the light of the precedent I have just cited from the English bill of rights, because, it seems to me that our bill goes little, if any, beyond the words used there with respect to punishment; and yet the English precedent establishes that capital punishment is not contrary to the bill of rights.

Mr. MARTIN (*Essex East*): I have two comments in that respect. First of all, the English bill of rights, in the language which you have quoted, is not as comprehensive as in this particular subclause (*b*), and that only points up what I said in another context: that when the courts come to deal with particular situations, I suggest that it will be found that they will not find the bill

of rights in any way restricting them in the interpretation, in special circumstances before them, in the light of specific statutes. I say that if your interpretation of what they will do in regard to (*b*) is right, they will take the same course that they have hitherto taken.

Mr. FULTON: The only problem before them with respect to (*b*), will be the problem of interpreting: is capital punishment a cruel, inhuman or degrading punishment. That is the only problem they will have.

Mr. DESCHATELETS: If you will permit me to ask a question in this regard, Mr. Chairman. There can be no problem in respect of capital punishment, because once an accused is found guilty of murder, the penalty of death is mandatory.

Mr. FULTON: Yes, that is true.

Mr. DESCHATELETS: There is no alternative.

Mr. FULTON: Yes, but Mr. Martin's point is that if I am right in saying that the bill of rights will override the provisions of existing statutes which are contrary to the bill of rights, then the courts will hold that the section of the Criminal Code authorizing capital punishment which are contrary to the bill of rights, is repealed.

I do not agree with that, because the courts would have to interpret the specific provisions of this subclause, because this subclause only has effect with respect to statutes that impose or authorize the imposition of cruel, inhuman or degrading treatment or punishment. The first exercise the courts must go through is to ask themselves the question: is capital punishment a cruel, inhuman or degrading punishment? If they find it has not those objections, then the bill of rights has no application to that particular case. In support of my argument the courts would not be likely so to find with respect to capital punishment, I have cited you the English bill of rights which says:

> That excessive bail would not be required nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Their words are:

> —cruel and unusual punishments—

It is a fine argument and one we will not be able to resolve, and only the courts can resolve, as to whether our words with respect to punishment make capital punishment "inhuman or degrading." Whereas the English interpretation has been that capital punishment is not "cruel and unusual."

Mr. MARTIN (*Essex East*): I suggest to you, Mr. Fulton, you have put your finger right on the difficulty by this particular section of the bill, the purpose of which I fully appreciate, sympathize with and support. I think the language has got to be changed. We can delete certain words, I think, and maintain the basic purpose. What we are doing in leaving the language in its present form is to transfer to the courts a responsibility that belongs to parliament.

They are going to, by this section—as the bar point out, as Mr. McInnes points out on page 12—create great latitude for judicial law-making, and we are going to give the courts the responsibility of interpreting situations that will have the effect of exercising the responsibility that belongs to the legislature.

Mr. FULTON: But parliament will have the ultimate authority.

Mr. MARTIN (*Essex East*): I know, ultimately, if the situation arises, you say parliament can correct these things. In the meantime the Criminal Code is in difficulty. There are certain punishments for certain kinds of crime, in which the courts are given the responsibility, or the duty, as you say, of imposing punishment pursuant to their findings in relation to the facts that are presented. But the statute under which they operate the Criminal Code is definitely precise. We are creating a whole series of adjectives here that give

them a discretion which I think belongs primarily to the legislature. We ought to frame this paragraph in such a way as to restrict their opportunity of judicial law-making. It seems to me that is one of the functions of the legislature.

Mr. FULTON: Unless you take away from the courts the right and obligation to interpret statutes, you must repose in the courts the function you are describing. The only way you can prevent them from doing it is to change our whole constitutional set-up under which, at the present time, the courts have to interpret statutes.

Mr. MARTIN (*Essex East*): If a man commits murder in this country, under the law the judge must impose capital punishment. By this paragraph we are giving the judge the opportunity of denying the expressed will, as of this moment, of the legislature, which is that this must be the form of punishment. That judge may say, "In the light of this section I consider capital punishment is cruel, inhuman and degrading. True, the Criminal Code says that, but I so find, in my conscience, and I will not impose that kind of punishment because the bill of rights says I shall not."

Mr. FULTON: If parliament intends, as I think parliament does, to prevent the imposition of cruel, inhuman or degrading punishment, then that is the will of parliament, is it not?

Mr. MARTIN (*Essex East*): That is right.

Mr. FULTON: Then, if the courts hold that capital punishment is cruel, inhuman or degrading—if the courts hold that—are not the courts exercising their proper function of interpreting the will of parliament; and if that is held by the courts, does it not then follow that parliament should take a look at the question of hanging and deal with that point when it arises?

Mr. MARTIN (*Essex East*): Do you intend, by this section now, as Minister of Justice, that the punishment known as capital punishment to be within the discretion or imposition by a judge in the case of murder. Your answer of course is no, that the law is there.

But you are faced with the situation where you admit that the judge may arrive at the very interpretation which you deny under the existing law he has the right to do.

Mr. FULTON: He does not; under the existing law he does not interpret capital punishment, he merely imposes it.

The CHAIRMAN: If the will of parliament is that there shall be capital punishment, and the court interprets it as being in violation of this section, and we are still of that opinion, we may once again provide that capital punishment, notwithstanding the bill, shall continue.

Mr. MARTIN (*Essex East*): The Criminal Code says now that a judge must impose capital punishment, and we cannot regard that as merely providing a discretion, because the judge must take that position by virtue of that particular section.

Mr. FULTON: I think it is a remote possibility. I think there is no likelihood that it may arise. I understand the reasons why you feel that way; but if it is the view of the committee that it is desirable to place capital punishment beyond the bill of rights, we could possibly change our words to conform with the English bill of rights and confine them to cruel or unusual. If you feel strongly that you want to have capital punishment, you could, peradventure, provide that it could be done.

Mr. BROWNE (*Vancouver-Kingsway*): My understanding of the English bill is that it has the words "cruel and unusual", and it seems to me that we are going to curtail this here by saying "cruel". That is the way I read the clause now; it would mean cruel. But in the case of the English bill it would have to be "cruel and unusual".

Was it the intention of the minister to go greatly beyond what we have had before in this respect?

Mr. FULTON: Here is a case actually in which we have taken the words from the universal declaration of human rights that no one shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment. We felt that these were appropriate words to use, and we gave consideration to the question of whether they would likely be so interpreted as to override the provisions of the Criminal Code, which authorizes the imposition of capital punishment.

We felt that they did not, and we based our belief in part on the fact that similar words had been in the English bill since 1689. And if I go on, I shall only be repeating myself.

Mr. BROWNE (*Vancouver-Kingsway*): I do not think the American bill of rights has words which are exactly similar. I do not think that in any of the bills of rights which I have read, there have been the words of this particular clause; and it would seem to me to go considerably beyond anything I have read in other bills of rights.

Mr. DORION: Possibly there is—

Mr. FULTON: This has been subscribed to by Canada, and it was agreed to by a joint committee of the Senate and House of Commons in the late 1940's; so it has been subscribed to by Canada for all those years, and it has not given any problem to our judges.

Mr. MARTIN (*Essex East*): Oh yes, but there is a difference between that declaration, and the particular imposition in a statute.

Mr. FULTON: Yes, I grant you that, but nobody has raised the point.

Mr. MARTIN (*Essex East*): I appreciate where the language comes from, but I think what Mr. Browne said has great validity.

Mr. DORION: I see another danger; it is because you will have different reactions or opinions from the judges. One may believe that there is no degrading treatment or punishment in capital punishment, and another may have another opinion. It is very dangerous to have different opinions from the judges —from the bench.

Mr. FULTON: I quite agree; but I think—

Mr. DORION: And it would be absolutely unjust not to have the same standard for everyone.

Mr. FULTON: We would never stop at the lower courts; we would go as quickly as possible to the Supreme Court and get a final determination of the case. Then, if the situation was as Mr. Martin thinks it might be, we would have to deal with it, or invite parliament to deal with it. I think that is a perfectly proper course to follow.

The only other way, it seems to me, you could meet the point—if there be a point, and I question whether there is a point—would be to put in this bill an express provision, "saving the capital punishment provision of the Criminal Code." But I do not think you want to clutter up your bill of rights with a number of such provisions. If there is a strong feeling that there is a danger of the course Mr. Martin predicts being followed, and this is essential, that, it seems to me, is the only way you could do it. We think the proper way to do it is to see whether the eventuality arises, get an adjudication by the Supreme Court of Canada in the shortest possible time, and then if we are faced with the situation where the courts have held the Criminal Code provision is overridden by the bill of rights, we would have to ask parliament to deal with it.

Mr. MARTIN (*Essex East*): Mr. Chairman, I have two further points.

The CHAIRMAN: Are they on the same point?

Mr. MARTIN (*Essex East*): Yes, they are on the same point. I cannot conceive that the Canadian parliament or, for that matter, the Canadian legislature, would impose any form of treatment that would warrant the adjective "degrading". However, one can never tell.

But I can conceive of situations where parliament, or the executive might want to recommend to parliament, with regard to a particular crime, a form of punishment in the future that would be very difficult to impose if we retain all of this language.

We are now dealing with a situation, in so far as the law is concerned, that exists. But if we want, at some future date, in the revision of the Criminal Code to impose a form of punishment, we will find individuals in parliament sincerely advocating that the particular form of punishment is one that is contrary to the bill of rights, and we might find ourselves very seriously hamstrung as a result.

Mr. FULTON: Parliament, if it came to the conclusion that that form of punishment recommended was a desirable one but, however, was prohibited by the present wording of the bill of rights, would have to enact a statute "notwithstanding the bill of rights", authorizing that form of punishment. But I cannot conceive of parliament, or the executive ever wanting parliament to authorize the imposition of cruel, inhuman or degrading punishments.

Mr. MARTIN (*Essex East*): But parliament has done that, in the opinion of many people. We have imposed capital punishment.

Mr. FULTON: But parliament will have to deal with that question, and the majority in parliament will have to decide whether in fact it is a cruel, inhuman or degrading punishment.

Mr. MARTIN (*Essex East*): Then, Mr. Minister, my final thought is this. We have pursued this pretty diligently, I think.

The CHAIRMAN: Might I just ask the minister this question, Mr. Martin? The word that bothers me there a bit is the word "degrading", because I sort of have a feeling that any punishment that is imposed is, in a sense degrading to the individual. I think all punishments are certainly not monetary; they may be imposed physically by way of incarceration, or something of that kind.

Certainly I think it is degrading, in a sense, to ever be committed to jail, and I am just wondering if we may not be using too broad a term in the use of the word "degrading".

Mr. FULTON: I would say that surely the courts, in interpretating the words used, "cruel, inhuman or degrading", will have to have regard to the circumstances that a crime has been committed and that a person, given all the benefits of the protections of our criminal code, has been convicted of that crime.

In the light of the fact that this person has defied the rules of society to the extent indicated by the crime of which he is guilty, they will then have to decide whether the punishment inflicted is cruel, inhuman or degrading under those circumstances. Certainly, it would be cruel, as well as degrading, to deprive an innocent person of his liberty by incarcerating him, by putting him in prison. But can you argue that it is cruel and degrading to deprive a guilty person of his liberty by putting him in prison?

I might have something favourable to say with respect to our program of penal reform, where the emphasis is on the rehabilitation and reform of the prisoner. However, even apart from that, I think the courts would exercise common sense in interpreting those words; as I say, in the light of circumstances that a person has been convicted of a crime which is an offence against society's laws. I think that the ordinary term of imprisonment, provided your jails are not brutal places, could not be regarded as a degrading form of punishment.

With respect to the question as to whether we should alter these words, Mr. Chairman, I am in some difficulty. Supposing I were to accept the argument of Mr. Martin and others, and were to say that we should modify these words. What we would be doing is enacting a bill of rights in Canada that does not go as far as the universal declaration of human rights, to which we subscribe. Personally, and sincerely, I do not believe the dangers that you have outlined really exist; and if they do, we can deal with the situation when it arises. But I certainly think it would be very questionable for us, when we are dealing with this problem, to refuse to go as far in protecting our citizens from the liability to cruel, inhuman or degrading punishments as we have ourselves subscribed to in the universal declaration of human rights.

Frankly, I see no danger in using those words, and I see some very desirable objectives to be achieved. I question whether you would really want us to go less far than those words which we have already used.

Mr. BADANAI: In view of the complication that this interpretation would give, would it not be better to remove clause (*b*) entirely? Clause (*a*) reads:

> Authorize or effect the arbitrary detention, imprisonment, or exile of any person;'

and then clause (*b*):

> Impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;
>
> (*c*) deprive a person who has been arrested or detained
>
> (i) of the right to be informed promptly of the reason for his arrest or detention,

and so on. But could we not remove that objectionable clause entirely, clause (*b*)?

Mr. FULTON: So the bill of rights would then be silent upon the question of the types of punishment that might be authorized?

Mr. BADANAI: Not at all.

Mr. FULTON: It would be, would it not, if you removed clause (*b*)?

Mr. BADANAI: No, because you do not envisage any imposition of torture, cruel, inhuman or degrading treatment or punishment.

For instance, supposing a person committed murder, as has been mentioned here this afternoon: he would still be imprisoned, and condemned under the law, and judged accordingly. But this particular clause, it is thought, is going to perhaps lead to a considerable amount of misunderstanding, and perhaps a conflict of interpretation.

Mr. FULTON: But if you remove it, the bill of rights is entirely silent as to the limitations or prohibitions against the imposition of cruel, etcetera, punishment.

This has been a tradition in bills of rights since, at least, the British bill of rights in 1689. It is a part of the universal declaration of human rights, and when we are codifying and declaring the protection of the rights of the individual who lives in Canada, I think it would be questionable—that is not quite the word I want: it would be a course which would render us liable to condemnation, if we should be absolutely silent on this matter on which traditionally bills of right and documents of this sort have spoken—

The CHAIRMAN: You would be derelict.

Mr. FULTON: We would be derelict, yes.

Mr. BROWNE (*Vancouver-Kingsway*): It seems to me that in addition to these particular words in here, when we get to quote "degrading" that if we made the stipulation it also had to be unusual that would bring it more in line with what we understand. While it is true that has been made in an international declaration there has been no interpretation of that.

Mr. FULTON: That is true.

Mr. MARTIN (*Essex East*): Along the line Mr. Browne was following, may I point this out. I appreciate the point that you make about your position in the light of Canada's acceptance of the declaration of human rights. But I would point out that the declaration of human rights was a declaration by some sixty odd nations at the time in the United Nations. This, however, represents situations which are not present in our country. There are countries where there does exist torture, where there does exist cruel, inhuman and degrading treatment. It is not possible in a declaration to encompass each individual nation's situation. It is a general declaration, and while Canada adheres to its principles, I do not think we would in any way be belying the undertaking by a formulation of words in regard to this. In the light of the discussion I would suggest that you and your officials might give further consideration to the wording and we as members of the committee might do likewise. I have some thoughts about the wording, but there is one word which still is troubling me in my formulation. I have been trying to clear it up. I think it does basically this thing, but does not invite the same interpretation which concerns so many of us.

Mr. FULTON: I appreciate what you say. I think it is a sensible suggestion. You must understand that in defending what is in here I am not defending it stubbornly. Naturally, however, I want to rehearse with you all the questions which have been in our minds in arriving at these words. I do not think I would be assisting the discussion if I did not defend this fully. I do not want it to be taken that I am stubborn and that we believe we are the sole repository of all wisdom and that the committee has none. So I certainly accept your suggestion.

I would like to conclude with one further observation. We are legislating, as I see it, not for this generation only. It is true we are admitting that what we have here is our inheritance of ancient and traditional liberties and we are, if you like, codifying and declaring that with legal effect, but we are also declaring that it exists for the future. I do not think there is sufficient justification for taking out certain words simply by saying "but we are not likely to resort to this form of punishment" and so on. We are legislating, as I think all legislators must, not only for today but in effect for tomorrow and the future.

I raise again for your consideration the question whether Canada internationally would not be exposed to criticism and whether we would not be giving a weapon to our ideological opponents if in our bill of rights we were to stop short in the words in the declaration of rights, particularly when we say we feel they are civilized democratic principles. If a country of civilized and democratic principles cannot go as far as the universal declaration goes then we are giving a tremendous weapon to the communists. They would say "we have no hesitation in ascribing to this". I know that this is propaganda, but we are engaged in a struggle for the capture of men's minds in the uncommitted nations. I would be very disturbed if in Canada's bill of rights we stopped short of words to which we have adhered in an international document when those who are ideologically opposed have adhered. I am convinced that the courts will not interpret the words as you suggest and if they do we can deal with that matter expeditiously by appeal to the Supreme Court and by act of parliament if necessary. I make this case to you as a final enlargement, if you like, of the sort of thought we had in mind in using these words. However, I will discharge the undertaking to reconsider it, and reconsider the arguments that have been made.

The CHAIRMAN: Gentlemen, does that conclude our discussion in regard to clause 3?

Mr. MARTIN (*Essex East*): No.

The CHAIRMAN: Could we wind up our consideration of clause 3 in five minutes?

Mr. MARTIN (*Essex East*): I think we could wind this up by 6 o'clock.

The CHAIRMAN: I think we should try to finish our consideration of this clause.

Mr. MARTIN (*Essex East*): I have only one comment to make. I appreciate the strong statement made by the minister, a statement that one would expect him to make, but the attitude of the Soviet Union, for instance, to this kind of concern, does not really affect me at all, because when they will learn what the rule of law means, as we apply it, then they will be in a sound position to take exception to our desire here to arrive at a formula that will not create complications in our judicial system. I am sure the minister would fully agree with me, in spite of what he has said.

Mr. FULTON: Except that I do not agree that it will create the complications in our judicial system which you have envisaged.

Mr. MARTIN (*Essex East*): No, but I simply say, as far as the Soviet Union is concerned, they are not in a very strong position to argue on the grounds of cruel, inhuman, or degrading treatment.

With regard to (c) (ii):

> Without limiting the generality of the foregoing, no such act, order, rule, regulation or law shall be construed or applied so as to—deprive a person—of the right to retain and instruct counsel without delay.

The CHAIRMAN: It says: "—deprive a person who has been arrested or detained—".

Mr. FULTON: Yes.

The CHAIRMAN: Those are rather important words.

Mr. MARTIN (*Essex East*): Yes. "—deprive a person who has been arrested or detained—of the right to retain and instruct counsel without delay—". That clearly only applies to a person who has been arrested or detained?

Mr. FULTON: That is correct.

Mr. MARTIN (*Essex East*): It would not apply to a witness?

Mr. FULTON: That is correct, unless he was ordered to be arrested by the court, then he would have that right.

Mr. DORION: Arrested without charge, then we would have that advantage.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): Thank you for pointing that out.

Mr. RAPP: In regard to subclause (*f*) which reads:

> Deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.

Would that apply to any person that is in Canada, or is domiciled in Canada, or who travels through Canada and who is perhaps detained for some reason or other in Canada?

Mr. FULTON: It would apply to any person who it entitled to the protection of our laws.

Mr. RAPP: You mean it applies only to a citizen of this country?

Mr. FULTON: No, no. You have asked me a general question and I can only give you a general answer. In the form in which you ask the question, the only answer I can give is; it would apply to any person who was entitled to the protection of our laws.

Mr. RAPP: That is what I wanted to know.

Mr. MARTIN (*Essex East*): I supose it is the result of fatigue, but I did not mean to refer to (*c*) (ii), I was referring to (*d*) which says:

> authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other consitutional safeguards.

Now, that is not restrictive as in (*c*)?

Mr. FULTON: No.

Mr. MARTIN (*Essex East*): Does that mean that if a witness, before a court, tribunal, or commission—not as accused—wishes counsel, he is to be given that opportunity?

Mr. FULTON: I think the key word is "compel".

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: It says: "compel a person to give evidence if he is denied counsel", and these are alternatives: "if he is denied counsel, protection against self crimination, or other constitutional safeguards". So I think that the case of the witness to which you have referred would be covered by that second alternative protection against self crimination.

Mr. MARTIN (*Essex East*): Not necessarily.

> 3(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;—

Yes, those words are all relevant. But could we not conceive of a situation where we might have a whole series of counsel representing a whole series of witnesses, each with the right of examination in chief, each with the right of cross-examination? I am just raising this, and I want to make sure I understand what is intended.

Mr. FULTON: It does not go nearly that far. Even on the most liberal interpretation it simply means the court is not authorized to compel a person to give evidence if he is denied these things, one or more of these things, which are spelled out there; but it does not give him the right to have counsel for cross-examination.

Mr. DORION: It does not change any particular law or the rules of evidence?

Mr. FULTON: I think not.

Mr. MARTIN (*Essex East*): You mean this is a right that now exists?

Mr. DORION: Not exactly. It is not a written right; it is accepted by the courts.

Mr. MARTIN (*Essex East*): What do we mean by "constitutional safeguards"?

Mr. FULTON: A witness sometimes takes counsel's advice as to whether he should answer or not; and counsel advises him to ask for the protection afforded under the Canada Evidence Act. I agree with Mr. Dorion it just is not explicit or implicit in the law now, but this guarantees it for the future.

Mr. MARTIN (*Essex East*): What do we mean by "constitutional safeguards"?

Mr. FULTON: That means our constitutional and judicial rights with regard to legal process and the rights and protection of a witness who is before the court.

Mr. MARTIN (*Essex East*): Are they protected now?

Mr. FULTON: Some of them are written out and some are not.

Mr. MARTIN (*Essex East*): I do not know what we mean by "constitutional safeguards."

Mr. FULTON: I would say one of them would be the presumption of innocence until you are proven guilty.

Mr. AIKEN: The right not to give evidence against yourself.

Mr. MARTIN (*Essex East*): Is that a constitutional safeguard?

Mr. FULTON: I think it is included in the generic description, just as are other specific statutes, apart from the B.N.A. Act, in our constitution.

Mr. DORION: It is the unwritten law.

Mr. FULTON: Much of that is dependent on the Evidence Act, on the judicial interpretation of the Evidence Act; and I think there is a body of law which, in this sense, I might appropriately describe as constitutional knowledge, such as the principle that a person before a court is entitled to be given the benefit of the doubt.

Mr. DORION: Would the protection given by clause 3(*f*) apply to the security case as well?

Mr. FULTON: Cause 3(f) applies only to criminal charges.

Mr. MARTIN (*Essex East*): What about sex charges?

Mr. FULTON: In our view, under this section, the court does not have the obligation to hold the hearing in camera, but the court may order it if the court deems it appropriate. If an accused insisted on the hearing being in public, I think, under this section, he probably would be entitled thereto. I think it very unlikely that a person accused of a sex crime would insist on a public hearing, if the court were prepared to order a hearing in camera, because that provision is partly there for his own protection.

Mr. DORION: This section would surely modify that article?

Mr. FULTON: Yes, I have said I think it goes to modify it, if an accused insists his hearing should be in public.

Mr. DORION: It would be impossible to apply that to the delinquents, because there is no criminal charged under that?

Mr. FULTON: I think there has been a mistake made there in some of the submissions. The Juvenile Delinquents Act is expressly stated—

Mr. DORION: There is no criminal charge?

Mr. FULTON: —not to be criminal, in the sense that he is charged not with a criminal offence but with a delinquency. So I do not think that paragraph (*f*) would apply to hearings under the Juvenile Delinquents Act.

Mr. STEWART: All through?

Mr. MARTIN (*Essex East*): I am not all through.

The CHAIRMAN: That completes the discussion of clause 3, then.

Mr. AIKEN: Before we adjourn, there is one matter I would like to raise.

The CHAIRMAN: Proceed.

Mr. AIKEN: We have all been invited to try our hand at a preamble to this bill of rights. Accordingly I have devised one which I would like to put on record, just in case I do not have an opportunity to do so later. It will just take a moment. It is reasonably short, and I think it is written in a form of modern, international language, and that it incorporates other things which will be acceptable. This is the suggested preamble.

> Recognizing the desire of all Canadians to understand the principles on which the peace, order and good government of Canada are founded, and desiring to establish these principles in writing, and to declare them as fundamental to the laws of the parliament of Canada.

Mr. FULTON: I would like to express our appreciation to Mr. Aiken for his helpful endeavour.

Mr. AIKEN: I want to put it on record so it may be considered. I think it does involve words taken from the British North America Act, and that it

clearly indicates the authority within which the bill intends to operate; and I think it is written undoubtedly in modern, international language which is commonly used.

Mr. FULTON: And it includes some words from history.

The CHAIRMAN: I suggest that the clerk make a copy of the suggested preamble and distribute it to the members, because it may be two or three days before we have this evidence.

Mr. DORION: I have prepared my own preamble, but it is not very complete, because I shall have to take into consideration the question which was raised this afternoon after a discussion of clause 2.

Now, I believe Mr. Martin has a draft preamble as well.

Mr. MARTIN (*Essex East*): It is in process; I do not have the facilities which Mr. Aiken has.

Mr. DORION: I believe the best way to consider the project is for the members to have those projects in their hands. We should have copies made of them for distribution as soon as possible so that we may be in a position to discuss them when we meet again.

Mr. FULTON: May I suggest for your consideration that in addition to each member who feels so inclined suggesting his own preamble and putting it on the record, that when all these have come in, might I suggest that you consider the appointment of a subcommittee to determine what is the best amalgamation of these various suggestions so that they might form a draft preamble which the committee itself might suggest.

In that way—and I am not trying to shirk any responsibility—you will avoid any suggestion that the minister arbitrarily has chosen parts of this, that or the other one, and that he appeared to favour or to disfavour any individual.

If you feel that this is not an improper suggestion for me to make, I know I can say that it would be very helpful to me.

The CHAIRMAN: I think it is a very excellent suggestion.

Now may I put on record a suggested preamble which I received from Mr. John A. W. Drysdale:

> Preamble to the Canadian bill of rights. We, the people of Canada, believe that the strength of a nation lies in the protection of the fundamental freedoms and human rights of all men with equality before the law regardless of race, religion, national origin, colour or sex and we believe that by setting forth these rights and freedoms that we reaffirm faith in the essential dignity of man.

Mr. MARTIN (*Essex East*): If the Minister of Justice would rise in his place in the house and ask that we revert to motions, he might get some 285 suggestions.

Mr. FULTON: I am trying to keep the work of the committee and the government within a reasonable compass, Mr. Martin.

The CHAIRMAN: Gentlemen, we will adjourn now until 9:30 tomorrow morning. We hope to have the minister back with us then, at 9:30 on Monday morning.

Mr. STEWART: But we meet tomorrow morning?

The CHAIRMAN: Yes, we meet tomorrow morning to hear Mr. Mundell.

Mr. STEWART: In this room?

The CHAIRMAN: Yes.

Mr. DESCHATELETS: Mr. Chairman, with regard to Monday morning, would it not be possible to postpone the meeting until Tuesday? I think it might suit the members of the committee if it could be done.

Mr. DORION: That would give us a chance to look at the evidence, which would be better.

Mr. DESCHATELETS: We are going to sit tomorrow morning.

Mr. DORION: It would give us a chance to look at the evidence, because we have not all the evidence before us.

The CHAIRMAN: Clause 5 presents no problem; but we have to deal with clauses 4 and 6. We are having a general discussion now in relation to them, and after we conclude those, we still go back to clause 2.

Mr. MARTIN (*Essex East*): I do not think we would lose much time if we waited until Tuesday. It would give us a chance to look at this matter. We are all working on this.

Mr. DESCHATELETS: We would choose a time that would suit the convenience of the minister. It might be Tuesday afternoon, or night.

Mr. MARTIN: When are you getting back from Washington, Mr. Minister?

Mr. FULTON: We scheduled Saturday and Sunday, in case we needed both days; but I will certainly be back Monday morning. We expect the combines legislation in the house, so I think the only time I could be available on Monday, Tuesday and Wednesday—depending on how quickly that bill goes through the house—would be from 9:30 to 11 o'clock in the mornings.

The CHAIRMAN: We are all sitting on Saturday, so I think 95 per cent of us would still be here.

Mr. MARTIN (*Essex East*): Mr. Deschatelets, Mr. Dorion and Mr. Badanai have expressed this view. I do not think one day would matter very much. It would give us a chance to look at this thing.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, if we do not complete it on Monday morning, at least we could make some progress, and time is of the essence in this session. It seems to me that we should take advantage of the fact that the minister does have that time available on Monday morning, when we would make some progress that otherwise we would not make.

Mr. MARTIN (*Essex East*): We could do that on Tuesday morning.

The CHAIRMAN: I am afraid we are going to need all the time that we have available to deal fully with this bill in the committee. I do not think we should lose the opportunity of proceeding on Monday morning for an hour and a half.

Mr. MARTIN (*Essex East*): I can be here on Monday morning; but three members of the committee find it difficult. I think we have to accommodate them.

The CHAIRMAN: All I can do is put it up to the committee. I will entertain a motion as to when we reconvene after Saturday.

Mr. BROWNE (*Vancouver-Kingsway*): I move that we sit on Monday morning, Mr. Chairman.

Mr. RAPP: I second that.

Mr. BADANAI: I move that we meet on Tuesday morning at 9:30.

The CHAIRMAN: If you negative the motion that is before us, I do not think we will be sitting before Tuesday, so it is the same thing. I will put the motion, and that is, that we sit at 9:30 on Monday morning. All those in favour?

Contrary?

I declare the motion carried.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 7

SATURDAY, JULY 23, 1960

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WITNESS:

Professor D. W. Mundell, Toronto, Ontario.

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OTTAWA, 1960

23574-7—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer Esq.

Vice-Chairman: Noël Dorion Esq.

and Messrs.

Aiken
Argue
Badanai
Batten
Browne (*Vancouver-Kingsway*)
Deschatelets
Jung
Martin (*Essex East*)
Rapp
Stefanson
Stewart
Weichel
Winkler

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

SATURDAY, July 23, 1960.

(15)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.40 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Badanai, Batten, Browne (*Vancouver-Kingsway*), Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, and Stewart. (10)

In attendance: Professor David W. Mundell, Q.C., Toronto, Mr. E. A. Driedger, Q.C., Deputy Minister of Justice.

The Chairman introduced Mr. Mundell and following a discussion of the Committee's future business, Mr. Mundell outlined his views concerning the Bill.

Mr. Mundell's questioning continuing at 11 a.m., the Committee recessed in order to allow Members to attend the opening of this day's sitting of the House of Commons.

At 12.20 p.m. the Committee reconvened and the questioning of Mr. Mundell continued.

At 1 p.m. the Committee adjourned to meet again at 2.30 p.m. this day.

AFTERNOON SITTING

(16)

The Committee reconvened at 2.30 p.m. The Chairman, Mr. Spencer, presided.

Members present: Messrs. Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, and Stewart. (10)

In attendance: Same personnel present as at the morning sitting.

Mr. Mundell was further questioned concerning his views on the Bill and probable impact of the Bill should it become law.

The witness was then thanked and retired.

At 4.15 p.m. the Committee adjourned to meet again at 9.30 a.m. on Monday, July 25th.

J. E. O'CONNOR,
Clerk of the Committee.

23574-7—1½

EVIDENCE

SATURDAY, July 23, 1960.
9.30 a.m.

The CHAIRMAN: Gentlemen, will you come to order, please.

This morning we have with us, and I would like to present to you, Mr. D. W. Mundell, Q.C., of Toronto, an eminent counsel, and chairman of the civil liberties section of the Canadian bar association.

Mr. Mundell.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I ask if Mr. Carter of Fredericton asked to come to this committee?

The CHAIRMAN: Mr. Carter was contacted, and I think there is a letter on file from him in which he referred the committee to his article in the Canadian bar review.

Mr. MARTIN (*Essex East*): Yes. Has that letter been placed on the record?

The CHAIRMAN: That article has been filed and has been made part of the proceedings of this committee.

Mr. MARTIN (*Essex East*): Yes, but did he say he would be willing to come?

The CHAIRMAN: No, I think he expressed the opinion that his views were represented in the article, and he was not interested in coming. At least that is the import of the letter.

Mr. MARTIN (*Essex East*): I just wanted to put on the record now the thought that he should be called, and we should have an opportunity of examining him.

The CHAIRMAN: Mr. Martin, I imagine that you could go on the record with a number of things.

Mr. MARTIN (*Essex East*): Do not make any personal observations, that is all I am saying.

The CHAIRMAN: Now, just a minute. I do not like the procedure of making observations that this individual would like to come, or somebody else should appear before this committee. As I said yesterday, we have 18 million people in Canada. If you can list these names for the purpose of laying the foundation for an argument which you may make later on, every member of this committee could do exactly the same thing. There must be an end to this committee. I for one, Mr. Martin, am not going to see this bill bogged down in this committee. I know it is possible to do that, but as far as I am concerned, I am trying to stop that.

Mr. MARTIN (*Essex East*): Mr. Chairman, I am not trying to bog this down in this committee, but the Prime Minister said this bill would receive the most thorough discussion, and I feel that people like Mr. Carter, who have very strong views, and have expressed them, ought to be given the chance to amplify those views. If you read that *Canadian Bar Review* article, which is only about two and a half pages, you will see that it is a commentary on what Mr. Mundell is now going to say.

Since we met last night I have looked at the newspapers and I find that copies of the report of the debate of parliament on the 7th of July did not reach centres in the maritime provinces, and in the western provinces, until at least the Monday of the following week which would be July 11. I find also

that a Canadian press despatch in regard to the second reading in the House of Commons was sent out either at that time or early on the following morning. That despatch did not mention that a committee was to be appointed. Only one western newspaper, that carried the despatch, mentioned that there was to be an appointment of a committee. The Saint John's *Telegraph Journal* and the Halifax *Chronical Herald* in the maritime provinces carried the despatch, but no mention was made in respect of the holding of a parliamentary committee. We are pushing this bill through with such rapidity—

The CHAIRMAN: We are not pushing it at all.

Mr. MARTIN (*Essex East*): May I make my statement?

The CHAIRMAN: I am just correcting you.

Mr. MARTIN (*Essex East*): May I make my statement—

The CHAIRMAN: You are making your statement now, but—

Mr. MARTIN (*Essex East*): May I make my statement without intervention by the chairman. There has been no opportunity of the public to—

Mr. BROWNE (*Vancouver-Kingsway*): On a point of order, Mr. Chairman. It seems to me that this committee made a decision in this regard yesterday morning. Mr. Martin was not here at that time. The meeting went along very nicely as it usually does when we do not have the kind of obstruction that we get from Mr. Martin. He came here yesterday afternoon and wasted our time by going over this matter again. Again he had the opportunity yesterday afternoon when you invited motions in this regard, and he could have done so if he wanted to at that time. Now he comes back here this morning with the same kind of argument to delay the committee once again. We came here this morning for the purpose of hearing Mr. Mundell, and I suggest we get on with that.

The CHAIRMAN: My comment is that you are obstructing and filibustering.

Mr. MARTIN (*Essex East*): Mr. Chairman, I ask you to withdraw those remarks.

The CHAIRMAN: I have no intention of withdrawing them, because that is my opinion.

Mr. MARTIN (*Essex East*): You have no right, Mr. Chairman, to express that kind of view at all. Now Mr. Deschatelets has the floor.

Mr. DESCHATELETS: Mr. Chairman—

The CHAIRMAN: Pardon me. I have not recognized Mr. Deschatelets yet. You asked for information regarding Mr. Carter. May I say again that the proper place for these things to be considered is in the agenda committee.

Mr. MARTIN (*Essex East*): Ridiculous, ridiculous! You are saying the members of this committee have no right to discuss business.

The CHAIRMAN: I said no such thing: I said the proper place for these things to be considered is in the agenda committee.

Mr. MARTIN (*Essex East*): Ridiculous!

The CHAIRMAN: I will read for your information, Mr. Martin—and if you had made inquiry of your representative on the agenda committee you could have had this information, and this time would not be taken up—I will read the telegram from Mr. A. Carter, your esteemed friend, I presume, addressed to the clerk of the committee and dated July 18:

Thank you for your telegram—

Mr. MARTIN (*Essex East*): Who is this from?

The CHAIRMAN: From Mr. A. N. Carter.

Mr. MARTIN (*Essex East*): Don't get excited, Mr. Chairman.

The CHAIRMAN: I am not getting excited. I cannot understand, when we have had so much discussion, why you will not listen to what I say.

Mr. MARTIN (*Essex East*): I wish you would stop making these personal references.

The CHAIRMAN: You started it.

Mr. MARTIN (*Essex East*): I made no personal references, and I exercised my rights.

The CHAIRMAN: You have just got through trying to tell the chairman what he should do.

Mr. MARTIN (*Essex East*): Exactly.

The CHAIRMAN: I do not intend to take any advice from you.

Mr. MARTIN (*Essex East*): That is quite obvious.

The CHAIRMAN: I am quite capable of handling the committee without your advice.

Mr. MARTIN (*Essex East*): That is quite obvious.

The CHAIRMAN:

> Thank you for your telegram. I refer the special committee to the comments made by me on the bill of rights introduced last year, which are printed on pages 259 to 262 of volume 37 of the *Canadian Bar Review*. They express my views also on bill C-79.
>
> (Signed) A. N. Carter.

That message was quite properly brought before the agenda committee some time ago—I think it would be on the Monday—and the agenda committee made a recommendation to this committee that that article be taken as read before this committee, be made a part of the proceedings before this committee, and that copies thereof be distributed to all the members. That was done. The report of the agenda committee was brought before this committee and adopted, I believe unanimously. That was because you were not here, Mr. Martin.

Mr. MARTIN (*Essex East*): If I was not here it was because of the way the affairs of this session have been arranged making it impossible—

The CHAIRMAN: We have heard that two or three times.

Mr. MARTIN (*Essex East*): Yes, and I am repeating it again.

Mr. BROWNE (*Vancouver-Kingsway*): You were notified of the meeting.

The CHAIRMAN: We heard this at the last meeting.

Mr. DESCHATELETS: On the point of order that has been raised by my friend on the other side, I would like to add this—

The CHAIRMAN: You are referring to Mr. Browne?

Mr. DESCHATELETS: Yes.

Yesterday morning we were told there was no other witness in sight, so I did not make any argument about that, but yesterday afternoon we were presented with at least one name of an important organization which might wish to appear as a witness here. Then, this morning, we are told that certain areas of Canada have not had enough publicity reach them yet in order to let them know that they would be invited, or that they would be welcome, if they arranged to appear before this committee. I think that is an important point, which must not be overlooked. If, in fact, certain areas have not been aware, they have not been given enough time to consider that they could prepare a brief and come before this committee, I think it is an important point. It is, at least, a new point, which gives the right to a member of this committee to raise it, as Mr. Martin has done this morning.

The CHAIRMAN: Well, Mr. Deschatelets, first of all I would like to correct for the record the statement that you made that no further witness was in sight, that representations were made here that no further witness was in sight.

Mr. DESCHATELETS: Yesterday morning?

The CHAIRMAN: Yesterday morning; and may I remind you that I am quite sure you were here at the time—but perhaps not. However, yesterday morning we adopted the report of the agenda committee.

Mr. DESCHATELETS: Except for Mr. Mundell?

The CHAIRMAN: Exactly, we conveyed the information that Mr. Mundell was still to be heard.

Mr. DESCHATELETS: That was the exception.

The CHAIRMAN: Yes. This matter was dealt with yesterday, and this report was adopted. And then, later in the day, Mr. Martin raised the matter again. I invited a motion to rescind that, but there was not even a motion made, let alone a seconder for it. You, Mr. Martin, apparently could not get a seconder.

Mr. MARTIN (*Essex East*): In this committee does everything have to be decided by a motion?

The CHAIRMAN: That is the proper way to decide them. But if you want to put the matter before the committee, you may do so again.

Mr. MARTIN (*Essex East*): I addressed myself to this gentleman over here who knows Mr. Carter as a very outstanding lawyer. He does not happen to be one of my party, so I do not know him except for one or two professional contacts. But he wrote an article in the Canadian Bar Review commenting on Mr. Mundell's evidence, and I submit that we do not complete our work when we overlook an opportunity to examine people with that kind of special competence. Mr. Carter may not want to come, but I submit he ought to be asked to come, because he has very definite views, and great knowledge, and we have had no chance to interrogate him.

Mr. STEWART: Mr. Carter apparently does not want to come. He was given the opportunity. I may say that I know Mr. Carter well.

Mr. MARTIN (*Essex East*): He would have to pay his own expenses and all that sort of thing; I submit he ought to be asked to come as other people.

The CHAIRMAN: He has been asked, the same as other people.

Mr. MARTIN (*Essex East*): You say he has been asked to come, but the committee has the power to call people to this committee, and there has not been one call made of this kind. All we have done is to invite people to come. In my judgment that does not constitute a thorough inquiry.

Mr. RAPP: Mr. Chairman, let us now hear from Mr. Mundell. The issue has been discussed.

The CHAIRMAN: All in favour? Those opposed? Apparently there is unanimity in the committee that we hear from you now, Mr. Mundell.

Mr. DAVID MUNDELL (*Professor of Constitutional Law, Osgoode Hall Law School, Toronto*): Thank you, Mr. Chairman.

The CHAIRMAN: So I suggest that you proceed with your presentation in such manner as you feel you would like to do it.

Mr. MUNDELL: Thank you. May I thank you, sir, and the committee for the opportunity of appearing before the committee. I shall try, if I can, to be helpful to the committee. First of all, I would like to correct a small error. I was for two years chairman of the civil liberties section of the Canadian bar association, but I am not so now. I served my term of office, and I wound up last year.

During that period—it was during that period that the first bill of rights—Bill C-60, I think it was then—was introduced, and I had an opportunity to discuss it with members of the bar from coast to coast. I realize that bill was substantially similar to this bill. Therefore I have been able to form some views of my own as a result of those discussions which I had with quite a number of the members of the bar.

I must make it clear that I am not speaking on behalf of the Canadian bar association, or in any way representing it. These are my personal views, formed after having had an opportunity to discuss the bill with a very large segment of the bar, and I will just put them forward on that basis.

Mr. MARTIN (*Essex East*): There are two more points. You are a professor of constitutional law now at Osgoode Hall?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): And formerly, you were associate deputy minister of Justice in Ottawa?

Mr. MUNDELL: No, not an associate deputy minister, but I appreciate the promotion.

Mr. MARTIN (*Essex East*): But, you were along with Mr. Driedger and Mr. Jackett.

Mr. MUNDELL: I was a senior counsel.

Mr. MARTIN (*Essex East*): In the department?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): And you were in the Department of Justice for how many years?

Mr. MUNDELL: Fourteen years.

The remarks I am going to make sir, are on one assumption—that there is going to be a bill of rights; it is going to be of this nature; the issue as to the kind of bill of rights is not in question at this time, and that we are discussing this precise bill. I would like to say, since one of the criticisms of this bill is that it is not in the British North America Act, or not made an amendment to it, there is a considerable body of opinion opposed to that. The issue does not arise really on this bill but I think, in many ways, people believe that this bill does not have the permanence an amendment to the British North America Act would have. That overlooks the fact that an amendment to the British North America Act would be a different kind of bill, a restriction on the legislative authority of parliament and the legislatures and, as a result, it would be permanent—and would have a different effect to this bill. All I am saying is that my observations, and the discussions I have had, lead me to believe there is a very weighty body of opinion that would be opposed to that kind of bill because, generally speaking, it would shift the ultimate responsibility for policy on these matters from parliament to the Supreme Court of Canada, and would be a complete change in the principle of the sovereignty of parliament. It would be a basic change in the constitution and, for that reason, there are many opposed. However, others are in favour of it.

Coming to the precise bill, my basic position,—and I think it is widely held,—is that there are uncertainties in this bill that can be avoided, or could be, and these uncertainties will lead to a vast amount of unnecessary litigation. It is on these points of uncertainty I would like to speak.

In the first place, the opening words of clause 2 of the bill, I suggest, are uncertain in their operation. It is not clear whether this section is intended to be a legally operative rule of law, or a mere declaration. Both views are

held by the members of the profession. I suggest to the committee that whichever is intended, it could be more clearly expressed. If I can illustrate the uncertainty:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms.

Now, if you boil down those words they say:

> It is hereby declared that there shall continue to exist in Canada these rights and freedoms.

Now, the operative word is the word "declared", but then it declares that certain things shall exist; so, you have a declaration of a sort of mandatory state of affairs. Is that a mere empty declaration, in the sense of its having any legal operation as a rule of law, or is it the equivalent of saying, "there is hereby enacted the following rights and freedoms"? All I am saying at this time is that there are differences of opinion both ways, and I suggest it is unwise for a statute to be enacted with the certain knowledge there is ambiguity in it.

Mr. MARTIN (*Essex East*): When Professor Cohen was here there was no brief, Mr. Chairman, and the point was raised that it would be better if we queried as we went along. What is your wish in this particular case?

The CHAIRMAN: I believe the same procedure might be adopted in this case, if it is agreeable to the committee.

Mr. MARTIN (*Essex East*): So we would question Mr. Mundell?

The CHAIRMAN: Is that agreed?

Mr. STEWART: What is your wish, sir?

The CHAIRMAN: In view of the fact that we have nothing before us to refer back to for the purposes of questioning, it might be better, in this instance—as we did in the last instance—to ask questions as Mr. Mundell goes along. Is that agreeable to you, sir?

Mr. MUNDELL: I am in your hands, sir.

Mr. BROWNE (*Vancouver-Kingsway*): Could I ask a question on this particular point, then, Mr. Chairman? Yesterday we did have occasion to refer to the London bill of rights. When we examined the wording of that, it was drawn to our attention that, in the wording of it, a declaratory statement was made.

I believe the minister indicated that as far as he and the draftsmen were concerned, it was felt that was intended to have the force of law, and, in their opinion, it did have the force of law.

In comparing this with the London bill of rights, which has very similar wording—"and hereby declares," I believe were the words used there—why do you feel there would be a difference? I do not think there has ever been any question about the London bill of rights; I believe it has always been recognized.

Mr. MARTIN (*Essex East*): The London bill of rights?

Mr. STEWART: The United Nations?

Mr. MARTIN (*Essex East*): No.

Mr. MUNDELL: I am sorry; I do not know the language of the London bill of rights. Certainly it could be made clearly declaratory.

Mr. BROWNE (*Vancouver-Kingsway*): In other words, it goes on and sets out substantially the same freedoms, and does it in the same way as this bill, by declaring that they are there and they should be there.

Mr. MUNDELL: Perhaps I did not make my position clear as to the difficulty I apprehend. The bill could say "There are hereby enacted the following freedoms," and that would be clearly a rule of law: these would be freedoms.

The bill could say, "It is hereby declared that there are the following freedoms"; a statement of fact. But here it is said, "It is hereby recognized and declared that there shall continue to exist." It is a declaration of a mandatory situation. What does it say? Is it simply a declaration that there are certain things existing—which may be right or wrong—but it does not make law; or is this bill an attempt to make law providing for these freedoms?

Mr. BROWNE (*Vancouver-Kingsway*): My understanding from the minister was that we were not enacting these freedoms at the present time, because they were here, and it would be wrong for us to attempt to say that we were creating these freedoms at the present time. They are there, and we are recognizing them and declaring that they shall exist in Canada.

It seems quite clear they would have the force of law, in those circumstances.

Mr. MARTIN (*Essex East*): That is not a correct statement of what the minister said. The minister said, Mr. Mundell—if I may point out what he said —that this clause did have the effect of law. He referred to section 91 of the British North America Act, where the expression "hereby declared" exists, and he said that the "hereby recognized" in clause 2 of this bill has the same effect as "hereby declared" in the British North America Act, section 91.

In other words, this section does have the effect of law. It is not merely a declaration; but it is an enactment of a declaration. Do you disagree with that?

Mr. MUNDELL: Well, I would say, sir that the fact that saying it has the effect of law has in it a latent ambiguity in itself. It is certainly a legal declaration that is made; but does it go beyond merely a declaration?

Assuming one of these freedoms does not exist under any rule, would it make it exist as a matter of law? Does it enact these freedoms, or does it simply declare an existing state of fact, without altering or varying their existence? Do I make myself clear?

Mr. MARTIN (*Essex East*): Yes. But, for instance, the minister said this bill, having the effect of law, has a direct bearing on existing law, and we shall see, when we come to clause 3, any act which is inconsistent with this bill is, by this bill, rendered legally inoperative.

Mr. MUNDELL: That is by clause 3?

Mr. MARTIN (*Essex East*): Yes.

Mr. MUNDELL: But would clause 2, by itself, have that effect? That is really the difference between a declaration and a legally operative rule. If clause 2 is legally operative, creating rules of law, and a statute, it would override any inconsistent statute.

Mr. MUNDELL: The first point I make is there is uncertainty.

The CHAIRMAN: You mean uncertainty as to whether there is an enactment of law.

Mr. MUNDELL: Whether there is an enactment of law or a declaration of an existing state of law without any intent to vary or alter the existing. Secondly, if it is an enactment it will raise a very serious constitutional question. As you know, under the B.N.A. Act a federal act validly enacted will over-ride any inconsistent provincial legislation. There can be federal legislation, say under bankruptcy and insolvency, dealing say with provincial executions, which would arrange the order of payment. There is, of course, provincial legislation dealing with execution. Both statutes are similar. If they collide in any province, the federal act will override.

Mr. DESCHATELETS: Are you thinking—

The CHAIRMAN: I think he is in the middle of making his point. Would you let him finish, please.

Mr. MUNDELL: If this is an operative legal provision creating these freedoms and if it is within the authority of parliament, this statute will override any inconsistent provincial legislation. It will not be an encroachment of provincial power—to legislate; it does not invade the provincial power, but cuts down the way in which the provinces can establish the power. The constitutional problem is that nobody knows at this time the full extent of parliament's power in legislating on these freedoms and rights. There are half a dozen cases which come up to the point and deal with it. There is a suggestion that the provinces cannot deal with these things, and there is even a suggestion by Mr. Justice Abbott that parliament cannot. If indeed this is made a mere declaration it raises a constitutional uncertainty and quite possibly cuts down on the power which may be exercised by the province. That may raise a constitutional political problem. I am not concerned with that. I am pointing out the legal problem which may arise.

Mr. DESCHATELETS: You said that if a provincial and a federal statute collide on a certain aspect that the federal statute would have precedence.

Mr. MUNDELL: Yes.

The CHAIRMAN: I think that has been qualified. It is a federal statute that is passed within the jurisdiction of the federal government.

Mr. MUNDELL: Yes.

Mr. DESCHATELETS: Suppose both statutes did collide on a specific matter and the federal statute would have precedence; now, are you basing your opinion on jurisprudence established by the higher courts—the supreme courts —or is it in the Interpretation Act or somewhere in the statutes?

Mr. MUNDELL: It is in the case law. I think it is in the first case which enunciated the so-called doctrine of federal paramountcy in the 1896 prohibition case.

Mr. DESCHATELETS: But this is a recognized rule today.

Mr. MUNDELL: Very much so, in many cases.

Mr. MARTIN (*Essex East*): Your point is, that if it has effect in law, then it does raise a constitutional problem involving the division of power? Would you say, that being the case, in view of that constitutional friction that has existed in Canada over sections 91 and 92, that the Supreme Court might have had this matter referred to it for an advisory opinion under the constitutional references act?

Mr. MUNDELL: They could have it referred to it. It seems to me, at this stage, the bill should be made clear as to its intention, then there is no problem in interpreting it. If it is intended to be an effective federal enactment of these freedoms, then it might be referred to the Supreme Court on a question as to its validity. I must say, with respect to the abolition of appeals to the privy council, that I would not particularly favour a reference now. I am not suggesting we revive appeals to the privy council; but at that time, if it were referred to the Supreme Court, there were always two stages of argument; in the Supreme Court, and the later argument. Now a reference to the Supreme Court is a one-shot proposition. It is argued in that court, and that is the end. I think, in view of that, it would be better to cut down references, and wait until we have concrete cases, and then let them work their way through it.

Mr. MARTIN (*Essex East*): How would you resolve this doubt then?

Mr. MUNDELL: I am speaking in the presence of a very expert draftsman sitting behind me, so I will have to be careful. I would think that you could say: "it is hereby declared that the following rights and freedoms exist"; just

that, nothing more. Or, it could be stated,—and you must remember that the openings words are "Her Majesty, by and with the advice and consent... enacts as follows": and then "the following rights and freedoms shall exist in Canada"; and that would be an enactment. This bill declares that there shall exist. Now, which is it?

Mr. MARTIN (*Essex East*): This is an interesting suggestion, Mr. Mundell, I want to take those words down.

Mr. MUNDELL: The first suggestion was: "it is hereby declared that the following rights and freedoms exist in Canada".

Mr. MARTIN (*Essex East*): Yes.

Mr. MUNDELL: And the second one was: "the following rights and freedoms shall exist in Canada". That is pretty much off the cuff.

Mr. MARTIN (*Essex East*): Yesterday when the minister was here some of us were concerned about the restriction on provincial powers by the failure to clarify the word "Canada", and the word "property", and that these two words in their naked form suggest an interpretation of this act, which notwithstanding what its intention is, would constitute an invasion of the powers given to the provinces under section 92. Have you any suggestion as to how that might be avoided? Do you think we could put in a preamble, and in that preamble use words that would clearly indicate that the intention of clause 2 was to deal only with matters that come within the competence of parliament?

Mr. MUNDELL: I would think it could be done in a preamble, yes, Mr. Martin. Of course, you must bear in mind that I do not know if this is intended to be merely a declaration; then we have no constitutional problem at all. If it says, "it is hereby declared there are certain rights and freedoms in Canada," and it is not intended to be legally operative, then it does not matter about restricting it to the federal sphere. If it is intended to be legally operative and creating these rights and freedoms, then you will have the problem as to how far federal competence can go. A statement could be put in the preamble such as, "in so far as within the competence of parliament", and that would indicate that it is limited to the federal field. We do not know the extent of the federal field, and that is the basic problem.

Mr. MARTIN (*Essex East*): This is so important I think we ought to pursue it carefully.

Mr. Browne was right when he said in his interrogation of you, that the minister did not say we were creating these freedoms. The minister took the position yesterday that these freedoms had existed in Canada, and that by this bill, we were not creating them.

The CHAIRMAN: Not creating them for the first time.

Mr. MARTIN (*Essex East*): We were not creating them for the first time. There is no doubt that he said that. He also said that this has the effect of law, and that it is not merely a declaration of pious intention. He said that because of the phrase "is hereby recognized", it has the same effect as the phrase "it is hereby declared" in section 91 of the British North America Act, which has legal effect. So I think there is no doubt the members of the committee would agree that is the position of the minister, that this does have the effect of law. What are the consequences of that?

Mr. MUNDELL: It might well override provincial legislation that was inconsistent. The extent of the federal authority, the authority of parliament in this field, is uncertain. It may be that parliament has the full powers to protect all these rights and freedoms, in which case any inconsistent provincial legislation would be overridden.

On the question of interpretation, it is odd that the word "declares" is used for the purpose of the enactment. *Prima facie* it is a declaration. Then follows "there shall exist", which gives colour to the other interpretation.

Mr. MARTIN (*Essex East*): As the minister said yesterday, this act does not create these things and these things have existed. In law, to the extent there is legal sanction for these various freedoms, do they arise only out of judicial interpretations, or are there statutes that guarantee these as well?

Mr. MUNDELL: I think there are both.

Mr. MARTIN (*Essex East*): What are the statutes?

Mr. MUNDELL: Do you mean, guaranteeing these freedoms?

Mr. MARTIN (*Essex East*): Yes. Take, for instance, the freedom of the press. I am thinking of the Alberta case. Am I wrong in saying that the freedom of the press is regarded as something outside of provincial powers as a result of that decision, which holds that any violation of the freedom of the press by a provincial power is a violation of the inherent quality in the whole parliamentary system?

Mr. MUNDELL: That certainly was the case.

Mr. MARTIN (*Essex East*): Is there any statute that covers that?

Mr. MUNDELL: I do not think there is any statute. At least, I do not know of any that, in terms, guarantees freedom of the press. But there are statutes—the libel and slander acts in the provinces—that deal with fringe matters.

Mr. MARTIN (*Essex East*): That is another point I will come to later, the qualifications. What I am trying to ascertain—and we all believe we should have freedom of religion in this country, without any restriction, and these other freedoms—but do the cases go any further than establish freedom within the context of the facts that were before the courts? Mr. Dorion mentioned this point yesterday. Take the Jehovah Witnesses case. Does that establish clearly that under our law, as interpreted by the courts, there is an absolute freedom of religion in Canada?

Mr. MUNDELL: I would say the cases do not very clearly establish anything; that there is a great uncertainty in the whole area.

Mr. MARTIN (*Essex East*): There is uncertainty. What is the consequence of that in terms of this section as an enactment?

Mr. MUNDELL: It means that nobody—or, as least, I would say that nobody can give you a firm answer as to what the effect of this section is in relation to provincial legislation. You can have different opinions, but nobody will know until the Supreme Court of Canada says what the section means.

Mr. MARTIN (*Essex East*): Is there any way by which we could strengthen this section, then?

Mr. MUNDELL: If it is intended to be legally operative, I think it should be expressed more clearly. You have mentioned a preamble. We have the opening words:

—in Canada there have always existed and shall continue to exist—

I am not quarrelling about the accuracy or inaccuracy of that, or the importance of it. But that is another thing that could go in the preamble, with any other suggestion, limiting it to federal application. You could have very much simpler language creating these rights and freedoms. It is a very odd thing, but there is almost universal reaction to this bill, that as a bill of rights it is too complicated. I have heard this reaction from many people, that it should be simpler, more forthright, with less legal "legality" in it, and be more a statement of fact.

A great many people think there should be a preamble of the Gettysburg address type of language, and if that were adopted, you could have a preamble in simpler language which would strengthen it as a constitutional document, and which would make it appeal to you.

Then the other two major parts of the act, clause 3, and the War Measures Act part might well go in as amendments to the Interpretation Act.

Mr. MARTIN (*Essex East*): I have not yet finished with clause 2.

Mr. MUNDELL: If you made it simpler, then you could take all the rest of this bill and bring these provisions in, in more appropriate places, and you would then have a very simple and forthright document.

Mr. MARTIN (*Essex East*): The effect would be to deal with the questions clearly as to whether this bill overrides existing legislation?

Mr. MUNDELL: You could make it clearer as to whether it was intended to do so or not.

Mr. MARTIN (*Essex East*): I have some more questions on clause 2, but there may be other members of the committee who would want to ask their questions now.

Mr. STEWART: I suggest that we hear from Mr. Mundell first, and ask our questions later.

Mr. MUNDELL: I am in your hands.

The CHAIRMAN: I have some questions I would like to ask Mr. Mundell. You have indicated that you think the language should be more simple than what we have here.

Personally I cannot conceive of it being any simpler. I have felt that the chief complaint about it was that it was expressed in too simple language. Do you feel that the language used in clause 2 is not simple enough?

Mr. MUNDELL: I have no quarrel with paragraphs (*a*) to (*f*) on that ground, but I think there is an ambiguity in one of them; and as far as simplicity goes, I think that the three lines at the beginning of the clause have this ambiguity in them.

I submit that it is not customary in statutes to put statements of fact in the enacting section, as has been done here. This is an unusual provision. It is not improper or anything like that, but I submit that it is unusual.

On the other hand, if it is intended to be a legally operative section, it could say "The following rights and freedoms shall exist in Canada", and then in the preamble you would cover the past history of it.

The CHAIRMAN: Your suggestion as to lack of simplicity relates not to the rights and freedoms that are declared, but rather to the first three lines of that paragraph?

Mr. MUNDELL: That is correct, except that I do have one reservation concerning "due process of law", which is in answer to another question.

The CHAIRMAN: Assuming for the moment that some doubt does exist as to whether or not this is substantive law, is it not clear that it becomes substantive law when you say—or rather when it is said in section 3 that the courts shall construe and apply all the statute law, as well as orders and regulations passed under the statutes, so as not to abrogate, abridge or infringe on any of the rights or freedoms recognized by this part, and that means those recognized by clause 2?

So surely the courts must give effect to clause 2.

Mr. MUNDELL: As far as federal enactments go, yes, clause 3 is limited to federal enactments.

Mr. MARTIN (*Essex East*): I am sorry, but I could not hear Mr. Mundell.

Mr. MUNDELL: As far as federal statutes are concerned, clause 3 certainly has the effect which the chairman says it has; it gives legal operation to clause 2 as far as federal enactments go.

The CHAIRMAN: And is not the purpose of that to make it perfectly clear that all the parliament of Canada is doing is dealing with matters which are within the competence of the federal government, and we are making it clear that we are not encroaching on matters exclusively within the jurisdiction of the provinces.

Mr. MUNDELL: I would say, with great deference, I would not agree with you.

Clause 3 relates to federal statutes, and provides for the right of interpretation, as well as having an amending effect on all past statutes; but parliament, obviously, could only amend or interpret its own statutes. They cannot enact an interpretation clause for provincial legislation. So, clause 3, in its nature, has to be limited to federal legislation. However, that does not necessarily mean that clause 2 is limited.

The CHAIRMAN: And, it is, in express terms, limited.

Mr. MUNDELL: It has to be.

The CHAIRMAN: It is, because it refers only to statutes that may be appealed, abolished or altered by the parliament of Canada.

Mr. MUNDELL: Yes, but that is as far as parliament can go.

The CHAIRMAN: And we are making it clear that is as far as we can go.

Mr. MARTIN (*Essex East*): That is true so far as clause 3 is concerned; but clause 3 does not provide a judicial interpretation of clause 2, in the sense that the chairman established it.

Mr. MUNDELL: It need not. It can be argued both ways. In connection with the interpretation of clause 2, it can do it with its own legislation, but clause 3 had to be limited. However, it does not means that clause 2 is necessarily limited to matters merely within the federal field. Our basic difficulty, which everyone knows, is that clause 2 is in the federal field, and it may cover these rights and freedoms in all aspects or, maybe, only in a limited way.

Mr. BROWNE (*Vancouver-Kingsway*): May I call this to your attention. I had mentioned earlier that the English bill of rights had been a declaratory statement, and I would like to draw to your attention that it is entitled:

> An act declaring the rights and liberties of the subject, and settling the succession of the crown.

and, it goes on, later on, and says:

> ——for the vindicating and asserting of their ancient rights and liberties, declare....

It seems to me that has been recognized by courts of law for a long time.

Mr. MUNDELL: This is the 1689 one.

Mr. BROWNE (*Vancouver-Kingsway*): Of course, it has been revised since that time, but the wording is still the same. They do not have the latest statute in the library at the moment, but I had it out and the wording is unchanged in that respect.

Mr. MUNDELL: Of course, this is a very ancient statute, and the language in the statutes varies.

Mr. MARTIN (*Essex East*): The point Mr. Browne is raising is this. The minister does say this is legally affected, and then you say, as a result, this raises a constitutional problem. Now, it should be pointed out, in so far as England—the United Kingdom,—is concerned, that problem does not arise. Our problem arises out of the fact that in Canada, the totality of our powers

are divided between two jurisdictions, and what this witness is pointing out is that once you say this is a legal enactment then you raise the question of constitutional powers. That does not arise in the United Kingdom, because there is only one omnipotent power.

Mr. BROWNE (*Vancouver-Kingsway*): You had the same thing in the United States. Their bill of rights is limited only to the federal government.

Mr. MARTIN (*Essex East*): You have not understood the point. If, what Mr. Mundell is saying is true, then a constitutional problem has arisen, and this is a very serious matter, which would be recognized, I think, by any student of government in this country. It creates a whole area of friction and conflict. It will create great uncertainty as between the two senior levels of government. If we can avoid that, I think we ought to do so.

I think, in fairness, Mr. Mundell ought to be told that the minister was rather sympathetic to our concern yesterday. Whether or not we can arrive at a formula that will take care of this, I do not know. But I rather think we can.

Mr. MUNDELL: Could I make an observation on this, Mr. Martin, arising out of something you said earlier.

Supposing you had a preamble, and said in the preamble "In so far as it is within the competence of parliament, these rights and freedoms are declared". That preamble would probably be referred to as an aid to interpretation, in any uncertainty in the bill. But the basic difficulty is that nobody knows what federal competence is. It may be that this statute, if it is legally operative, would create these freedoms; and, if it is taken as a matter of law, may override provincial legislation. Nobody knows to what extent it will override it. There is an area of uncertainty there.

Mr. MARTIN (*Essex East*): Will that exist if we use the words "within federal competence"?

Mr. MUNDELL: What is federal competence?

Mr. MARTIN (*Essex East*): Take the Alberta case, the Switzmann case. The courts have said these were matters that certainly came within federal competence. In so far as any violation of the freedom of the press, or freedom of religion is concerned, within the context of this particular set of circumstances, surely it is clear the federal government has the power?

Mr. MUNDELL: Taking the argument of Chief Justice Duff, with which, I think, Mr. Justice Davis concurred—

Mr. MARTIN (*Essex East*): That is in the Alberta case?

Mr. MUNDELL: —and Mr. Justice Cannon, the three of them suggested that it was basic to the parliamentary system that there should be freedom of the press. Therefore, they said the Alberta press bill was bad. The same thing might apply to parliament. It may be outside authority of parliament to do this.

Mr. MARTIN (*Essex East*): Not to enact—to interfere?

Mr. MUNDELL: To interfere.

Mr. MARTIN (*Essex East*): That point, really, has not been decided yet. There is an *obiter dictum* of Mr. Justice Abbott that says perhaps parliament cannot interfere; but there is no decision. But to the extent that there is a decision, there is at least a limited area in which parliament does have power to deal with these various freedoms?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): And if you put in the phrase that Mr. Dorion suggested, "within competence", then we are really not in difficulty?

Mr. STEWART: You might, in effect, be limiting the sovereignty of parliament, though, if it has greater power.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Mundell said we do not know what the federal jurisdiction is, so that would not make the slightest bit of difference to it.

Mr. MARTIN (*Essex East*): With respect, Mr. Browne, he did not say that, If you read these decisions, it is a very delicate point, but—

Mr. STEWART: He did.

Mr. MUNDELL: I think I did.

Mr. MARTIN (*Essex East*): Yes; but I do not think Mr. Browne has got the point, if I may say so with great respect.

Mr. BROWNE (*Vancouver-Kingsway*): I would say that Mr. Martin has not got the point.

The CHAIRMAN: I do not think, Mr. Mundell, you have answered the point that Mr. Stewart just raised. Would that not, in effect, indicate, possibly, a renunciation of some of the sovereignty of the federal parliament?

Mr. MUNDELL: I would think not, actually. If you put in "In so far as it is within the competence of parliament it is hereby declared that these freedoms exist", or, "It is hereby enacted that these freedoms exist", surely you are staking out the whole field. Whatever parliament is competent to do, you are staking out. You are not limiting it.

The CHAIRMAN: Do you know of any other statute of the parliament of Canada that has any such declared indication of the extent of the application of the legislation?

Mr. MUNDELL: There have been quite a few statutes, mostly in the provincial field I think, that enact something and then say "this statute is to be construed as limited to the authority of the legislation". That quite often is put in statutes.

The CHAIRMAN: I am thinking of the federal statutes. I cannot recall anywhere expressly in the act that it is stated it is limited to matters under the jurisdiction of the parliament of Canada. Whether it is or is not the courts will declare inoperative and invalid any federal statute that is not within the competence of the parliament of Canada. Is that not correct?

Mr. MUNDELL: Yes.

The CHAIRMAN: Why need we be so concerned about whether or not we have the words in or do not have them in when we know that actually they will have no effect if they are beyond the competence of the parliament of Canada. I am wondering why we are so concerned about it when we know the courts will not give effect to it if it is beyond the competence of the parliament of Canada.

Mr. MUNDELL: That, I suppose, is correct.

Mr. MARTIN (*Essex East*): Surely it is not quite; surely we want to make this an effective bill of rights. You say, why are we so concerned about this when the Supreme Court of Canada will determine whether or not we have exceeded our powers. I say if that is the situation, then we are producing an ineffective bill of rights. That is not what we want to do. I say we ought to produce a statute that will not run that danger in the hands of the Supreme Court. We should bring in a bill which is clearly within our powers.

The CHAIRMAN: I think we are not here to argue between ourselves. I wanted to get Mr. Mundell's view on the matter.

Mr. MARTIN (*Essex East*): But he agreed with you.

Mr. MUNDELL: I was not quite clear. That is true; but what might happen is that the whole bill might be struck down if in some respects it goes beyond the authority. If you put in the limiting words you might avoid the possibility of the bill being struck down.

The CHAIRMAN: But that is a lawyer's argument.

Mr. MUNDELL: I suppose so.

Mr. STEWART: There might be a set of local circumstances which becomes national in importance and parliament would have greater power under those circumstances than in the normal course of events. For instance, a provincial act might deal with the form of worship in a certain way—that is in the field of religion; but if it so developed that it became a situation causing a nuisance or public affray or some such thing, parliament might step in and say that, despite your power we are going to legislate in this matter and make it a criminal offence, for instance. Parliament certainly would have that power.

Mr. MARTIN (*Essex East*): The courts did that very thing in the Jehovah witnesses case. This just shows that you cannot do what the chairman suggests.

Mr. DESCHATELETS: If I understand it well, this bill is raising at least two very important legal problems. In stating that the provisions of this bill are within the federal jurisdiction only, we are taking care of one diffculty. Now, what is the competence of the federal jurisdiction if this could be left to the interpretation of the courts.

Mr. MUNDELL: It has to be, in fact.

Mr. DESCHATELETS: Do you not think, in stating that these provisions will apply only within the federal jurisdiction, that we are taking care of an important uncertainty.

Mr. MUNDELL: Yes; it would clarify it.

Mr. MACDONNELL: Are we not really trying to create a situation where litigation is impossible? We are wasting our time. There will be litigation so long as there are lawyers who issue writs. It seems to me we are very near the point where we are trying to guarantee that none of these words will be questioned. Of course,they will be.

Mr. MARTIN (*Essex East*): But we want, in so far as we can, to minimize that; that is the function of the legislature.

Mr. DESCHATELETS: On the point raised by Mr. Macdonnell I would like to point out to him that we have a brief from the Canadian bar association, stating very clearly that there are uncertainties arising out of the jurisdiction of the provincial as well as the federal field. If we state very clearly in this bill that the provisions of this bill only apply within federal jurisdiction I think we will take care of one of the big problems raised by this bill. That is my opinion.

Mr. MUNDELL: I must say that one prominent practitioner in Toronto informed me that he expected to retire on the litigation created by this bill. That is a comment in respect to what Mr. Macdonnell said.

The CHAIRMAN: I do not know how we could use more expressive and simple language than that which we have used. Every case that comes up in court is a play upon the meaning of words. Just last night I picked up the paper and found that a magistrate was dealing with the question as to whether whistling is a violation in so far as disturbing the peace. There is no end whatsoever to the ingeniousness of lawyers in inventing arguments. If we are ever going to have a statute which is free from the possibilities of lawyers raising questions about it, I am sure it will not be in our time.

Mr. BROWNE (*Vancouver-Kingsway*): Perhaps we could put in a clause protecting ourselves from lawyers.

Mr. MARTIN (*Essex East*): I do not quarrel with your statement, Mr. Chairman, nor do I quarrel with what Mr. Macdonnell has said; but we are now in the process of legislating, and it seems to me that it is not only our opportunity, but our duty to make sure that we have language that does not

create constitutional problems, which have been recognized as a result of our discussions yesterday. This is what we are trying to do. It may be a tedious job, but it is a very important one. I think from the highest political point of view it is desirable to make sure that people are not encouraged to question the validity of the legislation advantageous to themselves, and it is our concern to avoid that. That is why we are seeking to resort to the most careful language possible. I think this is very important.

I have a question I would like to ask Mr. Mundell in respect of another aspect of this clause. He mentioned this problem in respect of due process himself. Are you satisfied with the use of the phrase? Yesterday the Minister of Justice said that, while he agreed that the phrase "due process" is mentioned in one of the statutes of Edward II, he did acknowledge that "due process" is not a current legal phrase in Canada, notwithstanding the existence of much jurisprudence on this phrase in the United States. Do you think there is any point in the idea that we do not now know in respect of this clause, what "due process" means? We do not know whether it is due process according to law, or whether it is due process according to, let us say, the standard of natural justice.

Mr. MUNDELL: I would agree that there is ambiguity there. That was the second point I was going to raise. I was just talking about the uncertainties at this stage.

The CHAIRMAN: Would that phrase not mean both due process according to law and due process according to the standards of natural justice? Is it not desirable that it means both?

Mr. MUNDELL: It seems to me that as a matter of clarity, if it is intended merely to mean, in accordance with law, then that could be said in these terms; but if it is intended to mean more than that, for example in accordance with minimum standards of justice, or something of that sort, then it could be left.

The CHAIRMAN: Mr. Mundell, if we were to use the words "according to law", is it not possible that we would be defeating the very end we are trying to accomplish here? Would it not be possible then for another ingenious lawyer to argue, and argue perhaps quite effectively, that "according to law" means, according to a statute which specifies that a certain penalty may be imposed? Would we not be restricting this then, if we were to say "according to law"? The crown could say that "according to law" means, according to a statute, so that the people would have no protection in regard to these rights at all?

Mr. MUNDELL: The only point that I was making about the expression there is that there is uncertainty as to whether it means just that, or means more than that. If it was intended to have a more restricted meaning, then it should be so stated.

The CHAIRMAN: What other words could be used which would be more expressive than what have been used here?

Mr. MUNDELL: If you wanted the certainty of restricting the meaning, you could say: "in accordance with law".

The CHAIRMAN: I do not think that is very certain at all, because I could certainly argue against that, without any question.

Mr. MARTIN (*Essex East*): You would not argue that, with great respect, successfully, because on "according to law" the law is clear. There is no language in Canada which says what "due process" is.

The CHAIRMAN: If you could find a law in Canada that is that clear, I would like to know what it is.

Mr. MUNDELL: I personally would not have any difficulty in interpreting "in accordance with the law."

Mr. MACDONNELL: Can you guarantee all the judges would agree with you?

Mr. MUNDELL: Only 50 per cent.

Mr. MARTIN (*Essex East*): "According to law" is a clear expression.

Mr. MUNDELL: "Due process" has no defined meaning in Canada. It may mean minimum standards according to proper laws, if you want to put it that way.

Mr. STEWART: In the old statute it means the law of the land.

Mr. MACDONNELL: I would like to retain you to argue against the other side; you would do a good job.

The CHAIRMAN: If it was "the law of the land," surely, if we used those words, it would be restrictive.

Mr. MARTIN (*Essex East*): What words?

Mr. STEWART: "Due process of law—"according to the law of the land."

Mr. MARTIN (*Essex East*): That is precisely what the witness is suggesting. Use "according to law." Anyone who has had any experience with American decisions—and Mr. Spencer has had considerable experience; he knows the thousands of cases in which that expression has been interpreted, and we are just putting ourselves into the most difficult position. We do not have that difficulty in Canada at the present time. We are now introducing "due process" after a long interval of seven centuries; and you will not find the phrase "due process of law" in any Canadian statute, will you? I bet you there is no Canadian statute, in the last 50 years, that has the phrase "due process" in it.

Mr. DESCHATELETS: The Americans—

Mr. MARTIN (*Essex East*): Under the American system it is part of the constitution. But if you say "according to law" it seems to me there cannot be anything like the ambiguity

The CHAIRMAN: Cou'd we get on to the next branch of your presentation?

Mr. MUNDELL: That is all I have to say on clause 2.

Mr. MARTIN (*Essex East*): I have another question to put to you on clause 2.

With regard to these freedoms—of religion, and so on—you have said there is an area of doubt as to the competence of the federal parliament with regard to certain aspects of these freedoms. I suggested to the Minister of Justice there is another difficulty with regard to the way they are stated here; and that is that they are stated as absolutes, and that they are not stated as freedoms. Take the freedom of the press, to which I referred yesterday. It must be clear that we cannot say that everyone is entitled to freedom of the press in Canada, because there are in existence certain laws which restrict the freedom of the press. The Minister of Justice said that freedom does not mean licence. That is all we are saying here.

Mr. MUNDELL: I think that there is uncertainty there, but I think that freedom obviously means qualified freedom. I suppose that freedom is a qualified matter, and I think that qualifications are inherent in the term freedom of the press, for instance.

Mr. STEWART: It is not absolute.

Mr. MUNDELL: It is not absolute. This is a problem; but where is the line to be drawn?

Mr. MARTIN (*Essex East*): Mr. Macdonnell is very sure of himself on this point, and he may be irritated if I proceed in this manner, but I must take

issue with him. I say that this is an act of parliament; it is not a speech of a member of parliament. This is an act of parliament. This act says that there shall exist freedom of the press. Now, suppose a newspaper comes along and defames the character of the chairman. It would be regrettable, but it does so. Then that defamator would be able to use this bill as a complete defence. This bill says that I have freedom of the press. There is no restriction. And remember, this is a statute; it is not just a speech. It is a statute.

Is that argument of mine over-stretching it? Do you agree with Mr. Macdonnell's groans?

Mr. MUNDELL: Definitely, and I disagree with you, sir.

Mr. MACDONNELL: What about the law of libel? Does this bill override the law of libel?

Mr. MARTIN (*Essex East*): I recognize that it does. but Mr. Mundell is a much greater authority on that point than I am.

Mr. MUNDELL: Coming now to clause 3, it has been suggested to me that this bill might well stop at the end of clause 2, and that we should put clause 3 as an amendment into the Interpretation Act, and that the amendment to the War Measures Act should go into the War Measures Act—in other words, making three bills out of this bill, rather than to have one, with a view to coming up with a simple bill of rights. That is the suggestion which has been made to me by various people.

It is a matter of the form of the bill, and I do not suppose the committee can report out three bills, having had only one referred to them; however, that is the suggestion.

As to the form of clause 3, comments made to me indicate that people feel there is some doubt about the meaning of the words "construe and apply", and that normally construe means interpret. It is a question of whether you have an uncertainty or ambiguity in the language; but it does not mean amend.

To construe and apply therefore would seem to be really interpretation, when, in effect, it means that prior laws are amended in so far as they are inconsistent with this statute. That uncertainty could be removed by just providing that prior acts are amended or repealed to the extent that they are inconsistent with these freedoms. It has been suggested that would be more certain language. I just gave that. However, if that is correct—if this is an amendment of all appropriate acts, then there is some uncertainty as to the extent to which they are amended; and this, certainly is magnified when you consider the ambiguity in the words "due process of law" in clause 2, because it means all previous acts of parliament are amended to the extent that they provide for the taking of property without due process of law.

For example, may the Expropriation Act not be wholly inoperative? It provides for the taking of property by the simple filing of a plan and description in the registry office, on the decision of a minister, and a person is deprived of his property without any process of law at all. Now, does this mean that the Expropriation Act is put out of business?

Mr. MARTIN (*Essex East*): What do you think?

Mr. MUNDELL: Well I would interpret "due process of law" would be in accordance with the law and, in that case, the Expropriation Act would continue to operate. But, if it means according to a fair procedure, no one is defending the fairness of an expropriation.

Mr. MARTIN (*Essex East*): You are suggesting that we eliminate clause 3 altogether, and that we have an amendment to the Expropriation Act.

Mr. MUNDELL: That has been suggested, yes.

Mr. MARTIN (*Essex East*): Would an amendment to the Interpretation Act, create greater certainty with regard to the effect of the legislation on existing inconsistent law?

Mr. MUNDELL: I do not think the suggestion was directed to that point; it was merely a matter—

Mr. MARTIN (*Essex East*): Of simplicity of the bill.

Mr. MUNDELL: Of getting a simpler form of bill of rights.

Mr. MARTIN (*Essex East*): And, you would have a preamble, and then all we would have in the bill of rights would be the preamble and clauses 1 and 2.

Mr. MUNDELL: That is correct. That has been suggested.

Mr. MARTIN (*Essex East*): What would happen to the War Measures Act?

Mr. MUNDELL: We would have another bill amending the War Measures Act .

Mr. MARTIN (*Essex East*): That would be an amendment by another bill.

The CHAIRMAN: How about section 5? Would you not want section 5 in? We are surely not exhausting all the freedoms in section 2?

Mr. MUNDELL: I would have thought that if you had a preamble it could be made reasonably clear that this is not intended to be exhaustive, as a matter of interpretation.

Mr. STEWART: Clause 5 could be incorporated in clause 2.

The CHAIRMAN: For the purposes of minimizing litigation, would it not be desirable to have a clause like 5 in?

Mr. MUNDELL: It would. I suppose the only objection to it would be that you are, again, complicating what would be a very simple document.

Mr. MARTIN (*Essex East*): What about Mr. Stewart's suggestion, that clause 5 be incorporated somewhere in clause 2?

Mr. MUNDELL: That could be done, yes—making it a subsection (2).

Mr. STEWART: Setting out the bald declaration and bringing in the specific ones, is what I had in mind.

Mr. MARTIN (*Essex East*): It seems to me that this is a very novel suggestion. By amending the Interpretation Act, we could get all the effect that is in clause 3?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): That would not remove some of the difficulties that some of us find with regard to certain paragraphs in clause 3.

Mr. MUNDELL: No, it would not. It could be moved over exactly as it is into the Interpretation Act.

Mr. MARTIN (*Essex East*): That is a very interesting suggestion. If we do that, we are still confronted, as I say, with certain difficulties, and I would like to ask some questions about those difficulties.

Would an amendment to the Interpretation Act, or will clause 3 have the effect of overriding existing inconsistent legislation?

Mr. MUNDELL: That would be my interpretation of this provision.

Mr. MARTIN (*Essex East*): It will have that effect?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): You said that you did not think it would override the Expropriation Act?

Mr. MUNDELL: Depending on the interpretation given to "due process of law".

Mr. MARTIN (*Essex East*): Would it override the various sections of the Immigration Act?

Mr. MUNDELL: It might well. It might affect the National Defence Act too.

Mr. MARTIN (*Essex East*): Have you been able to make any examination as to the number of statutes that would be affected?

Mr. MUNDELL: No, I have not, Mr. Martin; I am sorry.

Mr. MARTIN (*Essex East*): Do you think that section 3 helps in interpreting section 2 at all in so far as it has a bearing on it?

Mr. MUNDELL: I do not think it really has any such effect.

Mr. MARTIN (*Essex East*): Yesterday a surprising number of us, even including Mr. Browne who resists almost everything I suggest, were concerned about 3(b)—even the chairman had some reservations, and that is saying something.

The CHAIRMAN: Thank you.

Mr. MARTIN (*Essex East*): We know that this could have the effect of abolishing capital punishment—that the words "cruel, inhuman or degrading" would create very great uncertainty. The minister is looking at this too. Have you any comment to make on that?

Mr. MUNDELL: I would certainly agree that it creates uncertainty. We will not know whether or not it abolishes capital punishment until the Supreme Court of Canada resolves the uncertainty; but it could be so interpreted. It is almost in contradictory terms to talk about degrading and punishment, because punishment by its very nature is generally degrading. It rather suggests there are no degrading punishments, which is an oddity in itself.

The CHAIRMAN: It was suggested in the interpretation of the word "degrading", as well as the words "cruel and inhuman", that regard is to be had to the fact that the individual with whom we are dealing has committed an offence. It is to be viewed in the light of what is degrading punishment or treatment of such a person.

Mr. MUNDELL: That would be one interpretation.

The CHAIRMAN: Do you feel there is some merit to this argument.

Mr. MUNDELL: I would think that a court coming to this section would treat "cruel, inhuman or degrading" really as something beyond what we have now.

Mr. MARTIN (*Essex East*): We should adjourn now. I am willing to come back after the orders of the day.

The CHAIRMAN: What is the wish of the committee?

Mr. Mundell has expressed a willingness to return after the orders of the day.

We will have a recess until the orders of the day have been reached.

The CHAIRMAN: I will call the meeting to order.

Do you wish to continue your questioning, Mr. Martin.

Mr. MARTIN (*Essex East*): I think we should let Mr. Mundell continue to make his remarks in regard to clause 3.

Before beginning with that, I would like to correct an impression that I may have created, but which I did not really intend to create. The Canadian Press did report the intention to set up a special committee. I would not want to think that anything I said was a reflection upon the press. My comment was that all the papers did not carry an indication of the intention to establish a committee. I say this in all fairness to Mr. Nelson, who is a very diligent, careful and responsible newspaper man.

The CHAIRMAN: Thank you, Mr. Martin.

When we recessed we were in the process of asking Mr. Mundell questions. Shall we now continue?

Mr. MUNDELL: Do you wish me to continue?

The CHAIRMAN: Yes, if you have anything further to say.

Mr. MUNDELL: I would like to refer to one thing in clause 2 that has been drawn to my attention during the recess. In the French version, "due process

of law" is translated, and you will pardon my accent, as "par des voies légales" which, I understand, means "by legal means", which is, in effect, "in accordance with law". Taking the French version along with the English version, it would look as though "due process of law" means "in accordance with law" in the English version. The ambiguity is resolved in the French version.

Mr. DESCHATELETS: Have you seen the French translation of the bill as to the meaning of "due process of law"?

Mr. MUNDELL: That is just what I was referring to.

Mr. MARTIN (*Essex East*): That is just what he was saying.

Mr. DESCHATELETS: Do you like this translation? Do you think it means the intent that we had in mind?

Mr. MUNDELL: I cannot speak about the intent, sir, but it expresses the narrower interpretation of "due process of law", I would think, rather than the wider one, and would give that meaning to it.

In regard to clause 3, I have suggested that there have been comments about the use of the language, "construed and applied" with respect to past acts, and suggestions have been made that this clause might be broken in two. The provision, relating to past acts, makes it clear that it is intended to amend anything inconsistent with the bill of rights. That is one suggestion that has been made, because people who have spoken to me say they find it difficult to construe the words "construed and applied". That is just one suggestion made to clear up the uncertainty that some counsel see there.

Coming down to the enumerated paragraphs in clause 3, mention has already been made of the uncertainty in relation to the words "cruel, inhuman or degrading treatment or punishment". Again, I cannot speak as to the policy of the act, but just as a technical comment, there is an uncertainty there as to whether, for example, capital punishment would survive. I suggest that it has been suggested to me that the meaning should be made clear.

Mr. MARTIN (*Essex East*): Do you have any suggestion in respect to a proposed wording in substitution?

Mr. MUNDELL: One suggestion is to stop the wording at "torture". That has been one suggestion that has been made. Another suggestion has been to use the words "cruel, unusual treatment or punishment rather than "inhuman or degrading". The phrase "cruel or unusual" would more or less mean that the thinking behind it was that anything that is now going on is not unusual, but anything in the future that varied from this would be cut out.

Mr. STEWART: The minister stated that if a change were made it would be less than the declaration in the international charter of the United Nations. I believe that was his comment.

Mr. MARTIN (*Essex East*): Yes, that is it. His comment was, as Mr. Stewart points out, that if he changed the word in here, Canada having accepted the declaration on human rights, we would be presumed to be now putting in our own statute law an obligation less than is supported in general terms. I just point out there that the declaration on human rights has a different significance in a particular statute. That is obviously one of his concerns. Have you any comment to make in that regard?

Mr. MUNDELL: I really do not have any comment, I do not think. It is a question, I suppose, of whether we want to adopt that language with the uncertainties or not. Maybe the thing to do would be to drop the whole provision in that case.

Mr. MARTIN (*Essex East*): Yes. Mr. Badanai made that suggestion. He felt that this was covered by (*a*) and (*c*), but the minister pointed out that he thought it was not covered. He thought we had to leave at least some aspect of this in, particularly in view of the declaration on human rights, and I must

say, that seemed to be the only position to take. Your suggestion is now that it should stop at the word "torture", so as to read: "impose or authorize the imposition of torture", is that it?

Mr. MUNDELL: Yes. I am only speaking now on the question of uncertainty.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, I wonder if I could ask Mr. Mundell if he suggests possibly using the words "cruel or unusual", because I think the wording in the American bill of rights, and in the English bill of rights, are "cruel and unusual"? Not being a lawyer, I do not know whether it would mean, to take the Criminal Code, that it would have to be both "cruel and unusual," or whether the word "cruel" would stand on its own, or whether "cruel or unusual" could still be open to the court to decide whether capital punishment was cruel.

Mr. MUNDELL: I think it should be "cruel and unusual."

Mr. BROWNE (*Vancouver-Kingsway*): It seems to me that should be so. That is what I would think. It seems to me, from what was said yesterday, that would maintain what we have at the present time.

The CHAIRMAN: That would maintain a cruel punishment, if it happened also to be a usual punishment, would it not? I query the advisability of that.

Mr. MUNDELL: I would think maybe the best thing to do would be to omit the provision, actually. We have not, I suppose, enacted all of the provisions of the declaration of human rights.

Mr. BROWNE (*Vancouver-Kingsway*): It seems to me that so far as the British law is concerned, and as far as our understanding of justice is concerned, the words "cruel and unusual" have been in the bill of human rights for a long time. Our present Criminal Code has come within that scope; and in this bill we are wanting to set out and protect the rights we now have. I do not think we want to go on putting the courts in the position of uncertainty; and there could be quite a difference of opinion as to what is "cruel" punishment. In the view of some people almost anything would be cruel punishment. It seems to me the words "cruel and unusual", having been used for so many years, have a certain application, and our present Criminal Code has been enacted by parliament obviously because those are the punishments they want to inflict and they come within the scope of the term "cruel and unusual." Whereas, I think an extension of anything we now have in terms of punishment could possibly come under "cruel and unusual punishment", if they were to be made more severe.

The CHAIRMAN: You have no further comment on that, Mr. Mundell?

Mr. MUNDELL: No, I just emphasize, again, the feeling there is uncertainty there and, possibly, the thing to do would be to drop the provision of that. That would avoid the uncertainty and the downgrading of the international declaration.

Mr. JUNG: This may be a little too obvious, Mr. Chairman, but could we not solve this by saying "other than the punishments prescribed by law at the present time"—add that to this particular section?

Mr. MUNDELL: That is really the effect of the word "unusual," is it not?

Mr. JUNG: Yes.

Mr. MUNDELL: The assumption would be that what is now in operation would be "usual."

Mr. MARTIN (*Essex East*): Would you speak up, please? I did not hear what Mr. Jung said.

Mr. JUNG: It is not an opposite point. I was trying to clear up a doubt in my own mind.

Mr. MUNDELL: Now I come to paragraph (*d*). It appears to enact a very novel provision, in fact. It says that no statute shall:

> (*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel—

I think this is the first time it has ever been provided that witnesses are entitled to counsel. The general assumption is that the witness is there to tell the truth, and he does not need counsel. As far as the bringing out of his story is concerned, it is left to counsel for the parties; and so far as protecting the witness is concerned, it is left to the court, to the judge. This would have the effect of creating a three-ring circus: a counsel for the plaintiff, a counsel for the defendant, and a counsel for the witness.

I suggest it would probably destroy the value of cross-examination, if the witness could have his own counsel to protect him. I suggest that possibly what was intended was that he should not be compelled to give evidence unless he has the opportunity of consulting with counsel before giving evidence; and, in other words, be advised as to his right to protect himself against self crimination. The classic example of this was the spy cases in which witnesses were not allowed to consult counsel, and all the evidence they gave before the court was admissible in a subsequent prosecution.

Mr. STEWART: The witness must ask for the protection of the court himself.

Mr. MUNDELL: Yes, and if he does not know he has to initiate it, well. I think if that is what was intended, it should be made simply, "if denied the right to counsel before giving evidence". This is a very sweeping statement, the assumption being that witnesses do not require counsel.

The CHAIRMAN: May I point out that paragraph (*d*) states or has reference to a denial of counsel, and protection against self-incrimination or other constitutional safeguards. Should not those all be read together?

Mr. MUNDELL: I am not quite sure that I follow what you mean when you ask if they should be all read together. I agree that the word "denied" goes with all three of them, and that maybe there should be a little change in the wording. I suggest you change it to read "to consult counsel before giving his evidence, or is denied protection against self-incrimination or other constitutional safeguards". I think it is a matter of whether a witness who is compelled to give evidence is entitled to counsel while giving that evidence, or is allowed to consult counsel and be advised as to his rights before giving his evidence.

Mr. MARTIN (*Essex East*): I do not quite understand. I understand your point, and I raised it yesterday with the Minister of Justice. At the time he satisfied me, but I do not quite get it now. You said right now that it was information given by the chairman about counsel?

Mr. MUNDELL: I do not think I quite follow you, Mr. Martin.

Mr. MARTIN (*Essex East*): Do you still think that this is the wrong way? It is worded:

> (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards.

Do you still say that this is the wrong use of the word counsel in that context?

Mr. MUNDELL: I would say that the plain words are that the witness is entitled to counsel, and protection against self crimination or other constitutional safeguards; the word "or" in line 25 would indicate that he is entitled to all three of these separately. But I would suggest in plain wording that the witness is entitled to counsel.

Mr. MARTIN (*Essex East*): The Minister of Justice said yesterday that I was using "counsel" in itself, and that the qualifying words were a protection against self crimination and other constitutional safeguards. It was only where he would be likely to criminate himself, or to be denied constitutional safeguards that he was entitled to counsel.

Mr. MUNDELL: I would not agree with that interpretation.

Mr. MARTIN (*Essex East*): You say you would not?

Mr. MUNDELL: No.

Mr. MARTIN (*Essex East*): That was the point. What do you suggest, Mr. Chairman?

The CHAIRMAN: I rather gathered from the comments yesterday that it involves a denial of counsel, where the person has the right to counsel, and that it was limited in that respect.

Mr. MUNDELL: At the present time I do not think witnesses are entitled to counsel.

Mr. STEWART: No. I think that is fundamentally correct.

Mr. MUNDELL: As a matter of fact, I recall one occasion when, upon being called to give evidence in connection with some matters which occurred before a commission, I could not give that evidence without consent of the commission, but I had to take the objection as a witness, myself, and not through counsel.

Mr. BROWNE (*Vancouver-Kingsway*): Do you take it that this word applies only if he had one of the three, that he would be entitled to only one of the three, and not to all three, and that he would be denied counsel, or denied protection against self crimination? But if he had protection against self crimination, then he would not be entitled to counsel.

Mr. MUNDELL: He can always claim the protection of the Canada Evidence Act.

Mr. BROWNE (*Vancouver-Kingsway*): Whether or not he is denied counsel, and before criminating himse'f by giving evidence; so there would be no reason for him to have counsel.

Mr. MUNDELL: Possibly my point is met by the fact that we have to discuss it. I suggest there is uncertainty, and possibly an interpretation which is of a very sweeping nature, and that he is entitled to counsel.

Mr. BROWNE (*Vancouver-Kingsway*): Your own feeling, from reading that clause, is that he would have to have all three, "denied counsel, protection against self crimination or other constitutional safeguards"? That is your contention?

Mr. MUNDELL: That is right, that is my interpretation. Now, if I might pass on to paragraph (*e*), it raises another uncertainty I suggest, in the word "hearing".

Paragraph (*e*), as I understand it, relates to hearings in connection with the determination of civil rights and liabilities, while paragraph (*f*) relates to criminal charges.

The present state of the law is that, unless a statute provides to the contrary, expressly or by implication, where a person's rights are determined, he is entitled to fair process, under the rules of natural justice. But that may not include an early hearing; it may be just a hearing in the broad sense of the term, the right to make his case. It may be in writing. I do feel the word "hearing", as here, in conjunction with paragraph (*f*), might be interpreted to mean an oral hearing, and this would seriously complicate many established administrative procedures. I am thinking of the Workman's Compensation Act and other statutes where, generally speaking, it was to get away from formalities that an abbreviated procedure was adopted, although it is supposed

to be fair and good. It might be the word "hearing" might be interpreted to mean oral hearing, whereas if you said "a fair procedure in accordance with the principles of fundamental justice for the determination of his rights and obligations", I think that probably is what the section is aiming at.

The CHAIRMAN: Well, Mr. Mundell, I think when we consider these clauses, including (*e*), that we must not lose sight of the premise, and what section 3 deals with is the construction and application of statutes.

Now, what we are saying in (*e*) is that a statute is not to be construed or applied so as to deprive a person to the right of a fair hearing. So, if in the statute there is a provision for a hearing which is fair, and that is made available to every person, then there is no denial of a right to a fair hearing.

Mr. MUNDELL: Yes.

The CHAIRMAN: And, taken in that context, I really do not see any difficulty.

Mr. MUNDELL: Well, let us take the case of an arbitrary assessment under the Income Tax Act, or an assessment under the Excise Tax Act, which would determine the rights of the taxpayer, subject to his appeals and so on. That is a determination of his rights but, at the present time, there is no hearing of any kind at all.

The CHAIRMAN: Oh yes, sure. I do not know of any province, for instance, in the Income Tax Act, where you are denied a fair hearing because, in the first place, there is a provision for a simple notice of objection, which brings about a review of the matter by the taxing authorities; and that is followed with the right of appeal to an appeal board. I do not think there could be any construction of the Income Tax Act which could be said to be a denial of the right to a fair hearing. I think the act makes ample provision for a fair hearing.

Mr. MUNDELL: I was thinking of the initial step—say, where the taxpayer does not keep proper records, and the minister assesses him for $50,000, or some such round figure as that. That is a determination of his rights at that point, unless he appeals. He has had no hearing at that time, and I suggest it may create uncertainties.

The CHAIRMAN: Well, I cannot imagine anyone arguing that under the provisions of the Income Tax Act the taxpayer is being denied the right to a fair hearing. I think there is ample provision for a fair hearing, and I think that is the way this section should be interpreted.

Mr. MARTIN (*Essex East*): This problem troubled me yesterday, and I still am troubled with it. Take, under the Food and Drugs Act, the minister may confiscate any amount of imported fruits— dates, for instance—on the grounds that they contain a percentage of deleterious substance. Now,—and correct me if I am wrong, Mr. Driedger—I do not think there is any procedure by which that discretion of the minister can be controverted.

Mr. MUNDELL: And, the action can be taken without a hearing.

Mr. MARTIN (*Essex East*): Yes, the action can be taken without a hearing, and a minister who takes that course would lay himself open, and there is no obligation on him.

Mr. MUNDELL: There is also, of course, another curious thing, coming back to the Expropriation Act. What is meant by "determination of his rights and obligations"?

The Minister of Public Works decides to expropriate a piece of property: he causes a plan and description to be filed: the owner has lost his property. There is no opportunity of making any representations that it should not be taken. He gets no hearing at all. I know of one instance where for eight months after the property was taken, the owner did not even know it. Would this mean there would have to be an oral hearing before any expropriation?

The CHAIRMAN: I would not think so. Surely there is provision in every Expropriation Act for a determination of the rights of the party.

Mr. STEWART: That is, again, as to quantum of damages, not as to the question of title. As Mr. Mundell points out, when the plan is filed, you automatically lose title to the property. You have a right, of course, to come into court and establish your damages and your compensation for illegal and unlawful taking; but you have lost title to the property—that is the point you are making?

Mr. MUNDELL: Yes.

The CHAIRMAN: That is not what this clause is driving at. You have to read the whole paragraph together:

> Deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

"For the determination of his rights and obligations." A statute is passed, providing for expropriation, which is compulsory, and then it spells out his right as being the right to compensation. What is said is that there must be a fair hearing to determine his right to compensation.

Mr. MARTIN (*Essex East*): But, as Mr. Stewart points out, there are more than the rights to compensation involved in the crown's act. There is the seizure of property; there is the right of the individual to say to the crown, "You shall not take my property", and to argue that point.

The point Mr. Mundell is taking is that he has an instance—as a matter of fact, Mr. Justice Thorson himself, who deals with compensation cases, in an address that he gave to the university of Ottawa—I have a copy of it—pointed out the denial of human rights in the Expropriation Act, on this very point.

The CHAIRMAN: That may be; but I do not think that clause 3(e) gives the owner any redress at all. I think the redress that we are providing for the owner is in clause 2(a). That is the right not to be deprived of his property except by due process of law.

Mr. MARTIN (*Essex East*): Well, I tell you that is the whole point of the constitutional question, clause 2(a). That is a provincial matter. He will not get any redress under this bill, on clause 2(a).

But I would think, Mr. Mundell, that clause 3(e) would help an individual in the situation you are talking about. He will be given an opportunity of a fair hearing.

Mr. MUNDELL: I might mention, sir—

Mr. MARTIN (*Essex East*): I think it corrects that.

The CHAIRMAN: He will get a fair hearing; but it may be beyond the power of the court that conducts the hearing to relieve from the liability to expropriation.

Mr. MARTIN (*Essex East*): That is right. This clause does not deal with finality; this clause simply provides that he shall be given the opportunity of a fair hearing in accordance with the principles of justice. It does not say there shall be a decision. But the right of a hearing is, in my judgment, a very important right that a citizen should have, and I am now taking issue with Mr. Mundell, thinking that this is a good provision.

Mr. MUNDELL: I agree with the idea of representation. You may recall—I think it is under the Fuel Act in Ontario; certainly, under most of the provincial expropriation provisions—for instance, a pipe line company, if it is going to expropriate property, has to go before the fuel board and obtain approval

for the expropriation, after giving notice to all the interested parties. They have an opportunity of making representation at that time. "Do not expropriate my property; take somebody else's"—that is the usual argument.

They have an opportunity of making representations against the expropriation itself, and I think that is a very good provision. But what I am suggesting is that a fair hearing here might mean that you have to have an oral hearing. Also, I would point out its uncertainty, that if this does knock out the Expropriation Act, or some other statute, it is purely negative. It knocks them out, but does not substitute anything.

It may be fantastic, but you may find, if it did knock out the Expropriation Act, that you have no power of expropriation, by reason of this statute. You would have to come along and make a positive amendment.

Mr. MARTIN (*Essex East*): I think the expropriation Act has to be amended, to bring it in conformity with this bill. Of course, I think all the other acts have to be amended also. But I do not think this bill does it.

The CHAIRMAN: I suppose the point is before the committee; but I construe "fair hearing " as being directly concerned with the determination of the rights and obligations of the individual—and that is all it relates to.

Mr. MUNDELL: May I just draw this to your attention, sir. I think maybe the word "procedure" would be better than "hearing". That is really my point—"a fair procedure".

The CHAIRMAN: That is why I think clause 2(a) is the one that protects the owner.

Mr. MUNDELL: Then— if I might go on, sir—I have nothing specific on the War Measures Act provisions, the other main part of the bill, clause 6, from the point of view that I am expressing and also the comments of people with whom I have spoken. It does, however, adopt the idea of amending the other act, like clause 3 might amend the Interpretation Act.

Mr. MARTIN (*Essex East*): Excuse me, Mr. Badanai had a question.

Mr. MUNDELL: I beg your pardon.

Mr. BADANAI: First of all, I would like the permission of the chairman to go back to section 3(b), if I may. I would like to have the opinion of Mr. Mundell on this. It seems to me that (b) really is superfluous in a sense. I would think that (b) could very easily be left out without any prejudice to what the rest of the bill is trying to convey. As everyone knows there never has been torture or cruel, inhuman, degrading treatment or punishment in the past so far as our law is concerned. This particular section would indicate that we have had that situation. I cannot imagine in recent times, since confederation, that we have had any situations that would require clarification. I would like to have Mr. Mundell's opinion on this particular section.

Mr. MUNDELL: I would agree that the provision could well be omitted from the bill. I suppose the argument for putting it in is that it is in the international declaration. There is a great deal more that is not in the bill, and why this particular one was picked I suppose is a matter of government policy. However, if it could be omitted it would eliminate a great deal of uncertainty.

The CHAIRMAN: May I direct your attention to the fact that the statute applies also to future statutes. Is it not a restraint upon parliament in the future designating a punishment or treatment that is cruel?

Mr. MUNDELL: To the extent that the statute did not expressly over-ride this section, it would be a restraint. It is a rule of interpretation.

The CHAIRMAN: I think it is directed towards future statutes and is not an indication that present statutes are in violation of that principle at all.

Mr. MUNDELL: This was the argument for uncertainty. That is the question: does it affect existing statutes?

The CHAIRMAN: I think it does affect existing statutes, but I am fairly confident myself that in the interpretation of the existing statutes after the passing of this bill they will be interpreted the same as before the passing of this bill.

Mr. MUNDELL: That is the problem of interpretation, is it not?

The CHAIRMAN: Do you quarrel with this confidence I have?

Mr. MUNDELL: I would be inclined to agree with you; but I do know a great many people would think that capital punishment, for instance, would be cruel, inhuman and degrading.

The CHAIRMAN: Individuals, yes; but how about a court?

Mr. MUNDELL: It might be that some courts would hold that.

The CHAIRMAN: If a court does, then of course, parliament might have to reconsider the matter.

Mr. MARTIN (*Essex East*): There are a lot of judges now who do not believe in capital punishment.

The CHAIRMAN: Per se as capital punishment; but not necessarily because it is cruel or is a torture. They just do not agree in the principle of capital punishment.

Mr. MARTIN (*Essex East*): But we are now giving them a legal opportunity of saying that capital punishment in the case of murder shall not be the punishment imposed. If they do take that course, just think what happens. There is no discretion; if the jury finds that the man is guilty the judge must impose the death sentence. What happens then? Does he order a new trial.

Mr. MUNDELL: I suppose it would become one of the cheaper crimes. I think it would probably come under the omnibus section which provides a one year penalty, so the penalty for murder would be one year.

The CHAIRMAN: Coming back to the argument of the minister, in the instance of a brutal murder, hanging would not in that light be considered to be cruel or inhuman.

Mr. MARTIN (*Essex East*): Are we going to sit this afternoon?

The CHAIRMAN: I was hoping we would conclude.

Mr. BROWNE (*Vancouver Kingsway*): Surely we are not going to bring back Mr. Mundell.

Mr. MARTIN (*Essex East*): I have to go now.

Mr. MUNDELL: I am in the hands of the committee.

The CHAIRMAN: If we permit you to continue and conclude your questions would that be satisfactory?

Mr. MARTIN (*Essex East*): I am late now, and I have some other questions. It is now 1 o'clock.

The CHAIRMAN: I think this is perhaps one area in which we can accommodate Mr. Martin.

Mr. MARTIN (*Essex East*): That would be a most unusual situation.

The CHAIRMAN: I say that just to show how considerate I am.

Mr. MARTIN (*Essex East*): If you keep this up I will become quite mellow. We are going to be here today in any event.

Mr. DESCHATELETS: Perhaps we could meet at 2.30.

Mr. MARTIN (*Essex East*): The government in its wisdom and mismanagement of affairs is keeping us here. Mr. Mundell does not mind returning.

The CHAIRMAN: I think those remarks are redundant. What time would it be convenient to meet again? I might just as well go overboard now.

Mr. MARTIN (*Essex East*): I would suggest 2.30.

The CHAIRMAN: Is it agreeable to the members of this committee to meet at 2.30, in these special circumstances?

Mr. STEWART: Shall we meet at 2.30 for half an hour?

Mr. BROWNE (*Vancouver-Kingsway*): You do not know Mr. Martin's ability.

The CHAIRMAN: I am afraid I cannot say how long it will take.

We will adjourn until 2.30.

AFTERNOON SESSION

SATURDAY July 23, 1960
2.30 p.m.

The CHAIRMAN: Gentlemen, we have a quorum.

I think first of all I should thank you all for arriving so promptly.

Mr. MARTIN (*Essex East*): I think we should note, Mr. Chairman, that those on your left hand are here in larger proportion on time than perhaps at any other meeting we have had. I hope this is on the record.

The CHAIRMAN: I was fearful that you might mention that.

Mr. MACDONNELL: They are all terrified of you.

The CHAIRMAN: I believe when we adjourned we were in the question period.

Mr. Martin indicated that he had a lot of questions to ask.

Mr. MARTIN (*Essex East*): Yes, I have lots of questions, and Mr. Deschatelets has lots of questions as well as Mr. Badanai.

The CHAIRMAN: Perhaps this is one occasion when you should not have the last word.

Mr. MARTIN (*Essex East*): Mr. Deschatelets will begin first.

Mr. DESCHATELETS: On what clause were we asking questions?

Mr. STEWART: We were considering clause 3.

The CHAIRMAN: I think we had just reverted to clause 2. We have moved on now to clause 3.

Mr. DESCHATELETS: At the opening of your remarks this morning, Mr. Mundell, did you express the hope that this bill of rights should be carried into constitution?

Mr. MUNDELL: No. I think what I said, sir, was, that while that issue did not arise except as a criticism of this bill, I was not going to deal with it at any length. I had brought to the attention of the committee, therefore, a very considerable body of opinion opposed to that suggestion as well as in favour of it.

Mr. DESCHATELETS: Now, Mr. Mundell, are you aware of the resolution that has been passed by the Quebec legislator on February 3, 1960, expressing their concern as to the uncertainties of this bill of rights in regard to the constitutional questions involved?

Mr. MUNDELL: No, I was not aware of that resolution, sir.

Mr. MARTIN (*Essex East*): Mr. Deschatelets, may I suggest that we put that resolution in as an exhibit?

Mr. DESCHATELETS: It is printed in French, Mr. Chairman.

Mr. MARTIN (*Essex East*): That is an official language.

Mr. DESCHATELETS: Should I put it in?

Mr. MARTIN (*Essex East*): Certainly, that is an official language. Mr. Browne will help us with the translation.

The CHAIRMAN: It has been suggested that Mr. Fulton read it into the proceedings.

Mr. DESCHATELETS: Mr. Chairman, if you will permit me at this point, I would say Mr. Fulton has admitted that in the lower house in Quebec both parties have agreed that they were afraid of the extent of this bill as far as the constitutional rights are concerned. This was agreed on February 3. I do not remember that the minister has talked about the resolution that has been unanimously adopted.

The CHAIRMAN: It is my recollection that he read it completely into the record. There were not very many of the present members here at that time.

Mr. MARTIN (*Essex East*): It must have been done when there was a vote in the House of Commons.

The CHAIRMAN: I think that was the morning, Mr. Martin, that you and Mr. Deschatelets were not here.

Just a minute, I will check on this.

Yes, I understand that it was given to the reporters.

Mr. MARTIN (*Essex East*): Does it appear in the minutes now?

The CHAIRMAN: I am quite sure it was completely read into the record.

Mr. MARTIN (*Essex East*): If it is in the minutes that will help Mr. Deschatelets.

The CHAIRMAN: We do not have it before us at this moment.

Mr. DESCHATELETS: Mr. Mundell, may I have your opinion as to the proposal which has been advanced by the present attorney general of the province of Quebec that an inter-provincial conference be held in order to study this bill of rights in its present form, before discussing it with the present government. Would you feel that in the light of what has happened, that every step should be exhausted, so that we could have a national bill of rights with the cooperation of the provinces?

Mr. MUNDELL: If you want my personal opinion, I am opposed to a bill of rights. I like the traditional method that we have of protecting our liberties in this country. When I say I am opposed to a bill of rights, I do not mean that the question of a bill of rights is not a matter of interest. Everybody, I think, concurs in the need for the maximum protection for human rights and fundamental freedoms; but is the bill of rights the best means of protecting those liberties? I think my basic reasoning would be a bill of rights might afford some protection, but also has disadvantages; and I think the disadvantages outweigh the advantages. What I am speaking of today is the assumption there is going to be a bill substantially of this nature.

Mr. MARTIN (*Essex East*): That is right.

Mr. MUNDELL: In answer to your inquiry, my answer would be, I would not exhaust the means of getting a national bill of rights; I would not have one.

Mr. DESCHATELETS: Since this bill, in its present form, has been adopted on second reading, do you not feel that we should have, or try to have the provinces concur in the bill we have now?

Mr. MUNDELL: If the interpretation that I understood was suggested by the minister, that this bill does have the legal operation to create these freedoms, at least, to give them further legal force, I can see the possibility

of provincial laws being overridden by this federal act. It would seem, to ascertain the effect of the bill, that there would be value in a conference with the provinces, because then each province would be in a position to assess the effect of the bill on its own position, which is a little more than anybody looking at it from a national point of view could do.

The CHAIRMAN: There could be no overriding of matters entirely within the jurisdiction of the provinces?

Mr. MUNDELL: If I could put it this way: supposing, as is suggested in the press case and in these other cases, there may be an aspect of these freedoms—or, rather, that these freedoms are really something more than property or civil rights and are matters of inherent national importance; maybe parliament can protect them across the board, if I might use that expression. Therefore, perhaps there should be a federal act that would override any provincial legislation that infringed these freedoms.

Mr. DESCHATELETS: Mr. Mundell—

Mr. MARTIN (*Essex East*): Would you permit one interruption?

Mr. DESCHATELETS: Go ahead.

Mr. MARTIN (*Essex East*): I notice Mr. Macdonnell is here, and we are very happy to have him with us, as he has a great interest in this subject. I also see that we have Mr. McGee here, and in view of Mr. McGee's interest in the abolition of capital punishment, I would be quite prepared, as one member of the committee, to allow him to ask questions. I say that, as it has been strenuously argued that clause 3(*d*) will have the effect of making unnecessary the efforts that he has launched in the House of Commons to obtain the abolition of capital punishment. Maybe Mr. McGee has come in for that purpose. I would be prepared to extend him that courtesy, in view of his great interest in the subject. I do not want to interrupt Mr. Deschatelets at this point.

The CHAIRMAN: Is it agreed, then, gentlemen, that both Mr. McGee and Mr. Macdonnell will be permitted to ask any questions they consider they would like to have answered?

Agreed.

Mr. DESCHATELETS: I refer you again to paragraph (*b*) of the bill where it is mentioned that the right of the individual is to the protection of the law without discrimination of sex. You have raised this morning many cases where there could be uncertainties as to the mutual rights of the legislatures and the provincial government.

Now, since we have in the province of Quebec the Civil Code which, as you know, is the Napoleonic code, where the husband has more rights than the wife, do you not think there would be here, if we recognized that there should not be any discrimination of sex—do you not think that there is the danger of encroachment with the civil rights of the province of Quebec, if we state, as we are, that these should be free, free now, and fundamental rights?

Mr. MUNDELL: I must say that this is one section that I did not mention earlier. I have some difficulty in assigning any meaning to this provision. But it seems to me that if it is the right of the individual to have the protection of the law, I would interpret that to mean that there may not be any discrimination in law, but that he has equality before the law, but not necessarily equality by the law.

As I said, I have some difficulty in assigning precise meaning to it, but it is not right that there should be no discrimination at all in the law, but just the right that you should have the protection of the law. That is all.

Now, where the line is, I do not know; but I do not think there should necessarily be any encroachment in the case you mention.

Mr. BATTEN: Did I understand Mr. Mundell correctly when he said that he would rather not have a bill of rights?

Mr. MUNDELL: That is right.

Mr. BATTEN: Do you think we would be better protected under the law of the land and of the Criminal Code?

Mr. MUNDELL: I think they offer the same protection, and I think the bill of rights might well bring with it some disadvantages, particularly if we put it into the British North America Act. In fact, I would not be opposed to a bill of rights so long as it had no effect. But I think that any effective bill of rights will have some disadvantages.

No doubt the committee has heard of the long history of child labour and how it was protected or permitted to continue until 1925, because of the freedom of contract clause.

Basically I think my objection is that a bill of rights, particularly in the British North America Act, would change the centre of gravity as far as policy is concerned from parliament to the Supreme Court of Canada.

Now, I have the greatest respect for the Supreme Court of Canada, but I would prefer to leave policy decisions on matters of freedom to our elected representatives rather than to the judges.

The history in the United States shows that the judges did not do a very good job. As a matter of fact, I do not see any reason why we could expect that they would do any better job in the future.

Mr. BATTEN: Do you think that the ordinary person who did not have too much knowledge of law might be encouraged to bring cases to court to a greater extent than he would do if we did not have any bill of rights?

Mr. MUNDELL: I just do not know that I can answer that now.

I agree that a bill of rights of this nature will have an educational effect, and whether they would bring a case to court probably depends on the legal advice they get. However, I do not know that it would have any effect, one way or the other.

Mr. BATTEN: A good deal has been said in this committee about this bill being a first step. Supposing this bill is passed by the Canadian parliament, do you think it would be a simple matter to initiate a second step?

Mr. MUNDELL: By "a second step" what do you mean?

Mr. BATTEN: A good deal has been said in this committee—

Mr. STEWART: He asked what you meant by the "second step"?

Mr. BATTEN: If this came to be known as the Canadian bill of rights—and let us suppose it is not perfect, by any means, then an attempt may be made to amend it as, for example was done in the bill of rights in the United States. Do you think Canada is a country where it could easily be amended?

Mr. MUNDELL: This is a political question really, I think, and far be it from me to tender a comment on political matters.

Mr. BATTEN: I am not talking about the political implications of it.

Mr. MUNDELL: Well, it would be a simple matter to amend this bill; another act of parliament could amend it, and I would think an amendment, expanding the rights would go through very easy. However, I doubt if any government will pass an amendment cutting them down.

Mr. MCGEE: What is the witness' opinion if this bill was passed, as to whether it would render invalid the clauses in the Criminal Code dealing with corporal and capital punishment?

Mr. MUNDELL: In my opinion, I do not think you would find the court holding that, but I think you would find a great many people holding the opinion that capital punishment is cruel or inhuman. But, I suspect that would

be interpreted as based on the assumption we have now. But, it would be quite open to a court to interpret it as being prohibited by this. The results are so drastic, though. The result would be that you would have no punishment for murder; there is only the one penalty. I doubt if a court would interpret this provision, as enacted, to produce that result.

Mr. McGEE: I am interested in your statement that this bill carries with it the assumption that everything at present on the statute books is validly acceptable.

Mr. MUNDELL: When you consider the drastic result that would follow if that view is not taken, I think that would be the atmosphere in which the provision would be interpreted, that everything now is accepted.

Mr. RAPP: But, there are some countries which have bills of rights, and still have capital punishment. Apparently, the courts there are interpreting—or not interpreting it,—as cruel, inhuman and degrading.

Mr. MUNDELL: Well, of course, we do not know the internal law of these countries. I believe it was said this morning that this is the language in the international declaration, but it may not have been made part of the domestic law in these countries. Therefore, I do not know that we can come to any very useful conclusion.

Mr. RAPP: Well, this morning, Mr. Browne said something about it.

Mr. BROWNE (*Vancouver-Kingsway*): I spoke about the English bill of rights and the American bill of rights, and pointed out that in the case of the English bill it says "cruel and unusual punishment" and, in the American bill of rights "cruel or unusual punishment".

Mr. RAPP: In all those countries they have capital punishment.

Mr. MARTIN (*Essex East*): Is it not a fact that in the United States the criminal law is a matter that comes within the competence of state governments, and not the federal government?

Mr. MUNDELL: So I understand.

Mr. MARTIN (*Essex East*): And so Mr. Rapp's observation, on that count, does not have the pregnant meaning which he had hoped it would have.

Mr. RAPP: No, not exactly. But, still, in the British bill of rights there is a provision, or a clause where it says it is inhuman, and so on—and still they retain capital punishment.

Mr. MENDELL: There is a difference, I think, between "cruel and unusual"—there may be a difference between that and "cruel inhuman or degrading".

Mr. RAPP: I am not quite familiar with how this other bill of rights—I have just forgotten the name of it. There, too, they stated along the same lines as this bill, and still they retained capital punishment.

Mr. MUNDELL: As I say, that is a matter of opinion. There are many people who would hold the view that capital punishment is cruel and inhuman, and intended to be degrading.

Mr. McGEE: Perhaps, if there is an area held in your mind about the general view of capital punishment, we can come back to the first part of my question, which affected corporal punishment.

We have, in the Criminal Code at the present time, several sections dealing with the administration of the lash, so-called cat-o'-nine-tails. Perhaps I am imputing too much to the public view of this matter; but one has only to read the relevant sections in the Criminal Code, and I do not think you can come to any other conclusion but that the application of the lash to a human being certainly is cruel, inhuman and degrading.

Mr. MUNDELL: And so intended.

Mr. McGEE: Yes. Then I come back and ask you again: what, in your opinion, would be the effect of the passage of this bill on those sections of the Criminal Code?

Mr. MUNDELL: I would say that the plain words would apply. That I would expect that a court would not hold that the punishment existing now of that nature is intended to be rendered inapplicable by general wording of this kind. I would expect that they would find some means of permitting existing punishments to be continued.

Mr. MARTIN (*Essex East*): I think Mr. McGee should be informed, in view of your statement, which is the same as the Minister of Justice's on that point—as to likely action that the court would take—that Mr. Dorion, who has had very considerable experience in the criminal courts, shares the view that is implied in your series of questions, that the interpretation of this section means that once the bill is passed, it will be open to that interpretation, and in his judgment, justifiably so.

Mr. MUNDELL: Oh, I would agree with that. It is open to it, and I would say that on the plain words that is what it does. But I really would not expect that result.

Mr. MARTIN (*Essex East*): Mr. McGee may have won his case by indirection.

Mr. RAPP: Mr. Chairman, the United Nations have adopted, in their universal declaration of human rights—and many countries have signed this particular declaration—this clause. It is article 5, and it says:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Many nations who signed this United Nations declaration still have capital punishment.

Mr. MUNDELL: I am sorry: do you want me to comment on that?

Mr. RAPP: Yes.

Mr. MUNDELL: That will depend on the domestic law. Canada has signed that. We have never changed our laws. It may be that the declaration calls for the abolition—certainly in the minds of those people who consider capital punishment to be cruel, inhuman and degrading—of it. But until their domestic law is changed, the existence of the international treaty will not render the law bad. There has to be a change made. Obviously, the change would have to be made in those countries.

Mr. RAPP: I cannot see any reason why our courts will change their approach to this problem when they know that Canada has signed the United Nations declaration and when that declaration contains an article in respect of cruel inhuman or degrading treatment or punishment. I really do not see why they should change their attitude towards a bill of rights where these words are stated.

Mr. BROWNE (*Vancouver-Kingsway*): May I say on this point that we do not know of any specific instance where there is a bill of rights having the force of law in any country containing those words or the words in this particular bill. I think too that we should remember this in respect of the discussion which has taken place when Mr. Martin suggested that perhaps Mr. McGee's mission will be accomplished by this bill. It is not the intention of the minister, in introducing the bill, that it have that effect. I certainly do not think it is the intention of this committee to leave it in any doubt, or if there is doubt that we would want to say that it is a matter to be determined by the courts. Mr. McGee seems to have taken the position that corporal punishment could be considered as inhuman or degrading. I think that we should give particular

study to this and be sure that we do put in words which will express the wish of parliament and not leave it to the courts to make the decision.

Mr. MARTIN (*Essex East*): Hear, hear.

Mr. MCGEE: Is it not true that when any parliament renders the decision that they would retain capital punishment that a situation could arise whereby a person sentenced to death could appeal to the Supreme Court of Canada and invoke this clause of the bill of rights and then, presumably by a simple majority in the Supreme Court of Canada, that would obtain, and with that precedent in effect capital punishment would have been abolished by the Supreme Court rather than by the parliament of Canada.

Mr. MUNDELL: Well, as I say I would think—corporal punishment probably is a better example of something which would be considered degrading—I would think that the court might interpret it as its duty to apply those words just as they are. I do not think you could say that it was the court which was abolishing capital punishment because they would be basing it on the statute. The effect of their interpretation would be to abolish it, though.

The CHAIRMAN: Are there any further questions gentlemen?

Mr. MARTIN (*Essex East*): Yes. I have some questions.

Mr. MUNDELL: May I just add one word to what I said a moment ago? It does point up the fact that the particular language in the bill of rights, where you are really making philosophical rules of law, vastly increases judicial discretion; namely, the power of courts to apply statutes is simply to interpret the words, or carry out the intention of parliament as far as possible, but where you have a philosophical concept it makes the judges legal philosophers, so it widens their discretion.

Mr. MARTIN (*Essex East*): Mr. Mundell, I would like to pursue a number of questions.

Mr. Deschatelets raised what I think is a very important point. Have you seen the terms of the resolution passed by the legislature of the province of Quebec?

Mr. MUNDELL: No, I have not seen the terms, sir.

Mr. MARTIN (*Essex East*): I have before me here the verbatim evidence of this committee for July 19, 1960, and I ask you to consider the terms of the resolution in the light of the constitutional problem which you spoke about in view of the minister's interpretation as to clause 2 intending a legal effect.

> The legislative assembly of Quebec, aware that the parliament of Canada, during the current sessions, will be asked to consider a proposed law whose object is to acknowledge and protect human rights and fundamental liberties, wishes to reassert that this legislation must not in any way, neither directly nor indirectly, encroach upon the exclusive jurisdiction vested in the province under the sections 92, 93 and others of the British North America Act, 1867, and more especially as regards the rights of liberty, property and civil rights, liberty of religion, liberty of speech, of assembly and association, liberty of the press, administration of justice in the province, the civil and criminal procedure as laid down by the legislature in the exercise of its rights, and generally all matters of a purely local or private nature in the province.
>
> The legislative assembly of the province of Quebec reasserts that the rights of the province must not be restricted, diminished, amended or altered by an act of the parliament of Canada and without the consent of the provincial legislatures and prays the clerk of the legislative assembly to transmit a copy of this motion to the Right Honourable the Prime Minister of Canada.

Now, you have had long experience. By the passing of this resolution do you see any difficulty in consulting the province of Quebec to ascertain whether or not the views that have been expressed in regard to clause 2 should be borne in mind by it, to see whether or not any accommodation could be reached?

Mr. MUNDELL: Do I see any difficulty in approaching the province of Quebec?

Mr. MARTIN (*Essex East*): Yes.

Mr. MUNDELL: This is a little outside my sphere, Mr. Martin, but I suppose they could be approached. I see no reason why they could not. I see no reason why they could not be asked, if the bill has authoritative effect making the federal rule a law that there shall be, say, freedom of the press, or any one of the freedoms;whether there are in Quebec laws provisions which will be overridden by this statute; and to that extent, the provinces could express their views as to whether their powers are being restricted. There is not, in any strict sense, any encroachment on provincial powers. If it is an authoritative federal act it might override the power of the province to exercise its rights.

Mr. MARTIN (*Essex East*): Mr. Chairman, I do think that we have to give consideration to giving to the provinces the opportunity of appearing before this committee before we conclude our deliberations.

The CHAIRMAN: May I ask Mr. Mundell if he is going so far as to suggest that the parliament of Canada should not legislate on matters that are within the jurisdiction of the parliament of Canada?

Mr. MUNDELL: I am not really expressing an opinion on that, sir. What I am saying is that this is one possible effect of the bill. In answer to Mr. Martin, I said I saw no reason why the province of Quebec could not be approached. I am not suggesting that parliament should exercise every power it has got.

The CHAIRMAN: Well, you agree that if we pass an amendment, say, to the Bankruptcy Act, that we are going to affect property rights in the province of Quebec?

Mr. MARTIN (*Essex East*): But bankruptcy comes under the federal government.

The CHAIRMAN: But do you suggest that because we are going to affect, say, bankruptcy rights in the province of Quebec—not only in the province of Quebec, but all provinces—we should consult all those provinces, because we are exercising a power which is manifestly within the jurisdiction of the federal government?

Mr. MUNDELL: No, I am not suggesting there should be consultations in that respect, but it would depend on the nature or the effect of the restrictions in a particular province. It may be that this bill is so widespread in its operation that this might be a case where consultation might be a good thing.

The CHAIRMAN: Is it not manifestly clear that section 2 of the act is to be applied only to statutes within the jurisdiction of the parliament of Canada? These words were added, might I say, to bill C-79, and were not in the former bill.

Mr. MARTIN (*Essex East*): Is that section 3?

The CHAIRMAN: Yes, that is section 3. These words were added to make it, I would think, abundantly clear that we were legislating only in the field of dominion jurisdiction, when we added these words:

> —that are subject to be repealed, abolished or altered by the parliament of Canada—

Now, does that not make it abundantly clear that no matter what the effect may be we are only dealing with and can only deal with a matter that is within the jurisdiction of the parliament of Canada?

Mr. MUNDELL: I probably have not made myself clear, but I suggested to you this, that if section 2 is interpreted as being a mandatory, legally operative provision—that is to say, if it is enacted, as a right of law, that there shall be freedom of speech—any one of those freedoms—and if the view were taken, and it is quite arguable from the press case and other cases, that these freedoms and rights are things, outside section 92, of such importance that they are matters that parliament can legislate on, then we would have a valid federal enactment saying there should be these freedoms. Any provincial act, under the doctrine of the supremacy of parliamentary legislation, would be overridden by this act. Section 3, on the other hand, is clearly limited to federal acts, because it contains a wider interpretation. Parliament could not enact rights of interpretation for other legislative bodies. Section 2 might, by itself, override a provincial act.

Mr. MARTIN (*Essex East*): I also understand you to say, in answer to a question of mine, that in interpreting the meaning of section 2 it was not open, for instance, to a court, in attempting to ascertain the meaning of section 2, to make reference to the qualifying words in section 3, to which the chairman directed our attention.

Mr. MUNDELL: I would put it a little differently. It is open to the court, in interpreting section 2, to read the statute as a whole, and section 3 is another section in the act. It does not follow from the fact that section 3 is limited to federal acts that necessarily section 2 is. On top of which, if federal jurisdictional authority is found to extend to the protection of these rights, across the board, or completely, then it would have that effect, if it is a mandatory provision.

Mr. BROWNE (*Vancouver-Kingsway*): I wonder if I may ask Mr. Mundell a question?

The CHAIRMAN: On the other point, may I just interrupt? You said that it was open to the court to look at the act as a whole.

Mr. MUNDELL: That is right.

The CHAIRMAN: Is it not actually in the interpretation of a statute the duty of a court to look at the act as a whole?

Mr. MUNDELL: That is correct, yes.

Mr. BROWNE (*Vancouver-Kingsway*): I rather understood from Mr. Mundell's remarks that he did not feel that a bill of rights was necessary because our rights were already adequately protected under the law.

That being the case, and with the British North America Act applying as to the distribution of rights between the provinces and the federal government, the situation would be unchanged in the results.

Because, if those rights exist, they could be interpreted by the courts within the terms of the British North America Act, and also, it seems to me, that if a bill of rights existed in any province of Canada, it would be unchanged even if you suggest that those rights were adequately protected without this bill.

Mr. MUNDELL: I say they are adequately protected under the ordinary law. That is my view. But there is nothing to prevent anybody changing that law, either the legislature in its field, or parliament in its field.

However, if you have an overiding federal act, it will restrict the provinces from infringing upon those fields.

Mr. BROWNE (*Vancouver-Kingsway*): Throughout the years the powers as between the federal and the provincial governments have always been in accordance with the British North America Act, and if this bill is intended to encroach upon those powers, it still must be governed in accordance with the British North America Act, because that is something which the provinces

and the federal government have always had to accept; so there cannot be any violation of it, and it will still have to be interpreted in accordance with the British North America Act just as it always has.

Mr. MUNDELL: I am not sure but that we are arguing a little bit at cross purposes. But if the British North America Act is interpreted as giving parliament authority to enact a federal act which protects, or offers this protection, then the provincial legislatures cannot legislate against them. They still would have the power to do so under the British North America Act, but by reason of an existing federal overriding piece of legislation, it would not be possible for them to exercise that power, or to effectively infringe against those rights.

Mr. BROWNE (*Vancouver-Kingsway*): If that is a proper interpretation of the British North America Act, then it could not be construed as being an infringement of provincial rights, because they have always existed. We have had the British North America Act, and it will remain unchanged.

So if that interpretation should be taken of it, I presume that in enacting a bill of this nature, or statute, the federal government expects it to continue; and looking at these matters, whatever the score may be, that has been he case with every piece of legislation enacted, and we have had to make sure that it fell within the jurisdiction of the federal parliament.

Therefore if the British North America Act is unchanged, then those powers are unchanged; and on that basis, if the interpretation you suggest was taken of it, it still could not be construed as being an infringement of provincial rights.

Mr. MUNDELL: I would agree that it is quite proper to say that it does not encroach or infringe upon provincial rights. But that is a distinction without a difference, because it could very well restrict the field of the provinces, although they would not be changed.

Mr. STEWART: Even if it penetrated those fields directly or indirectly, and affected provincial matters, it would still be a valid piece of legislation.

Mr. MUNDELL: Yes, and it is a sort of argument of words as to whether or not it would encroach upon those provincial rights.

The CHAIRMAN: Is that not one of the reasons why this clause 2 is in the form of a declaration:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms,.....

rather than an actual enactment of those rights?

Mr. MUNDELL: I would agree with you there. I think the operative word was "declare", and that it was not intended to have legal operation; but apparently that is not the government's view.

The CHAIRMAN: When read with clause 3, of course, it does have legal operation.

Mr. MUNDELL: I mean apart from the effect given to it by clause 3, it says declare, and it is there; there shall continue to exist the following human rights. What the purpose of it is, I do not know, and what the net result is. I do not know just what that result is. Apparently, the minister takes the view—

Mr. MARTIN (*Essex East*): The minister said it was supposed to have a legal effect.

Mr. BROWNE (*Vancouver-Kingsway*): It would seem to me, in our consideration of this clause of the bill that, in view of what the minister has said,

that is what we should base our considerations on. He said it is going to have legal effect, and I think our deliberations should be based on that fact.

The CHAIRMAN: I do not know how you can deny that it is going to have legal effect when you read clause 3, and it expressly states that regard shall be had to all the rights and freedoms listed in the act.

Mr. MACDONNELL: Surely, Mr. Fulton said that on the one hand it would have legal effect but, on the other hand, he made it clear this act was not purported to use these things if they had not been used before.

Mr. MARTIN (*Essex East*): I would argue that section 3 does not have the implication that you said. It stands by itself, and it does not deal with the human rights in article 2. It deals with certain measures by which constitutional safeguards are to be maintained, but it does not prove, in any way, to be operative in so far as article 2 is concerned.

The CHAIRMAN: I do not think, at this stage of the proceedings, we should be arguing between ourselves.

Mr. MARTIN (*Essex East*): I agree.

The CHAIRMAN: But might I suggest, for your subsequent reflection, that in the eighth line on page 2 of the bill, reference is made to rights or freedoms recognized by this part and, surely, when they speak about rights or freedoms recognized by this part, they do have reference to those rights and freedoms referred to in section 2.

Mr. MARTIN (*Essex East*): Yes, but not in the sense of following on the statement of the minister, that this section 2 has legal effect. However, this is a matter of argument.

I would like to ask Mr. Mundell some questions. I have no questions on section 4, and I would like to proceed, unless someone else has.

Mr. JUNG: I have a question. Mr. Chairman, I would like an interpretation on one point from Mr. Mundell. This may be a rather technical point. Section 16 of the Interpretation Act states that no provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby. I do not know what the usual practice is, but this act does not express that right in Her Majesty. Does the absence of such a vested right imply Her Majesty has the right to make regulations which, possibly, might have the effect of nullifying the effects of this bill?

Mr. MUNDELL: I think maybe there is a little confusion here. Of course, the crown has no right to legislate—Her Majesty has no right—nowadays anyway—except under a statute. This act, in terms, provides that no order or regulation thereunder may infringe these freedoms, and I would say, in terms, it is not really a question of referring to Her Majesty so much as referring to statutory power, and these are, therefore, cut down—and that section is not relevant to the discussion.

Mr. MARTIN (*Essex East*): Mr. Chairman, Mr. Badanai went out for a moment. He has some questions he would like to put on clause 4. I could go on to clause 6, and then we could come back, to accommodate him.

The CHAIRMAN: Very well.

Mr. MARTIN (*Essex East*): Mr. Mundell, have you any comment to make on clause 6 of the bill?

Mr. MUNDELL: I would say that clause 6 is an improvement to the War Measures Act, but of comparatively, probably, little practical importance.

The present War Measures Act comes into force on a proclamation of the governor in council—which is the government, really—and stays in force until a further proclamation is issued. Parliament could at any time, of course,

pass a statute repealing the War Measures Act and declaring it to be of no force and effect.

This provision permits parliament—the two houses acting together—to pass legislation making the War Measures Act ineffective. To that extent it is an expedition and aids parliamentary control. The likelihood of its being used is, I think, slight.

Mr. MARTIN (*Essex East*): I think it is rather a good provision, myself. It may not have the great substance that it seems to have; but I think it is a good provision.

Have you had an opportunity of going over the modification that Mr. Pearson has proposed?

Mr. MUNDELL: Those—

Mr. MARTIN (*Essex East*): Perhaps I could go over them, first, with you. Mr. Pearson suggests that in the bill there should be a provision limiting the powers given to the governor in council under the War Measures Act by expressly excluding the power, by order in council, to deprive any Canadian citizen of his citizenship.

You are one of the authors of the Canadian Citizenship Act.

Mr. MUNDELL: I think it is a very valuable document, sir. Very well drawn, too.

Mr. MARTIN (*Essex East*): It came forward in my name, and I fully agree with you.

Mr. MUNDELL: Yes, I would agree that it would be a good thing to have, in the War Measures Act, some restrictions to protect the rights of Canadian citizens from revocation of their citizenship, possibly from deportation—although the problem of deporting a citizen is an unusual one, because you have to have an accepting country.

The CHAIRMAN: I do not want to put any undue restraint upon you, Mr. Martin, but I think we are getting quite a way from the bill that is before us. I do not think the witness is suggesting that amendments to the War Measures Act be incorporated in this bill.

Mr. MARTIN (*Essex East*): No; but I am—and that is the point. I am asking this man, who has had considerable experience with the Citizenship Act, and so on. We, at some stage, will put forward Mr. Pearson's amendments.

The CHAIRMAN: As part of this bill of rights?

Mr. MARTIN (*Essex East*): No; that we should amend it. Well I do not know whether or not it is part of this bill of rights; but that we should amend it now.

The government has made one modification in it, and we are suggesting others. Mr. Mundell had, during the war, perhaps as much experience as a public servant as anyone with the operations of the War Measures Act, particularly its security provisions—perhaps more than anyone. His experience in this is so great that I am asking him these questions. Do you know of any country that deprives its citizens of the right of citizenship.

Mr. MUNDELL: I think it is quite common in regard to the naturalized citizens. We have it too. I think it is recognized that a country takes a responsibility for its natural born citizens and does not deprive them of citizenship and deals with them under its own law as to treason and so on.

Mr. MARTIN (*Essex East*): In the light of your experience, what do you think about the suggestion that the governor in council should be expressly forbidden to act under the War Measures Act to banish any citizen of Canada in any circumstance.

Mr. MUNDELL: I would agree with that.

Mr. MARTIN (*Essex East*): Was that discussed by the bar association in the committee of which you were chairman.

Mr. MUNDELL: No.

Mr. MARTIN (*Essex East*): What would you say about the suggestion that there should be written into this bill some provision which should limit the power of the governor in council, even under the War Measures Act, to detain any person for more that a stated period without a hearing before a Superior Court judge and without having satisfied that judge that there were serious grounds for believing that the detention of that person was essential for the security of the state.

Mr. MUNDELL: I would agree with the provision, in principle, that there should be no detention for a longer period than for instance sixty days without some review of the cause for detention. In time of war I do not think you could place the decision as to whether the detainee should be released on a Superior Court judge. It is not the case of a man having done anything. People are not detained in time of war because they have done something, but rather because there is a fear that they will do something. So I think you can do as was done at the end of the last war. When people were detained there was an advisory committee which I think was chaired by a Superior Court judge who reviewed the causes for detention and reported to the Minister of Justice; but the decision as to whether there was to be a release was left on the government, I think on the sound principle that it is a matter of national security and not a matter of trying the case.

Mr. MARTIN (*Essex East*): I am inclined to think the reference to a Superior Court judge should be reconsidered. There is no trial involved, just detention of the person.

Mr. MUNDELL: On suspicion.

Mr. MARTIN (*Essex East*): And it should not on that score perhaps go before a judge.

The CHAIRMAN: Is that all on the War Measures Act?

Mr. MARTIN (*Essex East*): Yes.

The CHAIRMAN: You are not pursuing that any further?

Mr. MARTIN (*Essex East*): Why not? this is repealing the War Measures Act.

The CHAIRMAN: If you are not going to pursue any more questions there is no necessity of discussing it. Surely because a bill is introduced to amend an act it is not open, and is not relevant, to introduce amendments to the same act that are absolutely foreign to the amendment that is introduced.

Mr. MARTIN (*Essex East*): Not at all.

The CHAIRMAN: Just because we bring in one amendment to the War Measures Act does not mean you can go through the whole act and introduce amendments to it.

Mr. MARTIN (*Essex East*): Are you suggesting in this bill, the government having taken steps to amend the War Measures Act and the speaker having allowed discussion in the House of Commons, that we are precluded in this committee from suggesting amendments to this.

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): Section 6.

The CHAIRMAN: No. You can make amendments to section 6 which come within the principle of what is involved in section 6 and that is, namely, the proclamation bringing the War Measures Act into effect being laid before

parliament, and being debated and so on. If you want to make some amendments to that, then that is in order, but to come along and say section 25, or section 30 of the War Measures Act should be amended or repealed is completely out of order, I would think.

Mr. MARTIN (*Essex East*): I am not going to move any amendment today, but I propose to move an amendment at the proper time. You will now be given the opportunity of considering very carefully our position, and I hope you will not take that position, because once this measure is introduced as it is, we are certainly entitled to suggest amendments. I think the Prime Minister would be the last person in the world to deny to members of this committee the opportunity of suggesting revisions that would liberalize the War Measures Act.

The CHAIRMAN: The Prime Minister has indicated that matters of amendment to the War Measures Act will be referred to a committee for study. I think that indicates that in his opinion it would not be open in regard to this bill to discuss other parts.

Mr. MARTIN (*Essex East*): If he wants to take that position he should not have brought this clause forward. I will at the appropriate time, of course, move that certain amendments be made, as well as will my colleagues.

The CHAIRMAN: In this committee?

Mr. MARTIN (*Essex East*): In this committee.

The CHAIRMAN: This is probably a good place to get the argument started.

Mr. MARTIN (*Essex East*): Of course it will not necessarily rest with the committee.

The CHAIRMAN: Of course not.

Mr. MARTIN (*Essex East*): My only question to Mr. Mundell was put to him because of his vast experience. Does he have any comments to make in regard to clause 6?

Mr. MUNDELL: No, I really have no comment to make. There is one other thing that might be considered along the line of this amendment and that is that regulations and orders be tabled in the house. This would have to be done under a special provision, because there would be some security problems.

Mr. MARTIN (*Essex East*): Did you say all regulations and orders?

Mr. MUNDELL: No, but there would have to be exceptions for confidential material.

Mr. MARTIN (*Essex East*): You are referring to the War Measures Act?

Mr. MUNDELL: I would think perhaps you could do it the other way. That is to say, any order or regulation providing or authorizing the detention of any person be tabled, or something along that line. There is a security problem there.

Mr. MARTIN (*Essex East*): Mr. Badanai is back, Mr. Chairman.

The CHAIRMAN: May I ask a question here, Mr. Mundell? You know that at the present time there is no provision for questioning the decision of the governor in council declaring that a state of war is apprehended, for instance, and bringing the War Measures Act into effect. In the light of that, and in the light of the fact that clause 6 requires that that proclamation be laid before parliament and that ten members of the House of Commons could require a debate in respect of it, do you still feel that that is not a rather important improvement advancing the security of individuals against abuses by the governor in council?

Mr. MUNDELL: I do not see that it really adds a great deal, sir. It has always been open to parliament to bring the War Measures Act before it.

This facilitates it and guarantees it, and to that extent it is an improvement.

The CHAIRMAN: It gives public debate, and I am sure that the opposition believe that debate is useful in the parliament of Canada.

Mr. MARTIN (*Essex East*): We do, but we have not been able to convince others.

Mr. STEWART: We have run into six volumes of Hansard.

Mr. MARTIN (*Essex East*): Only six?

I want Mr. Mundell to know I agree with him on that point.

Mr. BADANAI: Mr. Chairman, I wonder if you would allow me to ask questions in regard to clause 4? I just happened to be out of the room while this particular clause was being discussed.

I would like to ask Professor Mundell if he has any idea about the establishment or appointment of a committee similar to the one which functions now in New Zealand? This is a petition committee to which a citizen may appeal in respect of any wrong that he feels has been done to him in respect to his freedom or his rights. This committee functions independently of the government, but also there is the power to direct either the courts or parliament to right whatever wrong might have been imposed? I posed the same question to one of the previous witnesses, namely, Professor Wright, and he replied:

> I submit that that is a very important piece of machinery for the enforcement of civil rights and political and human rights and freedoms.

I wonder if Mr. Mundell has any opinion to express on such a procedure?

Mr. MUNDELL: I could certainly see no objection to a petitions commission, or something of that sort. I believe that the ordinary citizen gets pretty adequate representation through his own member.

Mr. MARTIN (*Essex East*): Thank you.

Mr. STEWART: That does not apply to you.

Mr. MUNDELL: To that extent it might not be desirable; but I would be more dubious about giving a board powers to direct corrections of rights and wrongs. Would it be a legislative board that could make new law on it? I would like to see the nature of its power before expressing an opinion.

Mr. BADANAI: Would you then suggest it should be a parliamentary committee?

Mr. MUNDELL: It would depend partly on what the function was. If it had not been given any power beyond reporting on the thing, or to bring it before the house, I think a parliamentary committee might serve very well. Actually, it is now open to the citizen to petition any time.

Mr. BADANAI: Would you agree, then, that under the bill, in its present form, it gives the Minister of Justice that power? Would you agree perhaps a parliamentary committee would be more effective to guarantee the rights than the Minister of Justice?

Mr. MUNDELL: At the moment the provision is limited to the minister examining acts and regulations. I suppose there is nothing to prevent any citizen writing or petitioning the Minister of Justice now. I do not know whether it would make very much difference whether it is the Minister of Justice or a parliamentary committee.

Mr. BADANAI: Here I have a copy of a universal declaration of human rights approved by the world peace foundation, with which you are no doubt familiar. Article 10 reads as follows:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

It seems to me that article 10 would envisage such a procedure, that of a board being set up to which a citizen might appeal.

Mr. MUNDELL: I would have thought it would be much wider than that, and aiming at the establishment of proper judicial machinery, though I have not read the article in a long time. I do not know whether it goes to this particular problem.

Mr. MARTIN (*Essex East*): Have you examined the English act that has relevancy to this section, the Inquiries and Tribunals Act?

Mr. MUNDELL: I think that is really directed at a different objective.

Mr. MARTIN (*Essex East*): Administrative decisions?

Mr. MUNDELL: It is really aimed at administrative decisions, and the supervision of administrative boards and tribunals, to ensure they have a fair and proper procedure, one which is adapted to their functions and which is fair to the subject.

Mr. MARTIN (*Essex East*): The Toronto bar had a submission on this article 4. They would retain the word "assure" in place of the word "ascertain" in the section. But it seems to me that section 4, as presently drawn, is really meaningless. Would you not say that the Minister of Justice now by implication of his office has the responsibilities which are sought now to be imposed upon him by statute.

Mr. MUNDELL: I suppose that formalizes the principle.

Mr. MARTIN (*Essex East*): Yes, and clause 4 really has no teeth in it. All he is going to do is to ascertain whether or not these things exist, and that is the end of it. There is no sanction, and there is nothing.

Mr. MUNDELL: This is very much the question which arose out of Mr. Badanai's suggestion. What powers could you give the minister if you were going to try to make it an effective section? He could not block a bill in the house. It seems to me that the section has a limited purpose, namely, that there should be a review made, and that it would rest then on the conscience of the minister.

Mr. BROWNE (*Vancouver-Kingsway*): Would you not think from this clause that if the minister is instructed to ascertain something, and if he found something wrong, in that case it would be his responsibility to bring it to the attention of the house?

Mr. MUNDELL: It would rest on the conscience of the minister, whatever he should do. The bill is based on the principle that the Minister of Justice would have a conscience.

Mr. MARTIN (*Essex East*): If it were a committee, as Mr. Badanai suggested, and he had to bring something to the attention of the committee, there would be publicity about the matter, and public attention would be directed to it, and that would certainly promote action to be taken.

Mr. MUNDELL: I see no objection to that kind of committee at all.

The CHAIRMAN: But you would not want to incorporate the power that has been given here—you would not want to set up the Minister of Justice or a parliamentary committee with the power to prevent bills being brought before the house, just upon their opinions?

Mr. MUNDELL: No.

Mr. MARTIN (*Essex East*): If you look at the clause you will see that it says:

> The minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in council, examine every proposed regulation submitted in draft form to the clerk of the privy council pursuant to the Regulations Act and every bill . . .

I can see a difficulty about the draft form of matters which go to the cabinet. It says,

> "Every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part."

Surely if the Minister of Justice says that a bill, or a form, is contrary to this act, then he should have imposed upon him the obligation to take action, if this section is going to mean anything, and if it is not, then this section should not be there.

Mr. MUNDELL: It would mean an obligation to take action by just reporting or doing something.

Mr. MARTIN (*Essex East*): First of all, he would have to report to his colleagues in the government that this particular bill or measure was not consistent with the bill of rights, and that the government should bring in legislation correcting that situation; but if the government does not intend to do that, then he should bring it to the attention of the house or of this committee so that some private member might introduce a bill along those lines.

Mr. MUNDELL: Any bill produced would be public.

Mr. MARTIN (*Essex East*): No. He has to ascertain whether or not every bill is inconsistent, and it may not be apparent, because members of parliament are preoccupied with many things, and they might not see any inconsistencies.

Mr. MUNDELL: He could always be asked as to what he has found.

Mr. BROWNE (*Vancouver-Kingsway*): It seems to me that if he is instructed to ascertain about a bill upon its introduction, then he is obligated to bring it to the attention of the house if there is something inconsistent.

Mr. MARTIN (*Essex East*): There is no requirement about it, so the only way we could make him do so is by saying that he must.

The CHAIRMAN: This provides for regulations to be prescribed, and I think the minister explained to us some of the things that he had in mind as to procedure.

Mr. MARTIN (*Essex East*): We had this same sort of situation some years ago in regard to reports from departments. There was no statuatory obligation to file a report—a departmental report—within a prescribed period. And some departments did not table any reports. And the same argument came up. The result was the act was changed requiring, for example, the Department of External Affairs, to file a departmental report within ten days of the beginning of the parliamentary session.

The answer was that it would be done by the minister, but it was not done. Therefore the act was changed, because it was felt to be desirable, and the Department of External Affairs had to make a report. It was made obligatory upon them. I am simply saying the same principle ought to apply to this, if this is going to have any teeth in it.

Mr. MUNDELL: Well, I would agree you could add a requirement to report but, in the case of regulations, I do not know to whom—the cabinet, I suppose, or counsel; and, in the other case, to report to the house. But the minister, presumably, can always be asked, in the house, if he has reviewed the bill.

Mr. DESCHATELETS: Personally, I would think this clause does not add anything to what we have already. If this bill becomes law, is it not a fact that it is the duty of any minister to prevent any bill which would come before the house which is in contravention with any existing law, or any other existing regulation.

The CHAIRMAN: You mean to prevent it?

Mr. DESCHATELETS: Well, today, we have not any bill of rights. I was saying that I think it is the obligation of any minister not to bring any bill, which is in contravention of the provisions of this bill, before the house.

The CHAIRMAN: He is not bringing it. It may be a private member that brings the bill before the house.

Mr. MUNDELL: I think it would be his duty under this section to form an opinion, but I do not think that opinion should be binding upon parliament.

Mr. DESCHATELETS: I am refering to a moral obligation.

Mr. MARTIN (*Essex East*): You will remember originally, in the bill introduced in 1959, the words were "in order to ensure", and now they have the word "ascertain" which, I think, weakens it to the point where this section is meaningless. It does not change the situation now. As Mr. Mundell said the minister now would be implicit in his responsibilities doing these things and this section does not change the picture at all. It seems to me there is great merit in the proposal made by Mr. Badanai.

The CHAIRMAN: May I make this observation: I do not know how the Minister of Justice could ensure something—unless he has an opinion from the Supreme Court of Canada.

Mr. MARTIN (*Essex East*): I can see two ways. One way is by the publicity that would ensue from the procedure suggested by Mr. Badanai. If that were brought to the attention of a committee, as he states, it would become public knowledge; it would create a sanction, and that sanction would be reflected in the government itself, or on the part of some members of parliament. I am sure if Mr. Browne saw that, he would introduce a bill at once, to see that the inconsistency was corrected. And, if that proposal is accepted, why can we not do something like this:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the governor in council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every bill introduced in the House of Commons, and shall take steps to see that such inconsistencies are removed.

Mr. MUNDELL: I would certainly agree with you that this section does not really do anything.

Mr. MARTIN (*Essex East*): The government is often called upon, by statute, to take steps.

Mr. MUNDELL: I do not know what else you could do actually.

Mr. BROWNE (*Vancouver-Kingsway*): May I suggest that if he is not required under this clause, the bringing of it to the House of Commons would be sufficient.

Mr. MARTIN (*Essex East*): He does not have to bring it to the attention of the house.

Mr. BROWNE (*Vancouver-Kingsway*): I am suggesting perhaps that may be the case. You can notice the difficulty there. In many instances, under the regulations that are submitted in draft form, he would have to bring it to the attention of someone before they became operative; in the case of a bill which is introduced in the house, that is a different matter. He should be required to bring that to the attention of the house; but I would presume that in the case of regulations, and so on, they would be amended before they were passed, after the minister had examined them.

Mr. MARTIN (*Essex East*): I agree with that—on a draft form. I have already said that is a matter for cabinet. But once the regulation becomes a public document, as an act, then there should be periphrastic direction put

on it, and I would suggest that when we come to the amendments we should give consideration to that.

The CHAIRMAN: Have we concluded, gentlemen?

Mr. MARTIN (*Essex East*): I have some more questions. The Minister of Justice said yesterday, in his comprehensive statement, that it was wrong to suggest that only amendments to the British North America Act were part of the constitution. He said that the Senate and House of Commons Act, the Supreme Court Act, the Representation Act, the Elections Act, the Governor General's Act, the Judges Act, the Royal Style and Titles Act, and the Succession to the Throne Act were part of the constitution of Canada. I suggest that was a specious observation.

Mr. MUNDELL: I think this is a very old argument. In fact, in England they have these documents in their constitution. In the United States they have the Declaration of Independence and other documents, and the constitutional law resolves around them. We are in the position, in Canada, of having both usages. When we talk of Canadian constitution, generally we think of the decisions under sections 91 and 92 of the British North America Act, the administration of power sections. The British North America Act, in our constitution, is used in some context to refer to all the basic documents and conventions, even to the constitution.

In section 91(1) it would seem to be the idea that constitution there refers to the other provisions of the British North America Act establishing the Senate and the House of Commons, and that sort of thing.

I think Mr. Justice Holmes said that the word was neither crystal nor a portmanteau. But it is a word that is used. This goes from one to the other; that is about the size of it.

The CHAIRMAN: You do not agree with Mr. Martin that it is a specious argument?

Mr. MUNDELL: Depending on the context. I do not know. I did not hear the context.

Mr. MARTIN (*Essex East*): Any act that has to do with the parliament of Canada, that has to do with the structure of government is, in one sense, part of the constitution. It is specious to say that, because that is the case, the obligations imposed on the legislatures and on parliament in sections 91 and 92, and the British North America Act itself as a whole, are a constitution. I say that in that sense the Minister of Justice was specious.

That is not a personal attack on the minister; I am referring to his argument. But I think it is—I tried to find out during the dinner hour, and could not; but I think perhaps Mr. Mundell could tell me: is there not some discussion on this particular point in Kennedy's book on the constitution of Canada? He makes the distinction between the Supreme Court Act, and so on, and the British North America Act.

Mr. MUNDELL: I do not recall it; I am sorry.

Mr. MARTIN (*Essex East*): I am sure there is.

Mr. MUNDELL: But I think you will find widely varying usage.

Mr. MARTIN (*Essex East*): You said you are not in favour of embedding the bill of rights in the constitution, and your point of view is something like that of Professor Lang the other day. But would there be no way of giving to the bill of rights, in your judgment, a form that would distinguish it somewhat from an ordinary act by some "notwithstanding" clause, or something of that sort?

Mr. MUNDELL: You mean, to distinguish it in appearance, or to distinguish it in legal operation?

Mr. MARTIN (*Essex East*): Both in appearance and in legal effect.

Mr. MUNDELL: By "legal effect" you mean, requiring some special method of amendment, or something?

Mr. MARTIN (*Essex East*): Yes.

Mr. MUNDELL: You mean, apart from embedding it in the British North America Act?

Mr. MARTIN (*Essex East*): Yes.

Mr. MUNDELL: I cannot think of any, no. It could be passed under the name of the British North America Act, or something like this.

Mr. MARTIN (*Essex East*): It would be form?

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): That has been done.

Mr. MUNDELL: I just remembered that this morning.

Mr. MARTIN (*Essex East*): In 1955, when we sought the right to amend the constitution with respect to the powers enumerated in section 91 we put in safeguards about the necessity of an election every five years and parliament being called every year, and guarantees about language. That gave solemnity and was more than an ordinary statute surely.

Mr. MUNDELL: That was an amendment to section 91 of the B.N.A. Act which was passed by the United Kingdom parliament pursuant to addresses. So it was an amendment to the B.N.A. Act. But there was a representation Act. The last amendment to 91 of the B.N.A. Act was passed under the title of the BN.A. Act of 1952. It is, of course a statute.

Mr. MARTIN (*Essex East*): But the form is different and that might be employed here. Where would we say that here in this bill if we were agreed on it?

Mr. MUNDELL: I think you would have to abandon the title to the bill of rights and say this would be cited as the British North America Act 1960. You could put it in as section 90 (*a*) or at least ahead of section 91 in the B.N.A. Act.

Mr. MARTIN (*Essex East*): In the form you suggested this morning with the preamble incorporating sections 1 and 2 and substituting 3 by an amendment to the Interpretation Act, where would you put the present clause?

Mr. MUNDELL: I would imagine if you were going to do it that way you could have the preamble and have the enacting clause and put the short title at the end. That is not uncommon. I think in Ontario the practice is to put the short title at the end in the statute, whereas here we have always put it in after the beginning.

Mr. MARTIN (*Essex East*): Are you familiar with the declaration of Philadelphia?

Mr. MUNDELL: No, I am not.

Mr. MARTIN (*Essex East*): Are you familiar with section 25 of the declaration of human rights?

Mr. MUNDELL: I cannot recall it offhand.

Mr. MARTIN (*Essex East*): Do you see any objection in a preamble to putting in a reference that would be declaratory of basic economic rights?

Mr. MUNDELL: If I might answer that in this way, there is one point I forgot to mention earlier. In the discussions I have had with people about the bill of rights and in discussions in the bar association and elsewhere, it is astonishing that these people seem to place emphasis on the desirability of some exhortation by way of a preamble. It is amazing how many people concur in that. Whether or not you should expand it to include economic rights I do not know.

Mr. MARTIN (*Essex East*): But assuming we have this form, which I think is desirable at this time, it could be done in the preamble.

Mr. MUNDELL: It would hardly play any part if there was no operative provision relating to it.

Mr. MARTIN (*Essex East*): It would be declaratory in the sense that we would be declaring, for instance that the matters contained in clause 2 were within the competence of federal parliament. You will remember this morning when we were discussing clause 2 you suggested that, to give full meaning to the difficulty that some of us had about the words, "property" and "Canada" in clause 2, that reference could be made to the effect that this was intended only to be within the matters concerning the powers of parliament.

Mr. MUNDELL: Yes.

Mr. MARTIN (*Essex East*): Did you have anything to do with drafting the bill of rights proposed by the bar association?

Mr. MUNDELL: I did not know one had been proposed by the bar association.

The CHAIRMAN: It was proposed by the Ontario section of the bar association.

Mr. MARTIN (*Essex East*): On the 6th day of February, 1960, the Ontario subsection on civil liberties recommended to the general meeting of all the Ontario members of the Canadian bar association, a proposed bill of rights.

Mr. MUNDELL: No, I did not know that, sir.

Mr. MARTIN (*Essex East*): You did not have anything to do with it?

Mr. MUNDELL: No.

Mr. MARTIN (*Essex East*): What about this proposed article where it suggests that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law? Do you think we cover that in this bill?

Mr. MUNDELL: No, it is not covered in this bill.

Mr. MARTIN (*Essex East*): This bill does not cover that point, you say?

Mr. MUNDELL: I do not think so. I had not thought about that before.

Mr. MARTIN (*Essex East*): Is that point covered anywhere in the law of Canada? It certainly is the custom and tradition and it may have acquired the force of law in one sense.

Mr. MUNDELL: I think it is covered by the general law. It is probably not covered by any statute amendment.

Mr. STEWART: This was part of the common law of England.

Mr. MARTIN (*Essex East*): Yes, but this bill does not cover it?

Mr. STEWART: It does not cover it expressly.

The CHAIRMAN: You mean this bill does not explicitly mention that right?

Mr. MARTIN (*Essex East*): I am asking Mr. Mundell if it is expressed even implicitly.

Mr. MUNDELL: No, I do not think it deals with it.

Mr. MARTIN (*Essex East*): No. Does it cover this point; the right of a person charged with a criminal offence to defend himself in person?

Mr. STEWART: The criminal code covers that point.

Mr. MARTIN (*Essex East*): The criminal code covers it, but this bill does not.

Mr. STEWART: Yes, but this bill does not supersede the criminal code in so far as its expressed provisions are concerned.

Mr. MARTIN (*Essex East*): I certainly agree with you that it does not. I do not think it touches the criminal code at all. This is a bill of rights and these are very fundamental rights that the bill does not touch upon. The bill does say that an individual shall have the right to retain counsel, but it does not say he shall have the right to defend himself in person.

Mr. MUNDELL: The word in subclause (*f*) the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him" would perhaps cover that. I am not sure of that, but it certainly does not say this expressly.

The CHAIRMAN: I would think it is fundamental that a man has the right to defend himself in person. I do not know any place where that is denied. In some instances it may have been felt that you denied counsel as well, but I have never heard it ever suggested that a man did not have the right to defend himself in person.

Mr. MARTIN (*Essex East*): I have not heard it suggested either. I am satisfied what the law of Canada does with regard to the declaratory intention of this bill, but I am now dealing with this bill on human rights. I am dealing with what I regard are some of the very important legal rights. They are not referred to in this bill. It is not an answer to say that they are covered by law. That is the basic argument made by men like Mr. Mundell who do not believe in a bill of rights as being an effective instrument to guarantee those rights. For instance, there is nothing in this bill that says a man shall have the assistance of an interpreter. Is there any law that requires that? Supposing a judge refused the individual the right to have an interpreter?

Mr. MUNDELL: I would suggest you again come back to the word "fair".

Mr. MARTIN (*Essex East*): You think that would cover it?

Mr. MACDONNELL: Has it ever been suggested that this bill of rights covers everything? It seems to me you could find a score of things that are not covered here.

Mr. MARTIN (*Essex East*): That may be, but surely in respect of a bill of rights it is our duty to try to cover everything that we can which we regard as fundamental in our society. For instance, there is nothing in this bill that says that no person shall be compelled in any criminal case to be a witness against himself. There is nothing in this bill that says that, and we regard that as implicit in our legal system. There is nothing in this bill that says that a man shall not be denied the right to reasonable bail. There is nothing in this bill that says a man shall not be tried for the same offence twice. That is a practice that some countries do not observe, but which we observe. However, there is no sanction of the law in it.

There is nothing that says that no one shall be subject to arbitrary, unlawful interference with his private and family life, his home and his correspondence. I have a submission from the parents-teachers association, which I forgot to bring with me, on the question of family life. I know Mr. Dorion, who has been working on a preamble, has some very strong views about family life in this respect. It seems to me those are measures that should be considered in a bill of rights.

The Minister of Justice, Mr. Mundell, was having difficulty about section 3(*b*) because of the declaration of human rights. I have a list of the provisions of the declaration on human rights that are not referred to actually in this bill.

The Ontario bar association, in the draft bill of rights that it put before this committee, has taken account of the provisions of the declaration on human rights, and has incorporated them in provisions in this bill, some of which we have recognized, but the ones I have mentioned, which are in the declaration on human rights, are not in this bill at all.

Mr. RAPP: If it does not cover everything, I wonder why Mr. Martin approved it in the house.

Mr. MARTIN (*Essex East*): Surely, Mr. Rapp, you are a very reasonable man, and I am a strong supporter of your particular subject. I have the right to ask the questions I have asked because I am trying to strengthen this bill; and that is no reason why you should descend on me with wrath?

Mr. RAPP: You listed about three or four items that should be covered, and still you approve the principle of the bill.

Mr. MARTIN (*Essex East*): Certainly, I approve the principle of the bill, but I want it to be a better bill. We said in the House of Commons we would, in this committee, go into this and study it carefully, and I am trying to make it a better document.

Mr. MACDONNELL: You do not recognize, Mr. Rapp, this is all Mr. Martin's unselfishness in aiding the government.

Mr. MARTIN (*Essex East*): I would not put it that way, but it is a desire to make the bill a better one. I referred to a draft bill of human rights of the Ontario bar association, passed in February this year, which is an appendix to the brief put in by the Canadian bar association. I think these are suggestions that ought to be considered, and I would just ask Mr. Mundell whether he was aware of them, because of his close association as a member of the Ontario bar, with the whole project of civil liberties.

However, I have brought that to his attention, and to the attention of the committee; and I have not neglected my duty on that account.

When we come to considering the bill, perhaps, we will have further definite proposals to make.

The CHAIRMAN: I think we are probably getting into the realm of argument instead of gleaning opinions of the witness.

Mr. MARTIN (*Essex East*): I wanted to know whether he knew about them.

Mr. MUNDELL: Thank you, very much.

Mr. MARTIN (*Essex East*): I am sure, Mr. Chairman, you will be happy to know I have no more questions to put.

The CHAIRMAN: Thank you, very much, Mr. Martin.

Mr. BROWNE (*Vancouver-Kingsway*): That has been evident for quite some time!

Mr. MARTIN (*Essex East*): Let it not be said we did not seek to improve this bill.

The CHAIRMAN: Gentlemen, the next meeting will be at 9.30 a.m. on Monday, in room 356-S, at which time we will have the Minister of Justice back with us.

Just before I close the meeting, on behalf of the members of the committee, Mr. Mundell, I would like to say thank you for coming and remaining with us so long today, and subjecting yourself to this rather severe cross-examination by some of the members of the committee. I assure you we appreciate it very much, and I hope we have not incommoded you too much.

Mr. MUNDELL: Thank you very much, sir.

—The committee adjourned.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 8

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MONDAY, JULY 25, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESS:

The Honourable E. D. Fulton, Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23578-8—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer Esq.

Vice-Chairman: Noel Dorion Esq.

and Messrs.

Aiken	Deschatelets	Weichel
Argue	Jung	Winkler
Badanai	Martin (*Essex East*)	
Batten	Rapp	
Browne (*Vancouver-Kingsway*)	Stefanson	
	Stewart	

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

MONDAY, July 25, 1960.
(17)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.35 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart, Weichel and Winkler.—12

In attendance: The Honourable E. D. Fulton, Minister of Justice; Mr. A. E. Driedger, Deputy Minister of Justice; and Mr. D. H. W. Henry, Director, Advisory Section, Legal Branch, Department of Justice.

Mr. Deschatelets moved, seconded by Mr. Martin (*Essex East*),

"That Premiers, or representatives on their behalf, be invited to appear before this Committee, while they are in Ottawa, in order that they may express their views on Bill C-79."

The Chairman ruled the motion out of order on the grounds that the Committee, by the adoption of a report from the Subcommittee on Friday, July 22, 1960, precludes the further solicitation of representations.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets,

"That the decision of the Committee taken on Friday, July 22, 1960, be rescinded in order that the Committee may entertain a motion for the invitation of representatives of the provincial governments." The motion was resolved in the negative; YEAS: 4; NAYS: 7.

Mr. Fulton was again introduced and commented upon Mr. Martin's interpretation, during the Saturday meeting of the Committee, of remarks he had made on Friday, July 22nd.

Mr. Fulton was further questioned concerning the Bill, and at 11.00 a.m., his questioning continuing, the Committee adjourned to meet again at 9.30 a.m., Tuesday, July 26, 1960.

J. E. O'Connor,
Clerk of the Committee.

23578-8—1½

EVIDENCE

MONDAY, July 25, 1960.
9.30 a.m.

The CHAIRMAN: Order, gentlemen.

Mr. DESCHATELETS: Mr. Chairman, if you would permit me I would like to say a few words before the minister resumes his study of the bill.

The CHAIRMAN: Very well.

Mr. DESCHATELETS: Last Friday morning it was decided that the minister would begin his statement, since there was no other witness ready to appear before this committee, except the witness whom we heard on Saturday. There was no suggestion yet, as far as I can recall, that we might invite before this committee the provincial premiers or representatives on their behalf. I think this committeee would be most anxious to know the views of the provinces on this bill for many obvious reasons.

I might just mention three of the most important reasons. Firstly, many witnesses, and particularly the Canadian congress of labour, have expressed vigorously the opinion that the provinces should be consulted.

Secondly, the Canadian bar association, in their brief, outlined and put very strong emphasis on the legal uncertainties arising out of the mutual jurisdiction of the provinces and the federal government on the rights enumerated in clause 2 of this bill.

Thirdly, since the premier of each province is in Ottawa right now, for a federal-provincial conference, with an important delegation of experts and advisers—and I think that in many cases the delegation also includes the attorney general of the province—we should consult them.

It would appear, for these reasons, that if we do not invite the provinces to appear before this committee on this bill, in order to have their views, I think this could be interpreted, at least, as a serious lack of courtesy.

For all these reasons, and others that might be brought up by my colleagues, I move, Mr. Chairman, that the premiers or representatives of the provinces be invited to appear before this committee while they are in Ottawa, in order that they may express their views on the present bill. I am seconded by the hon. member for Essex East.

The CHAIRMAN: Has that been reduced to writing?

Mr. DESCHATELETS: Yes, Mr. Chairman.

Mr. MARTIN (*Essex East*): Mr. Chairman, I would like to say a word in support of this motion.

We have had considerable representations made with regard to the invasion of provincial rights under particular sections of the bill—notably, section 2.

In his comments on Thursday and Friday the minister took the position that while that may be the case, or could be the case, the remedy would lie with the courts, which would correct whatever situation in that regard would develop.

We have had views, strongly expressed, by individual members of the committee—notably Mr. Dorion, who was disturbed that unless certain words were put in the bill its invasion, instead of promoting national unity, would create the opportunity for considerable additional law-making by the courts, and that was an undesirable thing to do.

We discussed and considered on Saturday a resolution passed by the legislature of the province of Quebec, in which it was unanimously expressed by both members of the government and members of the then opposition, particularly in the language of the then solicitor general, Mr. Rivard, that the bill now before the parliament of Canada was one that involved provincial considerations and rights.

It has been suggested that there would not be much point in conferring with the provinces because past experience had not shown any ability to make any progress in a manner such as an inquiring, collaborative effort in respect of a bill of rights.

The fact is that at no time in Canadian history has any attempt been made by a government to sit down with the provinces in the matter of a proposed bill of rights involving federal and provincial jurisdiction. In answer to this it is suggested that the efforts at the constitutional conferences of four or five years ago gave a clear indication of how unsuccessful any efforts along this line would be. Those conferences at no time dealt with matters involving a proposed bill of rights. Those were conferences called for the purpose of seeing what procedure could be devised for amendment in Canada of the Canadian constitution. These conferences had to do with the consideration of what were the excessive powers of the federal and provincial governments under sections 91 and 92 and what were matters of common concern to the two senior levels of government.

The proposal made by the member for Maisonneuve-Rosemont is that we take advantage now of the presence in Ottawa of the provincial premiers and attorneys general to ascertain from them the views of their respective governments regarding this particular bill. The motion does not single out any particular premier or attorney general, but it asks that we ask all of the provinces to express themselves on this matter.

We have not been told by the government that it has made any move, at any time, to ascertain the views of the provinces in this matter. We could understand it if there was difficulty in getting agreement; but we find it difficult to understand, in a matter which involves the greatest constitutional difficulty, as Mr. Mundell pointed out on Saturday, that the government should not have made any effort whatsoever to ascertain the views of the provinces in this particular—

Mr. BROWNE (*Vancouver-Kingsway*): On a point of order, Mr. Chairman, it seems to me what Mr. Martin is suggesting to us is that we should be concerning ourselves with legislation within a province,—

Mr. MARTIN (*Essex East*): I am not suggesting that at all. What I am—

Mr. BROWNE (*Vancouver-Kingsway*): I am on a point of order, and may I be allowed to continue?

Mr. MARTIN (*Essex East*): This is not a point of order; it is an argument. You are—

Mr. BROWNE (*Vancouver-Kingsway*): It is not an argument at all. You are suggesting we get in touch with the provinces to hear their views, and you suggested there was a constitutional problem. We are dealing with—

Mr. MARTIN (*Essex East*): This is not a point of order.

Mr. BROWNE (*Vancouver-Kingsway*): We are dealing with this as provincial legislation which is entirely within the jurisdiction of the federal government; and no witness who has appeared before this committee has disputed this fact in any way.

Mr. MARTIN (*Essex East*): Mr. Chairman, this is not—

The CHAIRMAN: Gentlemen.

Mr. BROWNE (*Vancouver-Kingsway*): It is entirely confirmed—

The CHAIRMAN: I cannot listen to two people at the same time.

Mr. MARTIN (*Essex East*): You have heard him.

Mr. BROWNE (*Vancouver-Kingsway*): You have interrupted me continuously, and I have not had a chance to say what I wanted to say yet.

Mr. Martin is talking about national unity, and I cannot think of anything which would do more to upset it than trying to arouse unfounded fears in the minds of the provinces, because every witness who has appeared before this committee has agreed that it is only within federal jurisdiction.

Mr. MARTIN (*Essex East*): This is not a point of order: this is replying to me, by way of argument; and he has the right to do that, after I have finished.

The CHAIRMAN: As I understood him, he was raising a point of order on this matter of wanting further witnesses called before the committee. That question has already been before the committee and its decision not to call further witnesses has not yet been reversed.

Mr. MARTIN (*Essex East*): It has not been reversed, and if it has not, it is open to any member of the committee to raise the matter at any time.

I was making the argument that this was a bill, in the opinion of a considerable number of witnesses and as expressed by some members of this committee, including Mr. Dorion, which did invade provincial rights.

I had been pointing out, when I was interrupted, that the government had not sought to ascertain the views of the provinces, and because of that it would be wrong for us not to take advantage, at this time—when the provincial premiers and governments are assembled for the purpose of the federal-provincial conference—to ask them to express their views with regard to this bill, if they wanted to.

I think this is a constructive move. We can ascertain from them what their views are with regard to certain sections of this bill, in so far as those sections are presumed or are argued to affect their competency under section 92 of the bill. I think it is a constructive effort on the part of the hon. member for Maisonneuve-Rosemont; and I support it strongly.

The CHAIRMAN: Any further discussion?

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, as I recall, the hon. member who now moves this motion was here when we did vote on the question of calling further witnesses, and he was one who gave unanimous support to the motion which decided we would not call any further witnesses, and that we had heard almost every view that could possibly be expressed on this bill. Then the matter arose a second time and Mr. Martin—who had not been at the earlier meeting—came to the next meeting, on the following day, and raised again the question of again calling for witnesses, and wanted to call people we had already contacted and who had shown no interest in coming before this committee. Now the question is raised for a third time.

It seems to me there has to be some finality to a vote of this committee on how it is going to proceed, otherwise we could go on interminably, going over and over the same old argument. It seems to me that this matter has been settled, and that it is entirely out of order to give any further consideration to it.

Mr. Martin declined to make a motion when requested to do so by the chairman last time he raised the question. It was the second time we had discussed the matter; and now it is being raised for the third time. If the committee were to continue in that way, having the same matter raised several times, I can see there would be no end to it.

The CHAIRMAN: On the point of order, the decision was made by the committee, following the recommendation of the steering committee of July 21, that no further representations on Bill C-79 be solicited. I feel, in the face of that decision of the committee, that the motion proposed by Mr. Deschatelets is out of order, because this motion is contrary to the decision of the committee taken before and, if considered, it would definitely be in conflict with that former decision of the committee.

My opinion is that until such time as the decision of the committee is reversed and the matter of soliciting further opinions is concurred in the motion now before the committee is out of order.

Now, if anybody wants to speak to the question as to whether or not this motion is in order, I will hear further representations, but they must be confined entirely to the point which has been raised.

Mr. BATTEN: Mr. Chairman, I would like to refer to the argument which I brought up at the first meeting of this committee when I said that we were going to hear not only from individuals but also from representatives of various organizations.

During the deliberations of this committee we have heard from individuals who have expressed their own private opinions, and we have also heard from people who were representing organizations, such as the Canadian bar association, the Canadian labour congress, religious bodies, and so on.

Now, at the first meeting of this committee I saw no reason why we should not hear from representatives of the provinces in relation to their position as provinces, because they represent large bodies of people. Therefore they would have the same right to come before this committee as representatives of organizations.

The CHAIRMAN: Mr. Batten, I appreciate what you were saying, but I believe it goes to the merits of the motion, wihch is to invite representatives of the provinces.

What I invited comment upon was this: I indicated what my ruling is going to be on the question of this motion being in order.

Mr. MARTIN (*Essex East*): Subject to argument?

The CHAIRMAN: Within reasonable bounds, yes.

Mr. MARTIN (*Essex East*): But surely subject to argument?

The CHAIRMAN: Yes, so long as you confine it to that one point. I do not think a great deal can be said on that as long as this decision stands. I think the only motion that would be in order would be one to rescind the decision of the committee.

Mr. BATTEN: Even if this committee has decided not to hear any more witnesses, surely it has the right to reverse that decision.

The CHAIRMAN: Absolutely, but I think the only motion that would be in order would be one to rescind the decision of the committee.

Mr. BATTEN: When this matter came up for discussion regarding the hearing of further representatives, I was one who voted with the majority, that we do not ask or solicit any more representations. Of course, at that time we had in mind not to solicit individuals; but the matter of the provinces has come up for discussion, and the question which has been raised this morning is that of asking the provinces to participate in a discussion, or to express their opinions. And in that I cannot see anything wrong. This is something new. It is a new angle, to bring in the provinces. Everyone admits that it is desirable to have their opinions. So I support the resolution.

The CHAIRMAN: I appreciate the point you are making, but I am sure that a great deal can be said as to whether or not this motion, which has been made, should be adopted, that is, on the merits of it. I have no doubt there

are many who would say that it was unnecessary to call representatives from the provinces, because, if there is any doubt about it, it is still open to this committee to make it perfectly clear in this bill that there is no infringement of the rights of the provinces. That would be the only purpose of contacting the provinces.

And there may be other reasons which members can invoke. So I think that all that is in order this morning is whether or not the committee wishes to change the decision which was made the other day.

My ruling is that I cannot entertain this motion before the committee this morning until somebody reverses, or makes a motion for the reversal of the decision of the committee. I think that is the only kind of motion which I consider would be in order this morning, and that it is out of order to go into the merits of the motion which has been presented to the committee—and I am not calling on members of the committee to answer the points which have been made by those who appear to be in support of the idea of contacting provinces—therefore, if anyone wishes to make a motion that this decision be reversed, I would accept it.

Otherwise I shall have to rule the motion out of order and proceed with the business before the committee this morning.

Mr. DESCHATELETS: Before you do it, I would like to say that the arguments raised by my friend from Fort William are really on solid ground, because as far as I can remember when, on Friday morning we agreed to a motion—

Mr. STEWART: Is this not on the merits of the motion?

Mr. DESCHATELETS: Yes, it is on the merits.

The CHAIRMAN: The point you raised is whether or not Mr. Deschatelets is again attempting to support his first motion.

Mr. DESCHATELETS: Yes, because your decision has not been given yet.

Mr. RAPP: Yes, he gave it.

Mr. STEWART: I think he should be ruled to be out of order.

Mr. DESCHATELETS: Your opinion has already been expressed. I submit that you are comparing the provinces to the witnesses we have already heard. It is not the case at all. There was no suggestion made that we should have the provinces and cross-examine them on the merits of the bill, clause by clause. That is not the thing at all that I had in mind.

The question of witnesses has already been settled, and this is entirely a new matter, and we would like it for the provinces to be invited to let us know their general views on the advisability of having a bill of rights at the present time and in its present form.

There is no suggestion that we should cross-examine them, clause by clause; and I do not think we could, for one moment, give the representatives of the provinces who would come here the same study as other witnesses.

As my friend from Fort William outlined, there was no suggestion at any time that we have it in mind not to call the provinces here to let us have their views.

Mr. BROWNE (*Vancouver-Kingsway*): Surely it is out of order to pursue this any further in the light that the member is giving it. He is arguing in favour of a motion that has been ruled out of order.

The CHAIRMAN: I agree, Mr. Browne. I think we have had enough discussion on the point of order.

Mr. MARTIN (*Essex East*): On a point of order, Mr. Chairman.

The CHAIRMAN: I do not think you can raise a point of order on a point of order.

Mr. MARTIN (*Essex East*): I wish to speak to a point of order?

The CHAIRMAN: A point of order has already been raised, and until that point of order is out of the way, I do not think we can entertain another point of order.

Mr. MARTIN (*Essex East*): I repeat, that I wish to speak to a point of order.

The CHAIRMAN: I do not think I wish to hear any more—

Mr. MARTIN (*Essex East*): I propose to speak.

The CHAIRMAN: I do not propose to accept any more arguments on a point of order.

Mr. MARTIN (*Essex East*): I am not going to dispute it with you.

The CHAIRMAN: You can appeal to the committee.

Mr. MARTIN (*Essex East*): I wish to deal with the question as to whether or not we have a right to make this motion. You have said that this motion is out of order, and that the only way it can be dealt with is by this committee moving to repeal a decision which has already been made by this committee.

The CHAIRMAN: That is right.

Mr. MARTIN (*Essex East*): I say that the motion made by this committee did not deal with provincial governments, but that it dealt only with witnesses, individuals and organizations in the country. Let us have an exact decision to see if Mr. Badanai is not right.

The CHAIRMAN: I am just reading what appears to be quite clear:

> The subcommittee on agenda and procedure recommends that no further representations on bill C-79 be solicited.

Mr. MARTIN (*Essex East*): What was the date of that?

The CHAIRMAN: The decision of the subcommittee was made on Thursday, July 21, and I believe it came before the committee on Friday, July 22, and was adopted. I think that is quite clear, Mr. Martin.

Mr. MARTIN (*Essex East*): I shall admit to you that the wording of it was comprehensive. But unfortunately as one of the members of this committee I could not be here, not because I did not want to be here, but because of the way the business of the house is arranged.

Mr. BROWNE (*Vancouver-Kingsway*): We have had that said at every single and solitary meeting of this committee.

Mr. MARTIN (*Essex East*): I have been here and I complain because in looking at the evidence of Professor Scott, whom I want to have called back, the record shows that I have the right to call him back; but we will deal with that later.

Since you have ruled that this particular motion is in order, I move—

The CHAIRMAN: No, it is out of order.

Mr. MARTIN (*Essex East*): Very well then, out of order. I move that the decision of the committee be reversed so that we can ask representatives of provincial governments to attend here before this committee.

The CHAIRMAN: Is there any seconder?

Mr. DESCHATELETS: I second the motion.

The CHAIRMAN: The motion is seconded by Mr. Deschatelets. Is there any discussion?

Mr. MARTIN (*Essex East*): Mr. Chairman, on the motion itself, it seems to me that it would be difficult for members of this committee to deny an opportunity to ask or inquire from provincial governments. There are two provinces

in Canada which have provincial bills of rights, Alberta and Saskatchewan. Would it not be a great help to us in this committee to have from representatives of those governments an elaboration of their experience with regard to the instrument of a bill of rights, and at the same time, asking them for their opinions?

We have not had representatives before this government who could speak for either of those provinces where those bills are in existence. We have had Professor Long and Professor Bowker of Saskatchewan and Alberta respectively, but they appeared in their individual capacities.

Then, I think in view of the resolution passed unanimously in the province of Quebec that we just cannot agree not to invite them to speak to the position of that legislature and of their government. I suggest it would be a lack of courtesy, a lack of understanding of the constitutional position of the provinces in a matter that obviously affects them, for us not to ask those governments to come here.

There can be no argument about whether or not we have the right to ask them. Other committees in the past have asked provincial governments to come, and they have come. So I hope this committee will reconsider its position. Otherwise, if we go back to the house, can we in all conscience argue that in this committee we have given every consideration to all of the aspects that attend this matter?

We cannot. Then a suggestion has been made that the bill of rights be embedded in the constitution. But that can only be done with provincial consent; and we have not before our committee any evidence whatsoever that in any way touches upon this vital aspect of this particular suggestion. I would hope that the members of the committee will reconsider their position and give us that opportunity.

Mr. DESCHATELETS: Mr. Chairman, of course I would favour the motion just made by the member for Essex East. I think that the provinces should be given the opportunity to let us have their views on this bill, and that this could be done every quickly. As I said before, there is no question that they would come here as experts on this bill; but we would at least have their views on its merits in its present form, and I think this could be done maybe very quickly.

We would have the opportunity of seeing them and having their views, and I do not think this would delay the proceedings of this committee in any way.

The CHAIRMAN: I hope you will bear in mind that they are here on a rather important mission, and I would gather that their time would be pretty well taken up on what they came here to do. There may be some question whether they are even able to appear before the committee. However, that is the—

Mr. DESCHATELETS: But the motion made, Mr. Chairman, is for the invitation of representatives. Maybe they will not find it advisable to attend. We do not know. But at least the motion is for having here the representatives of the provinces. We feel at this time that they should be invited and should be consulted, and this is the purpose of this motion. I do not think any member of this committee should oppose the motion at this time.

The CHAIRMAN: Are you ready for the question, gentlemen?

Mr. STEWART: Mr. Chairman, on the motion: in the first place, the bill does not propose to interfere in any way with provincial jurisdiction. The fact that it might touch incidentally on provincial matters is not a reason for having the provinces before us.

Secondly, the bill has in its present form been approved in principle, and in principle it is not a constitutional amendment.

Thirdly, the mover of the motion submitted a list of names that he wanted heard by this committee.

The CHAIRMAN: The seconder.

Mr. STEWART: No, the mover—Mr. Martin.

Mr. MARTIN (*Essex East*): Of this motion, yes.

The CHAIRMAN: Yes.

Mr. STEWART: He did not suggest at any time that any representatives of the provinces be called. Fourthly, the mover of the previous motion has asked, to my knowledge, I think every witness who has been before us if the provinces should be consulted, and he has waited until today to make such a motion.

If there was any necessity or any intention of having representatives from the provinces appear before this committee, the motion should have been made, or an application should have been made in the early days of the committee, not now, after the committee has unanimously decided not to solicit or hear further witnesses.

I submit, Mr. Chairman, that on those grounds, along with others, this motion should be voted against.

Mr. BATTEN: Mr. Chairman, with reference to what Mr. Stewart has said: I do not think that anybody should be called before this committee for the purpose of making any particular statement regarding this bill. I think witnesses are called before this committee to make their own statements. I do not think we should call any representatives of the provinces to take up any particular aspect of this bill. They should be called here to present their views on the bill itself.

Mr. STEWART: The bill has been before the country since 1958, and Quebec is the only province that has taken any steps against it.

Mr. MARTIN (*Essex East*): And you will not allow them to come.

Mr. BATTEN: But the point is this: the representatives of the provinces have the right to come before this committee to talk about the bill within the federal field, the same as everybody else has done. Whether they want to talk about the interference with the provinces or not, that is another matter. We have accorded that privilege to other people. But surely they should have the opportunity to come here and discuss their opinions of this bill within the federal field.

The CHAIRMAN: Mr. Batten, this bill was introduced in September, 1958, and at that time the Prime Minister made it clear that it was being introduced only for the purpose of bringing the matter before the people of Canada and to invite comments and representations in respect of that bill. The present bill is fundamentally the same bill, and in this period of time, which is nearly two years, none of the provinces has indicated in any way that this bill—that is, the bill that was introduced in September, 1958—infringed upon provincial rights.

Mr. BATTEN: But I do not think that is the point, Mr. Chairman.

The CHAIRMAN: Other than one resolution which came from the province of Quebec; and that resolution, as I read it, is simply a resolution indicating that there is to be no constitutional amendment made—

Mr. MARTIN (*Essex East*): No.

The CHAIRMAN: —without the province of Quebec being consulted.

Mr. BATTEN: Let me put two points to you, Mr. Chairman. First of all, I do not think the provinces should be asked here to discuss the infringement

of this bill upon provincial rights. They should be asked here to discuss the bill itself and give their opinions, as other people have done.

You say to me that time has elapsed, and they have not done anything about this. I agree with you, up to a point. But I think that when the first bill was withdrawn from parliament, the Prime Minister said that when the bill was reintroduced next session, in would be an amended bill and everybody would be given an opportunity to discuss it in the freest possible manner.

I think there are a great many people who may have made some representations, if that had been carried out, who have not done so.

The CHAIRMAN: The only point I was making is that the provinces have indicated no desire to appear before the committee.

Mr. BATTEN: But they have not been asked.

The CHAIRMAN: Even after this second bill was introduced.

Mr. BATTEN: But they have not been asked, have they, Mr. Chairman?

Mr. BROWNE (*Vancouver-Kingsway*): Question.

Mr. BATTEN: But they have not been asked.

The CHAIRMAN: That is right.

Mr. STEWART: They are not asked on any other federal statute either.

Mr. BATTEN: Why should not representatives of the provinces be asked to come here and give us their opinion of the bill in the federal field, like other representatives who have been before us?

Hon. E. D. FULTON (*Minister of Justice*): It is an extraordinary doctrine, that you invite provinces to express views on federal legislation. Just think of the precedent you are setting.

Mr. MARTIN (*Essex East*): The Minister of Justice does not mean that, surely. You will recall that when the old age security bill was introduced and was discussed in a parliamentary committee, it was a matter that did not touch the provinces at all, because they had agreed to turn over to the federal government whatever constitutional power was necessary.

Mr. FULTON: Yes; but that was quite a different basis.

Mr. MARTIN (*Essex East*): Several provinces came and gave evidence. The situation is this: some—

Mr. FULTON: It was a constitutional amendment then.

Mr. MARTIN (*Essex East*): No; the authority for constitutional amendment had been given, and parliament was then dealing fully with the matter that came within its exclusive competence. But the provinces were asked to come, because of their experience in the administration of the measure. And there have been other occasions.

In 1941, I think or thereabouts—no, earlier than that—when it was considering ways and means of amending the constitution, the committee of this house had no hesitation in asking attorneys general, and even officials of provincial departments, to come.

Mr. FULTON: When you were considering constitutional points, yes.

Mr. MARTIN (*Essex East*): The position is this: some members of this committee take the position that this particular bill, clause 2 in particular, does involve an invasion of provincial rights. Other members of the committee, like the chairman, do not think that is so. Mr. Dorion does think it is so. Mr. Dorion is not a member of our party, and I mentioned his name to give the indication of the strength of the position that we take.

The CHAIRMAN: Mr. Martin, I do not think Mr. Dorion thinks so. I think Mr. Dorion would like what he said, made clear.

Mr. MARTIN (*Essex East*): I think he clearly indicated that he thought so.

Mr. BROWNE (*Vancouver-Kingsway*): He said he personally did not accept that view, but there were some people who did, and therefore he wanted them to be reassured on that point.

Mr. MARTIN (*Essex East*): You can make your argument later.

Mr. BROWNE (*Vancouver-Kingsway*): Do not put words in his mouth that he did not say.

Mr. MARTIN (*Essex East*): My view is that he did say so, and I would be willing to hold this motion, as far as I am concerned, until we get his view, particularly if he is coming back this afternoon. In any event, witness after witness has said this. Mr. Mundell, who has had long experience with the Department of Justice, had no hesitation in saying that if clause 2 was, as the minister said, a legal enactment, then it created a great constitutional problem. On the basis of that, what objection there could be to our asking the provinces to give us their opinions, I find difficult to understand. The chairman said that no province has asked to come. I do not know how closely this bill has been studied by the provinces. I do not know that, but I do know that one province has passed a very strong resolution which, on the very face of it, should cause us to be concerned with this matter. This will not involve any delay. If the provinces cannot come, we have done our duty. We have put ourselves in the position where we have given them the opportunity. Otherwise, if we go back into parliament with this bill, the government will have to say that it has made no contact with the provinces, and that this committee had that opportunity but refused to give them that right, particularly at a time when the conferences are assembling in Ottawa. The chairman of this committee says that the provincial governments are represented here to give consideration to a very important matter, and notably to deal with fiscal questions. That is true, but the Prime Minister said in the House of Commons that there was nothing to prevent consideration at that conference of matters other than questions of fiscal import. How do we know that the matter is not going to be raised by one or two of the provinces themselves? Let us put ourselves in the position where we will have done everything that we should to give them the opportunity of coming here and giving us their views.

The CHAIRMAN: Mr. Martin, may I make one final comment, and that is this: if your appraisal of the evidence, which has been already presented to the committee, is correct, and I am not admitting that it is, then we have before this committee the views on the possibility of this legislation being in any way an infringement on provincial rights.

Mr. MARTIN (*Essex East*): Mr. Chairman, that is not the only point involved.

The CHAIRMAN: I do not see that we are advancing anything by getting five, or six, or seven others to express the same point of view. This will not be decided by preponderance of evidence. That is not what we are here for. We are here to hear the various points of view, and I think we have now heard them. I think this committee can deal with the matter when we come to the consideration of the bill clause by clause. I believe we have had enough discussion in this regard.

Some Hon. MEMBERS: Question.

Mr. RAPP: Question.

The CHAIRMAN: Perhaps someone could make a motion then that the question be now put.

Mr. MARTIN (*Essex East*): I do not think you can do that in a committee. We are entitled to unlimited discussion. I hope you are not going to start a procedure of that kind.

The CHAIRMAN: Yes, but within reason, Mr. Martin.

Mr. MARTIN (*Essex East*): When we have exhausted our position, and not before.

Mr. RAPP: This is repetition. There has been nothing added by what we have heard this morning.

Mr. DESCHATELETS: I would like to go back to something quite important. I would hope that every member of this committee would have in mind, and recall, the strong position taken by the Canadian congress of labour when they came here and presented their brief. I recall Mr. Jodoin's remark very well when he said that he did not see any reason why the provinces at this stage should not have been consulted.

The CHAIRMAN: Yes, in respect of a constitutional amendment.

Mr. DESCHATELETS: He said that in respect of this bill, Mr. Chairman. I have not got a transcript before me, but if I recall well, Mr. Jodoin put much emphasis on the statement that in the opinion of the Canadian congress of labour the provinces should be consulted, many other witnesses have also expressed that same view. I think we should keep that in mind at this present time.

Mr. RAPP: Put the question.

Mr. MARTIN (*Essex East*): I have one more comment to make in answer to the chairman.

The chairman has made the wonderful observation that we do not need to have the provinces represented here because the point has been made as to whether or not there has been an invasion, which he does not believe exists.

The CHAIRMAN: I did not say that exactly, Mr. Martin. I said that if the evidence, which has been put before this committee, indicates that, then we have their point of view.

Mr. MARTIN (*Essex East*): That is what I said. If the evidence is that, then we have their point of view, but that is not the case. We have not got the point of view of any province. We have the observations of the Canadian congress of labour, Professor Scott, Professor Bowker and Professor Cohen, and the observations made by Mr. Deschatelets, Mr. Dorion and other members of this committee. Those are the observations of individuals; however the provinces have not expressed themselves at all.

It is not only in respect of the question of invasion that we are talking about, and that we are concerned with, it is in respect of the equally important question, referred to at the outset of our deliberations by Professor Scott, in regard to the instrument by which the human rights and fundamental freedoms sought to be protected, should be incorporated, and that involved the question of embodying it in the constitution. So far as we know the government has not approached the provinces at all in respect of this matter. We would like to know what the attitude of the provinces is with regard to that phase of the question. If you think that the other argument is now sufficiently before us, it certainly cannot successfuly be argued that that question is. I feel that we should invite the members of this committee to consider the position that will develop if we turn this motion down. We will be saying that this committee, where it is proposed that there should be a bill of rights embodied in the constitution, which in turn calls for provincial collaboration, did not allow representations from the different provincial governments.

Mr. STEWART: Is that a principle which is before us? I am referring to the suggestion that it should be embodied in the constitution.

Mr. MARTIN (*Essex East*): That principle is before us, Mr. Stewart, in the evidence of many witnesses.

Mr. STEWART: It is not before us according to our terms of reference.

Mr. MARTIN (*Essex East*): You are not saying now that we cannot discuss what witnesses have discussed, surely. Mr. Mundell dealt with this. He did not agree with the suggestion to embody it into the constitution; but Professor Scott, Professor Bowker, and Professor Cohen did, as well as the Canadian congress of labour. Surely you are not going to say now that because witnesses have been allowed to discuss this the committee cannot consider the matter. I am just asking that members of the committee consider the consequences of this suggestion.

Mr. BROWNE (*Vancouver-Kingsway*): Put the question.

Mr. MARTIN (*Essex East*): My honourable friend keeps interrupting.

Mr. RAPP: You keep repeating, and repeating. You started at 9.30 a.m. and there has been nothing added to this at all.

Mr. BROWNE (*Vancouver-Kingsway*): Your only purpose is to delay the committee.

Mr. RAPP: You have not added one thing this morning.

Mr. MARTIN (*Essex East*): That may be your judgment, but I am going to continue to exercise my rights as a member of this committee.

Mr. RAPP: Yes, your right to filibuster.

The CHAIRMAN: Please, gentlemen.

Mr. MARTIN (*Essex East*): Please do not let members of your party, when we are discussing this bill of rights, interfere with the rights of the members of this committee, or other members, to freely express their opinions. This is a very important matter, and if some hon. members do not understand the implications of it, it is not our fault.

Mr. RAPP: We understand when you repeat, and repeat one thing for two hours. We know what repetition is.

Mr. MARTIN (*Essex East*): For the majority to take the position, that this committee is not going to entertain a motion to ask those, who take constitutional responsibilities in this matter, along with the federal government, to express their views, then I say this does not speak very well of this effort in respect to a bill of rights, in which human rights and fundamental freedoms are to be protected. I urge the committee to reconsider its position in this matter, and extend an invitation at once to the provinces.

The CHAIRMAN: I will put the question. The question is in respect to the decision of this committee which was made on July 22. All those in favour of the motion? All those opposed to the motion? I declare the motion lost.

Mr. MARTIN (*Essex East*): What was the vote, Mr. Chairman?

The CHAIRMAN: It was seven to four.

Mr. MARTIN (*Essex East*): Is that against hearing the provinces?

The CHAIRMAN: No, it is not against hearing the provinces at all. It is against reversing the decision of this committee made on July 22.

Mr. MARTIN (*Essex East*): It is against hearing the provinces.

Mr. BROWNE (*Vancouver-Kingsway*): It is not against that at all.

Mr. MARTIN (*Essex East*): What is it then?

The CHAIRMAN: Gentlemen, that motion has been disposed of. Now we will go on with the business of the committee.

On Friday we heard from the minister, who, I believe at that stage, had completed his general observations in respect of clauses 2 and 3. I think

it was the intention that he continue this morning with his general observations, and then we would proceed to deal with the bill clause by clause.

Mr. MARTIN (*Essex East*): Were we not dealing with the bill clause by clause?

The CHAIRMAN: Yes, we were, but in a general way.

Mr. FULTON: I had concluded all the general observations that I thought would be helpful. As you say, we were discussing the bill clause by clause, and I think we were on clause 3 when I was last before the committee.

The CHAIRMAN: I thought we had finished with clause 3.

Mr. FULTON: I would like to take the opportunity of referring to some discussion which took place in the committee on Saturday when I was not there. Mr. Martin is reported to have interpreted what I said with respect to the introductory words in clause 2. I do not think he interpreted my statement quite accurately.

I have it here at page E-4 of the transcript:

> Mr. MARTIN (*Essex East*): —The minister said, Mr. Mundell—if I may point out what he said—that this clause did have the effect of law. He referred to section 91 of the British North America Act, where the expression "hereby declared" exists, and he said that the "hereby recognized" in clause 2 of this bill has the same effect as "hereby declared" in the British North America Act, section 91.

And again on page G-5 of the transcript Mr. Martin is reported as follows: Referring there to the minister:

> He also said that this has the effect of law, and that it is not merely a declaration of pious intention. He said that because of the phrase "is hereby recognized", it has the same effect as the phrase "it is hereby declared" in section 91 of the British North America Act—

The comment I want to make is, that on both those occasions, Mr. Martin overlooked the fact that my point was made having reference to the fact that the word "declaration" is in our bill. I did not rely on the words; "it is hereby recognized". I pointed out to the committee that it is in the text; namely, the words "it is hereby recognized and declared". I drew to the attention of the committee the fact that the same word "declared" is in the phrase "it is hereby declared". I put that before the committee as a consideration to be borne in mind in considering the intention, keeping in mind those who say this bill has no legal effect. I did not base my statement on the words "it is hereby recognized".

The CHAIRMAN: Are there any further questions of the minister in regard to clauses 4, 5 or 6?

Mr. BATTEN: May I ask the minister a question concerning clause 3(b) which reads:

> (b) impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment;

I would like to ask the minister what remedy would be available to a prisoner sentenced under the Criminal Code, or to his friends, if the conditions of the prison were deemed by him or by them to be degrading?

The reason I ask this question is because I am of the opinion that this particular clause should be removed.

For instance, could any judge order the release of any prisoner detained under conditions which the judge regarded as degrading, and would the prisoner who was released from such imprisonment by an order of a judge on the ground

that the conditions of his imprisonment were degrading, have any right to a civil action against the officers of the prison, or against any high authority?

And another thing, what right of reply would be available to the authorities who sought to establish that conditions in the prison were not degrading?

Mr. FULTON: I think that the bill would not extend so far as to authorize an order for the release of a prisoner under the circumstances you have outlined.

But if the punishment inflicted was unlawful, in that it went beyond the authority of the person inflicting it, or if it was a form of punishment which might be held to be contrary to the bill of rights, then I would say that the remedy lies in a civil action against the person inflicting that punishment. At that time the issue would be whether the punishment was cruel, inhuman or degrading treatment, and it would be before the court in accordance with the principle of the bill of rights, and the court would have to investigate, and give the authorities an opportunity to make a case in support of the punishment.

Mr. BROWNE (*Vancouver-Kingsway*): When I raised the question of the wording, I found that I misled the committee. I think that I said that the words in the British bill were "cruel or unusual". But I found upon re-reading it, that the words were "cruel and unusual".

I think the minister said he was going to take that question into consideration, and that in looking at it he would have regard to the decisions of the courts in the United States. But their opinions have changed from time to time. So what might be cruel and inhuman at one period of time in our history, might be changed at another period of time.

It seems to me that to leave an interpretation of what was cruel, inhuman or degrading to the judges would be placing too much power in the hands of the court. Moreover, in future years, opinions might change. So it seemed to me that it should be a decision of parliament, and that we should make it clear that parliament determines whether or not capital punishment is cruel, inhuman, or degrading.

I wonder if the minister would care to comment on what consideration he has given to that question?

Mr. FULTON: I am not able to give you a final answer. I regret that I was away over the weekend and that I have not had a chance to do too much consulting on it.

I was interested to note from Mr. Mundell's evidence that his views coincided with my own, that the court would not give effect to those words so as to abrogate the provisions of the Criminal Code authorizing capital punishment.

There is, I think, room for a difference of opinion, and it must be taken account of as to whether these words, using the international form, go beyond, and have a legal effect, beyond the use of the words "cruel and unusual" as is in both the English and American bills of rights.

I indicated to you some of the reasons we thought the words of the international declaration should be used. But I am not wedded irrevocably or irrefutably to that form of wording. Therefore I would like to have an opportunity to consider it further and to consult with my colleagues and advisors as to whether it would be more advisable to go back to the words "cruel or unusual", rather than to retain the present words in the bill.

Mr. BROWNE (*Vancouver-Kingsway*): I would call to your attention the fact that Mr. Mundell did not think that the words would create or make any change; but I think he was thinking of the present time and not of some time in the future.

Mr. FULTON: That is true, but no one knows what the opinions of judges will be 50 years from now.

Mr. BROWNE (*Vancouver-Kingsway*): And while considering that they might make a change, it would be open to them to make a change if they came to the conclusion that the word unusual seemed to give a great deal more protection, because surely our present punishments could hardly be considered as unusual punishments; but it would be open to the courts to hold them as cruel, inhuman or degrading punishments.

Mr. FULTON: Support of this point has been made by several people, and it is one which we must consider.

The CHAIRMAN: Let us move on now to clause 4.

Mr. BADANAI: Yes, Mr. Chairman.

Mr. MARTIN (*Essex East*): I have some questions on clause 3 which I want to ask the minister, after Mr. Badanai.

Mr. BADANAI: I have a question here for the minister. During the course of the hearings witnesses were questioned and were asked whether or not a petitions committee would strengthen the purpose of the bill. Not all of them, but some, expressed an opinion to the effect that such a committee could be of value. I have in mind a committee similar to the one which functions in New Zealand, to which any citizen can appeal if he feels that his rights have been infringed upon. The success of it in New Zealand suggests that a similar procedure might work in any parliament to the benefit of the rights and privileges of individual citizens. I am asking the minister if he would consider adding, at the end of clause 4 of the bill, such a clause, recommending the establishment of such a committee; or if he has given any consideration to it?

Mr. FULTON: Yes, I dealt with the point in my general remarks on Friday, and there was some discussion on the point as well. I indicated that some of the considerations we had in mind led us to conclude not to put it in the bill.

You have the problem that ours is a federal and not a unitary state, which creates more problems in this field if you set up a review committee. I emphasized that our tradition is that the courts are the great guardians of these rights.

What the statute seeks to do is to provide a document that affects the legislature, the judiciary and the executive; and we have given a clear direction and indication to the judiciary, on the basis of which they will now be strengthened in their role of protecting human rights and fundamental freedoms.

Because so much of this field is included in the field of criminal law, however, as I pointed out to you, we felt that it was not wise, initially, at any rate, to set up a review body which would immediately be deluged with appeals on matters of criminal law, where the responsibility for enforcement is provincial, and where you already have the courts to try the issue and to hear appeals. These are courts established by the provinces, as well as the Supreme Court of Canada established by us.

I also indicated I felt we should move very slowly along this road because I would not care to see us do anything which gave the impression or which, in fact, did operate as an organization outside the courts to review what the courts have considered and disposed of. So I indicated to the committee that we felt that we should move stage by stage, and I am not ready, at this stage, to recommend the setting up of an independent committee along the lines that were suggested.

Mr. BADANAI: Then you would not suggest that such a committee would have merit?

Mr. FULTON: I do not deny there are purposes to be served, that the objective which is held in mind by those who advocate setting up such a committee is a good one. I think there are other ways in which it can be accomplished, and I would like to see first, for instance, whether there is any inadequacy after the bill is passed and whether there are issues that cannot come before a court, and issues which people cannot get before the courts which they might get before a committee of this sort. But before interfering with the existing machinery, we want to see how that machinery operates, in the light of the new legislation.

Mr. BADANAI: Thank you.

The CHAIRMAN: Is there anything further on clause 4?

Mr. MARTIN (*Essex East*): Mr. Badanai was asking questions on clause 4, and I have some questions on clause 4 and clause 3.

The CHAIRMAN: I thought we had finished clause 3 on Friday?

Mr. MARTIN (*Essex East*): I have a whole lot of questions on clause 3. I do not know why you made that kind of remark; I am very sensitive this morning.

The CHAIRMAN: I made that observation on Friday. I just looked it up. I called for further questions on clause 3 and there was no remark.

Mr. MARTIN (*Essex East*): I have a great number of questions. I wanted to get satisfaction in my own mind. I am more concerned about this bill the more I look into it. I want a good bill.

Now, Mr. Fulton, on the question we were dealing with earlier this morning, can you say whether or not this bill has ever been shown officially to any of the provinces?

Mr. FULTON: To my knowledge, it has not been shown, officially, because we are dealing here with federal legislation. We are introducing legislation in the federal field, and it is not my understanding that it is the practice to submit our federal legislation to the provinces for their comments. They do not expect it, and we do not offer it.

Mr. MARTIN (*Essex East*): Is it not a fact that it is the practice of the Department of Justice, where it is a bill involving sections about which some argument exists, and where it is a matter of interest to the provinces, involving a provincial right, that there is always an exchange of legislation?

Mr. FULTON: Of course, the officials of the department would not have the authority to disclose anything to anybody with respect to government legislation which is being prepared.

Mr. MARTIN (*Essex East*): I did not hear your answer.

Mr. FULTON: With respect to the department itself, the officials would not have the authority to disclose anything to anyone with respect to government legislation that is being prepared.

A draft bill was introduced in the house in 1958 for the very purpose of making it possible to disclose it to the people, to the provinces, and organizations. There was the widest publicity, and the widest possible knowledge of what was contained in the bill, after it was introduced in the house.

With the exception of the resolution from the province of Quebec, there has not been any word of any sort, which has come to my attention, from any of the provinces, indicating interest or criticism—nothing at all. They have been silent on it, and I can only conclude they are not concerned that this infringes on their jurisdiction.

Mr. MARTIN (*Essex East*): What is your last remark?

Mr. FULTON: I think I can only conclude that the provinces are not concerned with this bill infringing on their jurisdiction.

Mr. MARTIN (*Essex East*): Of course, I would disagree with you very profoundly, and my conjecture would be as authoritative as yours in the matter.

Mr. FULTON: I think common sense applies in this. It is certainly a conclusion of common sense that if the provinces are concerned, as you indicate, or as some have suggested, they would make it known. I have never heard it suggested before that the provinces are shy or reluctant to make their views known when they feel something is happening which prejudices their interests.

Mr. MARTIN (*Essex East*): But, you know that in many cases—and if you do not, Mr. Driedger is there to recall it to your memory—there have been many acts of parliament involving provincial concern which, once passed, have become involved in actions in the courts by the provinces to test their constitutionality—and we have been suggesting to you that it is undesirable to create that situation.

When did you first learn of the resolution unanimously passed by the legislature of the province of Quebec?

Mr. FULTON: I think about the same time as it was passed which, as I recall, was in February of this year.

Mr. MARTIN (*Essex East*): Did you have any communication, on your own initiative, with Mr. Rivard at the time?

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): And would you mind telling the committee the nature of it?

Mr. FULTON: Well, our discussions were private, and I am not able to reveal the details. However, the effect—and I think Mr. Rivard would agree with this—was that he felt—and we agreed—that the bill, as drawn, did not constitute a real infringement on provincial rights.

Mr. MARTIN (*Essex East*): You say "real infringement". Do you want to say "infringement"?

Mr. FULTON: I say a real one, and I use the word in the light of what many witnesses have said—that there are always, with respect to legislation, some uncertainties, and it is not possible, categorically, to state this bill will have no effect on any interest or position in a province. But, we were satisfied, and the discussions were amicable. It is my impression that Mr. Rivard was of the view, after discussing it with him, that this bill had no real dangers for the province.

Mr. MARTIN (*Essex East*): The discussion was in the month of March?

Mr. FULTON: The resolution was in February and, as I recall it, we received it very shortly after it was passed.

Mr. MARTIN (*Essex East*): But the discussion you had with Mr. Rivard was in the month of March?

Mr. FULTON: That is my recollection, yes.

Mr. MARTIN (*Essex East*): That was a telephone conversation?

Mr. FULTON: No.

Mr. MARTIN (*Essex East*): Well now, have you discussed the bill with the new government of the province of Quebec?

Mr. FULTON: No, we have not.

Mr. MARTIN (*Essex East*): Was any effort made by the federal government to call a conference with the provinces with regard to this bill of rights, or any bill of rights?

Mr. FULTON: No. We thought very carefully about that, as we had been giving general consideration to the matters which have been of concern to all

Canadian governments—and that is the question of constitutional amendment and procedures for amendment to the constitution. I do not want to go beyond what it is proper for me to say in my authority, because this primarily is in the field of the Prime Minister; but it is my view that we should not complicate the question of a constitutional amendment by relating it to a specific matter such as the bill of rights. I think the question of the method of repatriating the constitution is one which should be dealt with as a general subject of its own. I have rather strong feelings to the effect that if you inject into that discussion, or have that discussion centre around or be as a result of consideration of the bill of rights about which there are also some strong feelings, you are unnecessarily and unfortunately prejudicing the area of discussion of constitutional amendment.

Mr. MARTIN (*Essex East*): I am not altogether sure I disagree with you, but I was not asking about the repatriation of the constitution. I was asking whether or not the federal government had taken any steps to discuss with the provinces the possibility of embodying a bill of rights in the constitution.

Mr. FULTON: I did not quite complete my answer. In the light of the considerations I have just outlined to you, we felt that this was another of the reasons in favour of the federal government introducing a bill of rights which would not be a bill of rights in the field of constitutional amendment but rather in the field of federal jurisdiction. We rejected the idea of a conference with the provinces partly because there would have to be a discussion on a constitutional amendment to achieve the purpose you have in mind. That would mean that the discussion would be carried on in an atmosphere complicated by the fact that we are dealing with a bill of rights and for those reasons, along with others, we came to the conclusion that we should introduce a bill confined to our own field. So there is no necessity of consulting the provinces. Indeed, I think it would be an improper act to submit to the provinces legislation which is deliberately designed to be confined to our own field. They do not consult us in respect of legislation in their own field.

Mr. MARTIN (*Essex East*): Do you take issue with the Prime Minister when he expressed the view to the Canadian bar association that he would have no objection, and that in fact he thought one way of doing this would be by embodying a bill in the constitution, and that consideration would be given to the necessary ends for that purpose. Would you take issue with that?

Mr. FULTON: I do not accept the interpretation you have put on what the Prime Minister said or the position you are trying to push us into here. The Prime Minister's words will be there and will speak for themselves. It is well known that the Prime Minister for a number of years has advocated the idea of a constitutional amendment embodying the bill of rights. I do not suppose the Prime Minister has changed his view as to the desirability of that being achieved; but the Prime Minister and the government came to the conclusion that as things stand now the desirable thing first is to introduce a federal bill of rights. That does not mean that the Prime Minister has changed his view as to the ultimate objective which he has stated on any other occasion.

Mr. MARTIN (*Essex East*): It does seem to me difficult to understand why no effort was made to consult the provinces or to have them consider along with the federal government the steps that might be taken to embody the bill of rights in the constitution.

Mr. FULTON: I think those things are matters which should be taken in their due order. We have indicated our feeling that the proper thing to do first is to have a bill of rights in our own field. Various suggestions have been made by the Prime Minister, by myself and others, as to the possibility of having consultation after this has been done. After it has been demonstrated that this

is a desirable thing to do and that it is a desirable thing to have a bill of rights on the statute books, I am sure it then will be much more profitable and much more apt to succeed if you have your discussion and your conference with the provinces at that stage in the light of a successful and operating bill of rights on the statute books in the federal field.

Mr. MARTIN (*Essex East*): Have you any objection, having in mind the earlier discussion today, to our ascertaining the views of the provinces while this committee is in session.

Mr. FULTON: Mr. Chairman, I am afraid I am not going to be drawn into that subject. The committee has made its decision. I will not comment on the committee's decision. I have my responsibility as minister and the committee has its responsibility as a committee of parliament.

Mr. DESCHATELETS: If I understand it well, the decision of the government not to consult the provinces on this bill was taken well before this committee was organized.

Mr. FULTON: Yes; that is correct.

Mr. DESCHATELETS: Is it not a fact that the testimony we have heard so far in this committee is throwing some more light on this particular point of consultation with the provinces? I refer you to the brief and the statements made here by the Canadian congress of labour in particular.

Mr. FULTON: I reviewed, since you first referred to it this morning, Mr. Deschatelets, the brief of the Canadian labour congress. In what I have to say now, I may be interpreted as being conceited; but I do not mean to be conceited.

We do not think there has been any consideration put forward in this committee which had not occurred to us also during the period—which is now close to three years—within which in the Department of Justice and in the government we have been considering the bill of rights.

I say to you frankly that I am not aware of any new consideration having been put before the committee, any consideration that was not at one time or another considered and dealt with by us in our consideration of this problem.

Mr. DESCHATELETS: If you will permit me to follow this point, Mr. Fulton. Have you read very closely the brief and the remarks made by the vice chairman of the Canadian bar association as to the uncertainties, in the legal profession, of this bill?

Mr. FULTON: Yes, I have read his remarks and considered them. It is not a new consideration. They are not new remarks. I mean, it is not a new point that has been brought forward there at all.

I have remarked on earlier occasions that I suppose it is true to say that no statute is free of uncertainty. You will always have uncertainty so long as you have independent persons with the right and freedom to express their own opinions. You will always have differences of opinion. We do not feel, with all due respect to the bar association vice president, that the area of uncertainty is as wide or as serious as he suggests. But it is admitted that when you are getting into this field—and my point throughout has been that this is going to be a constitutional document, the bill of rights—then there are strongly held opinions and wide divergencies of opinion, just as there have been wide divergencies of opinion with regard to the British North America Act itself. But I do not share the opinion of those who go further than that in saying that it is full of uncertainties. I do not think it is full of uncertainties at all. But I do not go so far as to say that there are no uncertainties with respect to it.

Mr. DESCHATELETS: Mr. Fulton, could you tell me if at any time you have taken part in debates or discussions with the Canadian bar association in any of their sittings on this bill of rights, or on the previous bill of rights?

Mr. FULTON: I was present at a discussion in, I think it was 1958, of the Canadian bar association, and again at one of their mid-winter conferences at the Seigniory club. But I was careful to make it clear that I was there in the role of an observer.

Mr. MARTIN (*Essex East*): *Amicus curiae.*

Mr. FULTON: Yes—and I did not participate in the discussion. I do not think it would be a tenable position for the Minister of Justice to take, who is, by the nature of his position, the senior law officer in Canada, under the Prime Minister, who is head of the government. I do not think it would be an appropriate thing for that minister to enter into a controversial discussion in the bar association, in view of the relationship between the minister and the bar association.

Mr. MARTIN (*Essex East*): You are the senior officer?

Mr. FULTON: I think that is correct.

Mr. MARTIN (*Essex East*): I do not think you should be overly modest.

Mr. BATTEN: Mr. Chairman, with reference to clause 3, page 2, does the wording apply to make it mandatory upon a judge to grant relief from any degrading treatment or punishment?

Mr. FULTON: That would depend upon the nature of the relief sought. The action taken and the decision given by the judge would depend upon the nature of the relief sought. But the bill makes it mandatory for him not to construe the bill so as to authorize these things in subclause (*b*), and the decision he hands down will depend upon the facts of the case before him.

The CHAIRMAN: Gentlemen, it is now 11:00 o'clock. You are going to be tied up the rest of the day, Mr. Minister?

Mr. FULTON: I am concerned with the legislation of the Combines Investigation Act in the house.

The CHAIRMAN: Then the next meeting of the committee will be at 9:30 tomorrow morning.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 9

TUESDAY, JULY 26, 1960

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Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

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WITNESS:

The Honourable E. D. Fulton, Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23580-4—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

and Messrs.

Aiken,
Argue,
Badanai,
Batten,
Browne (*Vancouver-Kingsway*),
Deschatelets,
Jung,
Martin (*Essex East*),
Rapp,
Stefanson,
Stewart,
Weichel,
Winkler.

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, July 26, 1960.
(18)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.34 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Argue, Badanai, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart, Weichel and Winkler.—14

In attendance: The Honourable E. D. Fulton, Minister of Justice, assisted by the following from the Department of Justice: Mr. E. A. Driedger, Deputy Minister; Mr. D. H. W. Henry, Director, Advisory Section; and Mr. H. A. McIntosh, Legislation Section.

The Chairman observed the presence of quorum and read a letter received from Professor Maxwell Cohen suggesting certain amendments to Bill C-79. It was ordered that the letter be reproduced and copies distributed to Members of the Committee.

Mr. Stewart read a suggested draft Preamble to the Bill.

Following a discussion of the possible future business of the Committee, it was moved by Mr. Argue, seconded by Mr. Deschatelets,

"That the Committee do now adjourn until Friday morning of this week." The motion was resolved in the negative; YEAS: 4; NAYS: 9.

At 10.55 a.m. the Committee adjourned to the call of the Chair.

J. E. O'Connor,
Clerk of the Committee.

23580-4—1½

EVIDENCE

TUESDAY, July 26, 1960.

The CHAIRMAN: May we come to order, gentlemen?

Mr. MARTIN (*Essex East*): Have we a quorum?

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): Mr. Chairman—

The CHAIRMAN: I have a letter, Mr. Martin, which was delivered to me yesterday by Professor Maxwell Cohen. Inasmuch as it is supplementary to the evidence which he gave before the committee I think it now should be read into the proceedings and copies of it made and delivered to the members so that all the members will have it for consideration at the time they are reviewing his evidence.

Mr. MARTIN (*Essex East*): Have you a letter from the Windsor chamber of commerce?

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): Would you put that on the record?

The CHAIRMAN: There are three or four letters which came in which I intend to lay before the steering committee. I think it is simply a matter of filing those.

This letter reads as follows:

> In our hurry to complete my evidence last week before your committee—

At this point I should interject that I do not recall any hurry to complete his evidence. You will recall he had originally been scheduled to appear before the committee in the evening, but we received word that day from Mr. Park that he did not consider it necessary for him to appear on that afternoon. Therefore we advanced Professor Cohen's appearance to the afternoon and did not sit at all that evening. However, he may have felt that there was some hurry. May I continue with his letter?

> —I omitted to state, in my summation at the end, the precise changes in the language of bill C-79 that followed logically from my conclusions. For the convenience of yourself and the committee I set these proposals out below:
>
> 1. The preamble as I have suggested it, subject to whatever improvements may be made.
>
> 2. Section 2, the word "always" in line 6, to be removed.
>
> 3. Section 2(a), in line 10, the words "by due process of law" to be replaced by "in accordance with law." But I have no strong views here.
>
> 4. Section 2(b), line 12, a comma after the word "law", and the following to be inserted before the word "without" in line 13: "and to life, liberty, security of the person and enjoyment of property,".
>
> 5. Section 3(a), line 12, eliminate "or exile of any person" since it is unnecessary in the light of international legal obligations.
>
> 6. Section 3(b), at the end of line 14, add the following: "but this section shall not apply to the Criminal Code or to other penal statutes as presently enacted by the parliament of Canada and in force."
>
> 7. Section 4, a new paragraph to be added, providing for the establishment of a national rights commission.

8. The proposals with respect to the War Measures Act contemplate a revision of that statute.

There is also a penned postscript. It states:

Please express my cordial thanks to the committee for inviting me to come before it.

As I stated, I think the clerk should make copies of those suggestions and distribute them to the members today.

I believe Mr. Stewart has a suggested preamble which he would like to have read into the record this morning.

Mr. MARTIN (*Essex East*): I was going to say—

The CHAIRMAN: You may prepare one, too.

Mr. MARTIN (*Essex East*): I am grateful for the document you circulated last night, as I am sure are the other members. I do not know how fair such distribution is. I understood that the members are to be invited to prepare preambles and that then we would have a committee assembled for the purpose of discussing them. I know there are four other preambles which are in existence. I think there ought to be some orderly way in which to deal with these things before they are made public. However, I have no objections. The Minister of Justice had suggested a committee that would sit down and consider all the suggested proposals. I am sure the preamble I have, for instance, is infinitely superior to any of the others suggested. However, I did not think it was equitable to distribute them at this point. If the members wish to do so I have no objection.

The CHAIRMAN: I had an idea that you would have a very desirable contribution to make and most of us are anxious, I think, to have the benefit of your preamble this morning.

Mr. MARTIN (*Essex East*): I do not know what the point was in circulating preambles from five Conservative members. I suppose it was intended to reflect quality and initiative that no one else possessed.

The CHAIRMAN: I would think the purpose was more to be helpful.

Mr. WINKLER: I do not believe the reason is that as suggested by Mr. Martin, because being a Conservative member myself I know that whoever prepared this memorandum of preambles missed a very good one in not accepting my own. However, it will be available shortly.

The CHAIRMAN: Mr. Stewart, would you like to read yours into the record now?

Mr. STEWART: This will just add to the ones which are already in:

The Canadian people conscious, appreciative and determined to retain to the fullest extent their common heritage of basic human rights and fundamental freedoms obtained through centuries of united effort and sacrifice and now firmly enthroned as part of the law of Canada and being desirous that these rights and freedoms be declared and confirmed by an act within the legislative capacity of the parliament of Canada and for this purpose and to express this intention:

Therefore Her Majesty—

The CHAIRMAN: Thank you.

Mr. MARTIN (*Essex East*): Mr. Chairman, before we proceed, I take advantage of the presence of the Minister of Justice to raise a matter which I think now has to be considered by him, by the government and by this committee. Yesterday, we interrogated the minister on the extent to which there had been collaboration with the provinces towards the objective of embodying in the constitution a bill of rights which would embrace the human rights and fundamental freedoms that are totally domiciled in Canada, including the

provincial and federal governments. Attention was called to the circumstance of a resolution unanimously concurred in by the legislature in Quebec. The minister told us of his consultations with Mr. Rivard. The evidence is that the government has made no move whatsoever towards seeking to get an agreement with the provinces in this matter. Yesterday the premier of Quebec made the following statement in which he said, at the dominion-provincial conference—this is in the *Globe and Mail* of Tuesday, July 26:

> We all admit I am sure that our democratic system rests on the freedom of the individual. Fundamental human rights constitute the very basis of our civilization. The experience of the past few years has convinced the government of Quebec that human rights are not sufficiently protected in the sphere of provincial jurisdiction. We, therefore, believe that it is now necessary for us to have a bill of human rights. We are also of the opinion that such a bill would have a much greater actual and symbolic value if it were part of our constitution. We have noted that the federal parliament is at present studying a bill of rights which we certainly hope does not extend beyond the field of federal jurisdiction.
>
> "It seems to us", Mr. Lesage told the Prime Minister and his nine fellow provincial premiers, "that we have here a magnificent opportunity to discuss this problem and to see if we cannot agree on a joint declaration of human rights that could be embedded in our constitution.
>
> "The government of the province of Quebec therefore proposes that this important problem be discussed immediately in a preliminary manner in order to ascertain whether it should be studied more thoroughly when the conference resumes its meetings".

The premier of Saskatchewan, I believe, although I do not have his words, did express concurrence in this general statement, and the premier of New Brunswick also expressed support of the statement made by the premier of Quebec. Now it seems to me, Mr. Chairman, that this opens a new chapter, that it presents us with an opportunity which hitherto did not exist. In view of the position taken by the Prime Minister and also by the Minister of Justice it seems now that we ought to consider what steps we should take so as to make this bill of rights now before us a more comprehensive document, one that will take into account our human rights and fundamental freedoms in so far as they are applicable in all jurisdictions of our country.

We now seemingly have an opportunity of doing something that apparently did not exist before, although I said earlier there was no evidence before us to show that any effort was made to obtain collaboration with the provinces. So I think that the first item of business for us this morning is to consider the implications of this important development and to determine as a result what we should do.

Hon. E. D. FULTON (*Minister of Justice*): Mr. Chairman, Mr. Martin indicated that he would take advantage of my presence this morning to bring this matter up. If I may be permitted, then, I would like to comment on what he said. I quite agree with Mr. Martin that it is an interesting and important development which took place at the conference yesterday; but he will appreciate, of course, that that suggestion having been made to the conference of Prime Ministers and premiers it is not within my competence, and I venture to suggest it is not within this committee's competence, to decide what disposition to make of that subject.

In so far as the government of Canada is concerned there will have to be consultations in the government, of course, and our views would have to be made known at the appropriate time and place. If it is decided that something should be said about it now, that will be done at that conference. The Prime Minister, accordingly, would be making known the views of himself and the

government of Canada. Naturally, I am not in a position to anticipate anything the Prime Minister will say or may say. We will have to await the development of events to reveal that.

In the meantime, I do not for a moment minimize the possible advantages that are now open to the country as a result of this expression from three of the provincial premiers. But I would suggest to the committee that it is still our responsibility here to review the bill that parliament has referred to us, the principles of which parliament unanimously adopted on second reading. That is the project before us. I think it could be and should be discussed in the light of the fact—which has been referred to several times—that simply because we enact a bill of rights of our own within federal jurisdiction does not for a moment preclude the possibility of subsequent discussion with the provinces to see whether this is the document they would care to adopt as theirs or whether we can agree at once as a result of discussion of it on the form of an amendment to be embedded in the constitution. I would think, as I have said, that the chances of success for such a discussion will be in no way lessened, indeed in every way improved, by the parliament of Canada having acted within its jurisdiction to provide its own bill of rights.

I am not at all sure that it is not open to me to suggest that, indeed, my views, as I have expressed them on this point, are reinforced by the likelihood that it is precisely because we are now discussing our bill of rights, because we have embarked upon this course which has been proper for us to take—that it is more than a slight possibility that it was because we went ahead in this way, that we have now been favoured with a statement from the provinces. I point out to you that the project in respect of a bill of rights has been before the country since 1958, but it was not until the parliament of Canada proceeded this year with this bill of rights that these statements of the desire to cooperate in respect of a constitutional amendment have been forthcoming from the provinces.

Mr. MARTIN (*Essex East*): That may be because you have a new government in Quebec which has just taken office.

Mr. FULTON: There is not a new government in Saskatchewan.

Mr. MARTIN (*Essex East*): But the province of Saskatchewan has tried all along, without any success, to get collaboration.

Mr. FULTON: They have made no effort since we took office to have collaboration in respect of this question.

Mr. ARGUE: The province of Saskatchewan has.

Mr. MARTIN (*Essex East*): Yes. Mr. Douglas wrote to Mr. Diefenbaker in regard to this point.

Mr. ARGUE: Mr. Douglas wrote in January, 1959.

Mr. MARTIN (*Essex East*): Mr. Douglas wrote on January 19, 1959.

Mr. FULTON: I stand corrected then, Mr. Martin.

Mr. MARTIN (*Essex East*): Here is what Mr. Douglas said:

> For these reasons, I urge you to reconvene the constitutional conference of federal and provincial governments which was held in 1950 and to submit to it your proposals for an amendment to the constitution which will contain a statement of human rights and fundamental freedoms in clear and explicit form.

Mr. FULTON: I stand corrected, and I apologize to the committee for having incomplete knowledge, or an incomplete recollection of the situation. However, I do not think that alters the basic position as to what we should do in the light of the current invitation from the provinces. The decision on

that is one to be made and announced at the proper place, which is at the conference itself, and that does not alter the nature of the task before us here, which is the task entrusted to us by parliament of reviewing our own bill of rights.

Mr. DORION: Mr. Chairman, on this important point raised by Mr. Martin I would like to speak as a member of the committee and also as a citizen of the province of Quebec, because I know particularly the views of certain of those citizens in respect to our own system of civil legislation.

I read a short speech delivered by Mr. Lesage yesterday, and I understand there were two important points raised by him. One of those points was, first of all, that he would like to have a bill of rights for the whole country with the consent of all the provinces.

The other point is that he would like to have a Canadian constitution. He recognizes that if we have to proceed by amendment to the constitution we would have to go to London to obtain such an amendment through imperial power. He was perfectly right in this, but I do not concur in those two suggestions because, if we wanted to go to London to obtain an amendment to the constitution, that would surely be against his own proposition.

Secondly, I do not believe that this is the time to make a constitutional amendment in order to establish such an important constitutional statute as a bill of rights. That is my first point.

My second point is that the legislature of the province of Quebec itself is against this draft of the bill of rights.

Mr. MARTIN (*Essex East*): That is right.

Mr. DORION: That resolution was unanimously adopted not only by the government of the time, but also by the opposition. That resolution did not mention at all that the provincial government, or the provincial parliament, was ready to act in respect of a bill of rights which would have been for the whole of Canada. There has been nothing at all in this regard, which has come from the provincial legislature. In other words, the only thing we have is an opinion expressed by the premier without the consent of the new provincial government. He did not have the consent from the old government. In consequence, I do not believe that this is the time now, and I speak as a citizen of the province of Quebec in regard to this particular point, to discuss a constitutional amendment in regard to such an important point, particularly in respect to the province of Quebec. The reason I say it is such an important point is because we do not have unified legislation. In the constitution, it was provided, that the common law for every province is different. It is provided that it would be possible to unify the legislation in respect to common law adopted in every province, but the province of Quebec is an exception. The legislation of the province of Quebec is an important exception. I go further and say this: I do not believe that, in respect of such a bill of rights provided as our own is provided, it would be possible to adopt it without serious discussions. I say that Mr. Deschatelets was right in regard to this point, when he spoke yesterday for example in respect of the question of relations between a husband and wife. There is a serious difference in this regard in the province of Quebec, because the civil code is based particularly on respect and solidarity of the family. A husband has certain rights in regard to the financial point of view, for example. The principle in regard to community of property is different in each province. There are a number of clauses and sections in the Quebec civil code which would be affected seriously by a bill of rights of this nature.

Mr. Lesage declared yesterday that the sovereignty of that province, within its own jurisdiction, is absolute. He is perfectly right. That is the reason why the province of Quebec has the absolute right to have its own

bill of rights. One must take into account the principles which are the basis of Quebec's civil code in drafting a bill of rights of this kind. It would be very dangerous to proceed without a serious investigation and without having the consent of not only the province of Quebec, but the consent of the legislature, after it has consulted with every class of citizen in Quebec. Otherwise it would be very dangerous to proceed. You appreciate the fact that the province of Quebec is jealous in regard to its legal institutions, and particularly jealous in respect of its civil code.

Mr. MARTIN (*Essex East*): And rightly so.

Mr. DORION: They are perfectly right, as Mr. Martin says, because this is one of the factors involved in their survival. We cannot touch that by a declaration, we cannot touch it even by a statement of the premier. I respect the premier, not only because he is the authority of the province, but because I know him, and I know that he would seriously want to fulfill and accomplish his duties. It is for that reason that we are opposed, at this stage of the proceedings, to a bill of rights that covers things outside of the field of federal parliament jurisdiction, and which goes beyond even its own limits and jurisdiction. In consequence, I do not believe it is the time now to proceed, without having serious discussions with the authorities of the province of Quebec. I do not believe that it is time to proceed with this question.

The CHAIRMAN: Thank you, Mr. Dorion.

I am pleased to see Mr. Argue back with the committee today representing the CCF party. I suggest that after we hear from Mr. Argue, we should consider a point of order which I will now raise.

Mr. MARTIN (*Essex East*): Does a chairman raise a point of order?

The CHAIRMAN: Certainly.

Mr. MARTIN (*Essex East*): I have never heard of that in my life.

Mr. FULTON: It is the responsibility of the chairman to consider all such matters.

Mr. MARTIN (*Essex East*): The Minister of Justice is not a member of this committee, and he must not intervene, in regard to this question, without an invitation.

Mr. FULTON: You draw a very fine line, Mr. Martin.

Mr. BROWNE (*Vancouver-Kingsway*): Does Mr. Martin want to run the committee all by himself?

Mr. ARGUE: Mr. Chairman, I wonder if we could postpone this discussion for a moment until I make my comments.

The CHAIRMAN: I feel that Mr. Argue should be given considerable latitude, inasmuch as we have had quite a lengthy discussion. I do not want the members of this committee to get back to a discussion of this question, because I think it is out of order.

Mr. MARTIN (*Essex East*): Mr. Chairman, you say "out of order"; my goodness!

The CHAIRMAN: Certainly it is. Let us not get into this argument.

Mr. ARGUE: Mr. Chairman, could I make my comments?

Mr. AIKEN: Mr. Chairman, you did not finish your statement, and I think you ought to. You started to raise a point of order and you were half way through, but did not finish. I would like to hear what your statement is so that we can consider it. Some members may be able to decide on the question without considering it, but I would like a few minutes to think about it.

The CHAIRMAN: The point of order is this: this bill has received second reading, and the bill itself is the reference to this committee. I think any dis-

cussion in regard to a constitutional amendment is out of order, however this will be dealt with later, Mr. Martin.

Mr. MARTIN (*Essex East*): You should not have mentioned it now.

The CHAIRMAN: I am going to hear from Mr. Argue now.

Mr. ARGUE: Mr. Chairman, I think it is commendable on the part of Mr. Martin to raise this whole matter in light of the new developments at the federal-provincial conference. I want to say that I was encouraged by the attitude and the words of the Minister of Justice. He seemed to convey to the committee, and certainly to me, the impression that he would prefer, if possible, and if practical, a constitutional amendment, but to the Minister of Justice, it seemed to be a matter of timing, and a matter of what may be accomplished at this time. I think the statement of the premier of Quebec is very clear. Mr. Dorion has raised objections to the validity of this bill of rights on the basis that the premier of Quebec does not bring with him the authority of the Quebec legislature. However, under our system of responsible government, the premier speaks for the government, and the government, itself, has the responsibility of carrying out the policy in the legislature. While, undoubtedly, Mr. Lesage's statement would have been somewhat more weighty, had the legislature met and approved his stand, nevertheless, I think this is obviously a break-through in this whole field. I want to go on record as being pleased with this attitude of the premier of Quebec and with the statement that he has made. In the position I hold, I think it is very understandable, because the province of Saskatchewan and the C.C.F. party have taken this position for a very long time.

Mr. Dorion has said there is strong opposition within the House of Commons to this kind of procedure at this time, and I regret that that kind of opposition is in the House of Commons. I do think that the opposition in the House of Commons is unified now in its approach. We have support, in this regard, from the premier of Saskatchewan, from the premier of Quebec, from the premier of New Brunswick, and it has been intimated to me—and I consider the person who intimated it to me to be in an authoritative position —that this general approach would have the support of both the governments of Alberta and British Columbia. I was advised to make that statement at this time. If my authority is correct, as I believe it is, this then would put five provinces in support of this kind of a procedure at this time.

Now, the Minister of Justice has argued that proceeding with the bill before the committee, and placing it on the statute books, would act as an encouragement to a constitutional amendment. I do not see that. I agree with him that action by parliament at this time has helped speed up the discussions of a bill of rights in Canada, and has been an encouragement to provinces and others to come forward with the points of view that have been presented. However, what I am afraid of is that if the parliament of Canada at this time passes this kind of a bill of rights, public discussion will be much lessened; it will tend to cease, and this whole thing may be placed in the background. The attitude will be: let us wait, and see what happens in the courts. Then, what appears to be a real possibility of a constitutional amendment which would imbed human rights and fundamental freedoms in the constitution, may be lost.

My suggestion to the government would be that we postpone consideration of this at this time—perhaps, even for this session, but certainly until this federal-provincial conference is concluded, and until such time as the government may be able to sound out the other provinces.

Now, the member for Bellechasse has said that the two attitudes of the premier of Quebec seem to be in conflict. The one is that we could go to London at this time to get an amendment to the constitution—assuming there is an agreement in a bill of rights—and the other is that the constitution should

be brought back to Canada. I do not see any conflict in these two points of view. I think it is a question of timing. If we bring it back to Canada then, obviously, it will be amended here. However, there is a delay in bringing the constitution back to Canada, and nationalizing a Canadian constitution. To use the words of Professor Scott: we would do what we are now doing for other reasons—namely, providing an address to the United Kingdom parliament, asking for an amendment to our constitution. I do not feel there is any conflict at all in the views that have been expressed by the premier of Quebec.

I would urge upon the minister, and all the members of the committee, that we should wait at least until such time as the views of the premiers of all the provinces have been ascertained, and perhaps it might be better—and I think it would, if these signs continue—to postpone the enactment of this bill, at least until the next session of the House of Commons, in the hope that this kind of general agreement can be achieved, and that we can protect human rights and fundamental freedoms by an amendment to the constitution.

Thank you, Mr. Chairman.

The CHAIRMAN: Thank you, Mr. Argue.

Now, Mr. Deschatelets, do you wish to discuss the matter?

Mr. DESCHATELETS: Mr. Chairman, I would like to say a few words arising out of the comments made by my hon. friend from Bellechasse.

Yesterday, the premier of Quebec made two suggestions: first, he has expressed the idea that the province would like to have a bill of rights—is in favour of a bill of rights; and he has favoured the idea that we should proceed by way of an amendment to the constitution, with the cooperation of the provinces.

Now, I personally feel that these two proposals conciliate themselves very well, and there is nothing contradictory in them. Mr. Dorion has recalled what happened in the Quebec legislature on February 3. It is true that the Quebec legislature, at the beginning of February, unanimously pronounced itself against the present bill of rights, but I would like to outline that the members of the present government, who were in opposition at that time, took part in the study of the mutual powers of both governments, when this resolution was put forward. Now, the government of Quebec wishes to proceed with a national bill of rights by way of an amendment to the constitution, and I submit—following the proposal made by Mr. Lesage yesterday—if there is a contradiction, it exists between the statement made by the Prime Minister on July 1, 1960, at page 5648 of *Hansard*, where he said—and I quote:

> They say, if you want to make this effective it has to cover the provinces too. Anyone advocating that must realize the fact that there is no chance of securing the consent of all the provinces.

Well, following the statement of Premier Lesage yesterday—

Mr. MARTIN (*Essex East*): What was the date of that statement?

Mr. DESCHATELETS: July 1.

Mr. MARTIN (*Essex East*): This year?

Mr. DESCHATELETS: Yes. Following the declaration of Premier Lesage yesterday—and it was a statement which was concurred in by the premier of New Brunswick and, I am told, although I have not the statement by the premier of Saskatchewan, by him—I think there is now a contradiction, if one exists, in the statement of the Prime Minister on July 1, because we know now it would be much easier. We know now, in fact, it would be easier to go ahead, in cooperation with the provinces, following these statements. Personally, I have believed always that we should proceed by way of an amendment to the constitution, with the cooperation of the provinces; and now we know, since yesterday, not because the provinces have been consulted,

but because the provinces have come here and made known their views on this matter. I think now, following this declaration by the premier of Quebec, and then by two other premiers, that this is throwing much more light on the matter, and we should now differ in our views as to the way to proceed with this bill of rights.

The CHAIRMAN: Mr. Deschatelets, I understood you to say, at the outset, that you interpreted this resolution, which was passed by the province of Quebec, as being opposed to this bill. I hope you do not mean that, because that is not my interpretation.

Mr. MARTIN (*Essex East*): Well, it is mine.

Mr. DESCHATELETS: I will make myself clear. The province of Quebec was opposed, in February, to this bill, as I think they are now, but they were at the time, as they are today, in favour of proceeding with a bill of rights on a national basis, with the cooperation of all the provinces, and we can count on the cooperation of the province of Quebec.

The CHAIRMAN: I do not think that is a proper interpretation. However, the resolution is before the committee, and it speaks for itself. Therefore, I do not think any further discussion on that is necessary.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, the point of order you raised was well taken. I think a great deal of leeway has been shown in order that no one would be prevented from expressing his views, however far it might be from this particular bill. But, as you pointed out, the principle of this bill is a federal bill of rights, under the jurisdiction of the federal government, and it should be enacted at the present time. The principle was unanimously agreed upon in the house and, as that was a matter that was referred to this committee, I feel that is what we should be discussing. A constitutional amendment is not within the scope of this bill. As I say, everyone has been given plenty of opportunity to express his views but, however interesting they are, I do not think we should take up any more of our time in discussing matters which are outside the scope of this bill.

Mr. MARTIN (*Essex East*): To the point of order, Mr. Chairman.

The CHAIRMAN: Just a moment. I think your point is well taken, but the committee did, at the outset, direct the chairman to allow a great deal of latitude because of the fact that witnesses were coming before the committee, and they were not aware of the limitations which exist in so far as this committee is concerned. It was agreed that there would be no restriction whatsoever on witnesses stating their views in connection with a constitutional amendment, or anything of that kind. As I say, there has been considerable latitude allowed in this committee—and that was done with the approval of the committee. Therefore, I think a limited amount of discussion on this matter is desirable this morning even though, strictly speaking, it is not in order. I still maintain that the point is well taken. However, I indicated, earlier in the meetings of this committee, that when it came down to consideration of the bill, we would be confined strictly—

Mr. BROWNE (*Vancouver-Kingsway*): Pardon me, Mr. Chairman; when you mentioned "a limited amount of discussion", we did spend most of the time that was available yesterday morning on this issue. It has come up again, and taken over half the time available to us this morning. It seems to me that might very well constitute "a limited amount of discussion". I think we should get down to business and arrive at the procedure of dealing with this bill clause by clause; then passing the clauses, so that we know where we are at. Otherwise, we will be going on forever.

Mr. WINKLER: Agreed.

The CHAIRMAN: Mr. Martin would like to have a final word on this, and then we will ask the minister to comment on it.

Mr. MARTIN (*Essex East*): Mr. Chairman, I am glad you have not ruled on the point of order that you have in your academic mind, if not in your capacity as chairman, and I regret that Mr. Browne should seek to abridge a discussion which, as Mr. Dorion has said, was as important as this one.

Now, let us look at this situation in the context of the government's own desires in this matter. The Prime Minister, the sponsor of this bill, always has taken the position that he would like to see a bill of rights that would comprehend a totality of human rights and freedoms in Canada, and he has repeatedly said, as he did at the Vancouver meeting of the Canadian bar association, that nothing would please him more than a bill that would be based upon the joint consideration and consent of the two senior levels of government in Canada. Now, that is the background of this whole matter, and I ask Mr. Browne, in particular, who seems to be my bête noire in this situation, particularly having in mind what we are trying to do, to see how desirable it is that we should root—if we can get over the difficulties which Mr. Dorion mentioned—this whole matter on such a fundamental foundation as a constitutional amendment, which carries with it the consent of the provinces. If we can get a bill of rights in Canada which will touch on all our human rights and freedoms in all of our jurisdictions, we will have accomplished something which no federal state in the world in this century has been able to achieve, in spite of what Mr. Browne wants—an abridged, limited, uncertain document, which I do not deny will have value in its declaratory form, but it will be a limited one which will create litigation, confusion and uncertainty and, in the end, really will not satisfy. Now, that is the background of the situation, and I rest what I have to say upon the statement of objective given by the Prime Minister on more than one occasion. Here, we have a statement from the premier of one of the provinces, and although I agree with many of the things that Mr. Dorion has said, I do not agree with him that Mr. Lesage's first statement about a constitutional amendment—about getting the Canadian constitution domiciled here—has anything to do with this matter. As Mr. Deschatelets has pointed out, I think these are two separate questions. It may be that it will take more than a mere conference of the federal and provincial governments to settle this problem in so far as the province of Quebec is concerned because—

(French)

The CHAIRMAN: The rest of us would like to understand that.

Mr. MARTIN (*Essex East*): Well, this is a country where two languages are spoken.

The CHAIRMAN: We will have to get an interpreter then.

Mr. MARTIN (*Essex East*): I just want Mr. Dorion to know that I share fully his concern about the question of certain rights of the people in the province of Quebec—not only the people in the province of Quebec but in other sections of Canada.

Is not the issue now before us simply this. We have our own bill which we are studying and seeking to improve. We are making some progress, but I suggest we would not have made progress if we had not had some insistence, even over Mr. Browne's objections which have not been helpful or understanding; but we have an agreement now apparently that we will have a preamble, and we have an agreement based on Mr. Dorion's suggestion that we amend section 2 of the bill to take into account, we hope, provincial powers, rights and sensibilities.

Now we have a chance of doing what the Prime Minister said he would like to see done. Now the leader of the C.C.F. has made a good suggestion. I do not know at this stage that I would want to concur in the suggestion that this matter be left over until next session—I would want to consider that.

But the conference between the federal government and the provinces is underway and is to go on, I believe, until tomorrow night. Three premiers have said that they want to see this matter discussed. It is true Mr. Frost was a little lukewarm in this.

Mr. ARGUE: I think you can say five provinces.

Mr. MARTIN (*Essex East*): I do not think you can include Premier Frost. Apparently Premier Frost said that Ontario did not consider it had to have one. I am rather amazed at that statement because again I think of the complaints of certain coloured citizens of Canada over the denial of their right to be able to take advantage of housing loans. I wonder if Premier Frost really can have been correctly reported.

In any event we now have an opportunity of exploring a situation which yesterday morning when we were interrogating the Minister of Justice seemed to present nothing else but a closed door. I asked the Minister of Justice: "Have you had any discussions with the province?" He said "No; I had one with Mr. Rivard and Mr. Rivard seemed to think that this bill was not objectionable." I do not say that this was not a fair assumption for the minister, although I do criticize the minister for not having tried and for feeling that there was not much point in seeking to discuss with the provinces the possibility of a bill of rights which would take into account their responsibilities and powers.

That was the position yesterday morning; but that is not the position today. In view of the evidence that we have had from so many witnesses about some of the uncertainties of this bill, the concern that we were invading in some particulars provincial rights, and the desire of most witnesses that we should have a bill of rights imbedded in our constitution; in the face of that background surely, Mr. Chairman, the most constructive thing for us to do now is to see whether or not at the present time we might embark upon procedures that will do the very things which we thought yesterday morning were well nigh impossible.

What happens if we do not follow that constructive course? What happens if we decide by the exercise of the majority rule in this committee to go ahead as though there had been no rapprochement by the Premier of Quebec and by the other provincial premiers? What happens? Are we to go and pass this bill ignoring completely the suggestions made by the five provincial premiers—certainly three—ignore them completely? Do we in that way further the cause of human rights and fundamental freedoms in this country? Do we further in any way the possibility of getting agreement with the provinces? Are we not taking the position that we want this bill passed in its imperfect form right now even though the provinces have now given an indication, as Mr. Argue said, of their desire to break through? I would say that this is too important a matter to be treated lightly, too important a matter for us to dispose of in the way in which I was afraid it was going to be disposed of in the beginning.

This is the first time in the history of Canada that we have had an opportunity of touching this matter. I am sure that no one could be happier than the Prime Minister in the conference yesterday when he heard this statement made by the Premier of Quebec. I wonder if the Minister of Justice has been so preoccupied with the combines and Washington—all of them important matters—that possibly he has not had an opportunity of discussing this with the Prime Minister.

Mr. FULTON: Oh, yes he has.

Mr. MARTIN (*Essex East*): I would be very interested in knowing, after I finish, what the Prime Minister's view is.

I do appeal to this committee to give its serious attention to this matter and not just to throw this aside. We might not get this opportunity again. Anyone who reviewed the 1941 Rowell-Sirois report, anyone who examined the report of the joint committee on human rights in 1947-48, anyone who has examined the minutes of the joint committee in 1926 on constitutional problems, realizes how difficult this matter is and I think ought to consider it very carefully before throwing aside the suggestion that is now open to us to have further constructive action in this field.

If we turn this aside and proceed as though nothing happened yesterday, it seems to me we will be missing not only the opportunity of amending our own constitution here in Canada but of really bringing forward a real bill of rights that will have no doubts in respect of invasion of provincial powers and that will touch our freedoms in their totality. That would be something that no one else has done.

I hope that by the use of the majority position in this committee we are not going to throw aside this morning this valuable opportunity.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, might I have a moment, after that long tirade, to correct a complete misinterpretation which was placed on my remarks by Mr. Martin. The position I took was that I thought we should proceed on the basis of the work which was given to this committee, even though a statement has been made by a provincial premier. Mr. Martin a short time ago interpreted the resolution passed by Quebec as being opposed to this bill, and it seems that even if we entered into negotiations with the province at this time a matter of years might intervene before we agree. He is furthering the philosophy of the Liberal party throughout the years of stalling and not taking action at the present time. That is the reason they got nothing done for 22 years. Mr. Argue seems to be joining with him in this.

Mr. ARGUE: Your Prime Minister will not even answer the letter.

Mr. BROWNE (*Vancouver-Kingsway*): If we pass this bill now it does absolutely nothing to prevent discussion with the provinces. Once we have this on the record I have every reason to believe it would encourage discussion with the provinces and further the efforts to obtain a national bill of rights. They are just further annoyed that the Prime Minister took the initiative and put this bill forward when they did nothing for many years.

Mr. MARTIN (*Essex East*): May I ask you a question, Mr. Browne?

The CHAIRMAN: Order.

Mr. MARTIN (*Essex East*): I am asking a question. You have no right to interfere.

The CHAIRMAN: I certainly have the right.

Mr. MARTIN (*Essex East*): You do not. Particularly in a bill of rights committee.

The CHAIRMAN: Order.

Mr. AIKEN: I have been trying to get the floor.

The CHAIRMAN: Would you calm yourself, Mr. Martin.

Mr. MARTIN (*Essex East*): If you would recognize the functions of a chairman there would be no trouble. The chairman of the committee is supposed to be neutral and not indicate in any way how he feels on any subject; but you have carried the ball; you have been the prosecutor when you are supposed to sit in benevolent objectivity.

The CHAIRMAN: While I am chairman of this committee I intend that its deliberations will be conducted in an orderly and parliamentary manner.

Some Hon. MEMBERS: Hear, hear.

The CHAIRMAN: When you were speaking and when Mr. Argue was speaking no member of this committee interfered. When Mr. Browne was speaking you were proceeding to interfere and interrupt.

Mr. MARTIN (*Essex East*): I did not.

The CHAIRMAN: That is unparliamentary.

Mr. MARTIN (*Essex East*): I asked him a question.

The CHAIRMAN: I intend, whenever it is possible for me to do so, to have the deliberations of this committee conducted in an orderly fashion.

Mr. MARTIN (*Essex East*): We will help you.

The CHAIRMAN: I wish you would.

Mr. MARTIN (*Essex East*): I wish you would cooperate by recognizing us for a moment.

The CHAIRMAN: If you would stop interjecting perhaps I could finish my statement.

Mr. ARGUE: I think you are just two school kids—the chairman and the member for Essex East.

Mr. AIKEN: You have not been in school for some time?

Mr. ARGUE: You had better go back to school yourself.

The CHAIRMAN: I would like also to clear up another situation. Mr. Martin, when you engaged in a discussion in French I did not interrupt for the purpose of preventing you in any way carrying on in French. The proceedings before this committee are taken down in shorthand. This particular reporter is not able to get the remarks or interjections that may take place in that language. If it is desirable we will get a French language reporter to take care of it.

Mr. MARTIN (*Essex East*): Mr. Dorion had made a very important argument which I felt very sincerely and understood. I wanted him to know it was appreciated.

The CHAIRMAN: Did you wish to say something, Mr. Aiken.

Mr. AIKEN: Yes, Mr. Chairman. I just wanted to say that the statement of intention issued yesterday does not in my view alter the situation very greatly. Mr. Lesage in the first place has not consulted his legislature since being elected. Yesterday morning there was a motion by the Liberal members to postpone the matter. In the afternoon Mr. Lesage made his statement and this morning Mr. Martin is back in again.

An Hon. MEMBER: Collusion.

Mr. MARTIN (*Essex East*): There, Mr. Chairman—

Mr. AIKEN: Let me finish.

Mr. MARTIN (*Essex East*): The chairman never objects to members of his own party. It is only when the minority speaks that he has an objection.

Mr. AIKEN: I think this calls for comment, if nothing else, as to the degree of manipulation that the provincial premiers have submitted themselves to at this time.

Mr. MARTIN (*Essex East*): I would ask the hon. member to withdraw that remark. He said that the provincial premiers have allowed themselves to be manipulated into this situation. I think that is a most unconstructive remark, which a man like Mr. Aiken, on reflection, would want to withdraw.

Mr. AIKEN: I do not withdraw it. I said that in view of the three events that have happened, one after another, there is call for comment.

The CHAIRMAN: I would call on the Minister of Justice to comment in regard to this point.

Mr. FULTON: Mr. Chairman, I would like to add something which would be helpful, but I do not really know if there is much I can add. I had tried to express an opinion when you were kind enough to call on me earlier.

I would like to suggest, without any reflection in any way upon the proceedings of this committee, or upon what has been said here by the members of this committee, that nevertheless, while this is an important problem, the question of whether there should be a conference with the provincial authorities to see if a constitutional amendment, embodying the bill of rights, should be held, it seems to me is not a decision which can be made by this committee. That decision, and decisions in regard to a number of other questions which have been discussed here since we met at 9.30 is a decision to be made elsewhere; and the place where it should be taken, it seems to me, is in the conference of the premiers where the suggestion was made, and where the reply to that suggestion will have to be made.

I said to Mr. Martin a moment ago that I had had discussions with the Prime Minister in regard to this question. I also said earlier this morning that it is not for me to anticipate what the Prime Minister may say, and particularly not for me to anticipate at this committee, because it is for the Prime Minister to reply to the suggestions. If he is going to reply, I am sure he will feel that he should reply at the dominion-provincial conference where these suggestions were made. It seems to me, therefore, that for this committee to say we should decide whether there should be a dominion-provincial conference, is for the committee to go outside its field. Also, for the committee to say that we will not proceed with the consideration of this bill until there is a decision on another question, is for the committee to prevent itself from doing that which parliament has instructed it to do.

There are many of these questions that are raised here that I say cannot be decided here, but should be decided elsewhere. The question as to whether or not there are five premiers who favour Mr. Lesage's proposal, is not a question for this committee to decide. We have been given information by Mr. Argue; but indeed, I am surprised that we should have that information from that source here when one of the premiers, on whose behalf the information purported to be given out, spoke in the conference yesterday after Mr. Lesage spoke and said nothing as to his position. It is only there that the official record can indicate how many premiers are in accord with Mr. Lesage's proposal.

One other comment, which I think is proper for me to make, is that the question of the disposition of this bill, and whether the bill will be passed by parliament, again is not within the competence of this committee to determine finally. This committee has the bill before it for consideration, study and report to parliament; but the decision as to whether it is desirable to defer the passage of this bill until after a dominion-provincial conference may be held, is for parliament to make, because parliament has to deal with the bill. That sort of discussion was before the House of Commons in the debate on second reading. The House of Commons, with these factors before it, made the decision to approve the principles of this bill and to refer it to this committee for study in detail.

So, what is before this committee is not a general question even in respect to the bill of rights. It is not a question of whether or not there should be a dominion-provincial conference; it is not even a general question in regard to the bill of rights. What is before this committee is a bill approved by parliament on second reading and referred to this committee for specific study, I respectfully submit, for your consideration, that to allow yourselves to be sidetracked for too long in regard to the question of whether there should be

a dominion-provincial conference, which is not something that this committee has the power to decide, is to allow yourselves to be deflected from the basic task the House of Commons has entrusted to this committee. I should think that this committee's decisions and deliberations in respect of the bill now before it could be usefully carried on, and the adoption of a report which you should make with respect to this bill could be usefully arrived at, bearing in mind that that will not prejudice the right of the House of Commons, or parliament, to make any decision with respect to the disposition of this bill. Nor will it prejudice the right of anyone having that responsibility to recommend that this bill be deferred until after a dominion-provincial conference may or may not have been convened.

I make these suggestions, Mr. Chairman, as I said, without in any way reflecting upon the deliberations of this committee here this morning or at any other time, because this is an important point; a most important point.

Mr. MARTIN (*Essex East*): Hear, hear.

Mr. FULTON: I think it is a point that most of the members of this committee are bound to be directed to from time to time.

My point in making these comments, however, is that I think it would be a mistake, for the various reasons that I have advanced, to allow your attention to be deflected entirely to those questions which are really within the competence of other authorities.

I do not think I can say much more than what I have said in this regard.

The CHAIRMAN: Mr. Argue has asked for the floor for a moment, and I am inclined to give it to him.

Mr. ARGUE: Mr. Chairman, I want to say again that I appreciate the general attitude of the minister. I do not agree with his conclusions, but he does seem to be giving at least some consideration to the point of view that is being put forward.

Mr. MARTIN (*Essex East*): Hear, hear.

Mr. ARGUE: The Prime Minister will reply to the statements made by the premiers and, therefore, we will learn from the Prime Minister, on Wednesday or Thursday, the position of the government, and whether it has changed in respect of this particular question or not; and we will then know whether or not we should proceed expeditiously, in view of the Prime Minister's statement, with the measure that is now before the committee. I feel there is a real possibility of some agreement being achieved at this time, as to the method by which we can have an amendment to the British North America Act to provide for the protection of human rights and fundamental freedoms.

That being the case, Mr. Chairman, I make a strong plea to the members of this committee; I make a strong plea to the Minister of Justice, who I feel has taken a helpful attitude, that this committee suspend its sittings until Friday of this week, and until we have the benefit of the opinions and conclusions of the Prime Minister, and the further statements that are bound to be made by other premiers at that conference in regard to this exceedingly important subject. I think the mood of the Canadian people at this time is in support of a constitutional amendment to protect human rights and fundamental freedoms. I therefore feel it would be a mistake for this committee to proceed within the next day or two in respect of a bill which, I think the minister will agree with me, is inferior to a constitutional amendment, if such a constitutional amendment is practical. Therefore, Mr. Chairman, I wish to move that this committee now adjourn until Friday next at 9.30 a.m.

The CHAIRMAN: There is no seconder for that motion.

Mr. DESCHATELETS: Yes, I second it.

Mr. BROWNE (*Vancouver-Kingsway*): Call the question.

Mr. AIKEN: If we go along with the proposal that Mr. Argue has made we will have done nothing this week. I wonder if we should not consider, it being an all-or-nothing consideration, making a decision to go ahead with the bill as it presently stands with the understanding that we will not finally report the bill? If we do not proceed we will have done nothing this week in this committee. Perhaps if the provinces work out something in the future, that can be considered, and if they do not work something out, we will be through in any event.

Mr. ARGUE: I think deferring our considerations would be an extension of a courtesy to the provincial premiers, and would be a service to the Prime Minister to the extent that it would leave his position open. I think it would be an indication, from this parliamentary committee to the premiers of the provinces, that we wish them to come to a conclusion in regard to this question, if they will, within the next two days. The people of Canada, I feel, are on our side in hoping that this will be done. I can see nothing from the government's point of view, that will be harmed in any way if we follow my suggestion. As a matter of fact, I think the hon. members of this committee take the view that this is the way we should proceed at this time, and that our position would be greatly strengthened if, at the conclusion of this dominion-provincial conference, no progress has been made in regard to a constitutional amendment. On the other hand, if some real progress could be made, surely the Prime Minister would feel that he has made an important contribution, especially if, after consultation with the provincial authorities, this kind of an amendment could be obtained.

Mr. Chairman, I move this motion, not to obstruct the committee and not to delay either the proceedings of this committee or the business of the House of Commons, but because I believe this is a sensible approach at this time, and would be a helpful method by which we could come to a satisfactory conclusion.

The CHAIRMAN: I think the Minister of Justice has already indicated, Mr. Argue, that this is a matter which probably should be dealt with in the House of Commons, and not by this committee.

Mr. MARTIN (*Essex East*): What matter do you refer to?

The CHAIRMAN: I can see that the work of this committee would not be helpful if we were to continue with this discussion in respect of this bill. Such a discussion might even be out of order in the House of Commons without this bill being reported, inasmuch as it has been referred to the committee.

I think I should put the question.

Mr. AIKEN: Before the question is put, I would suggest that there is some merit to Mr. Argue's suggestion, but I wonder if he would consider amending his proposal to the effect that we should continue, but not report the bill before Friday, so that we will not have wasted a week by not discussing the bill at all. I think his idea that we close the consideration off, is good, but we are now reaching the conclusion of the session. However, we will be able to have three or four meetings this week in order to discuss the merits of this particular bill—whether or not it is decided to adopt it.

Mr. MARTIN (*Essex East*): If, on Friday, we find—

Mr. STEWART: Question.

Mr. MARTIN (*Essex East*): People keep saying "question". I would ask that hon. members think of this as a very serious matter.

Mr. ARGUE: No closure.

The CHAIRMAN: We have been on this subject for one hour and twenty minutes.

Mr. MARTIN (*Essex East*): That is all right—and I object to your saying that.

The CHAIRMAN: Well, it is a fact.

Mr. MARTIN (*Essex East*): All right, but in making that statement you cast an aspersion on those who take issue with the point of view you have. I suggest it is an improper remark for the chairman to make.

The CHAIRMAN: The chairman does not think so.

Mr. MARTIN (*Essex East*): There is the chairman again. The chairman should not make any remarks that have, in any way—

The CHAIRMAN: Well, get down to the merits of this motion.

Mr. MARTIN (*Essex East*): I would, but unfortunately, I have to deal with you.

Surely we are not going to waste any time on this subject. Mr. Argue's suggestion, it seems to me, is a sound one—that if, on Friday, we find this matter cannot be advanced any further along the line that Mr. Argue and others have envisaged, then we could sit on Friday and Saturday and, in that way, I think we could conclude our work—at least, certainly, by Saturday afternoon, and we then will have done our duty. No one will be able to say that we did not take advantage of a possible opening. Now, that is what is behind Mr. Argue's resolution, and it seems to me it ought to appeal to all of us.

Mr. ARGUE: Question.

The CHAIRMAN: All those in favour of the motion?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: Opposed?

The CLERK OF THE COMMITTEE: Nine.

The CHAIRMAN: I declare the motion lost.

It is now seven minutes to eleven, and I am afraid we cannot accomplish a great deal more.

Is it the wish of the committee that we meet at 9.30 tomorrow morning?

Mr. BROWNE (*Vancouver-Kingsway*): I submit we should make provision—in case the combines legislation finishes today, or this evening—for possible sittings at that time—especially in view of the lack of progress we are making. Also, if the combines legislation is not finished today, but tomorrow, we should sit as many hours as possible to finish this.

Mr. MARTIN (*Essex East*): It depends on what is before the house.

Mr. ARGUE: There is the steamroller again.

Mr. CHAIRMAN: Is it agreed that we meet at 9.30 tomorrow morning?

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Argue, if you made more worth while statements, they would be more useful to the committee.

Mr. ARGUE: Steamrolling; that is all it is.

Mr. MARTIN (*Essex East*): May I say that if we finish the combines bill today—this afternoon, and if there is nothing in the house which causes a substantial number of our members to be in the house, I would be prepared to meet today. However, that will depend on a reasonable interpretation of the situation by the chairman, and I hope he will take into account what I mean by a "substantial number". It is easy for government members to be here, but not for the opposition members who have responsibilities in the house. If it is possible for us to meet today—and may I say that I regret that Mr. Argue's motion was not carried; I think we have missed a great opportunity—I would be prepared to do so.

The CHAIRMAN: We will meet tomorrow morning?

Mr. MARTIN (*Essex East*): I say that we could meet today, if we can—after we finish the combines legislation.

Mr. FULTON: You are suggesting that if we finish the combines legislation, and there is an opportunity, that we meet today?

Mr. MARTIN (*Essex East*): Yes, depending on our obligations in the house. However, if there are other matters in the house which require our attention, that is a different matter.

Mr. FULTON: And, if such is the case, you want me back at 9.30 tomorrow morning?

Mr. WINKLER: Could we say that we will leave it to the courteous discretion of the chairman?

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament
1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noel Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 10

AUG 3 1960

WEDNESDAY, JULY 27, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

WITNESS:

The Honourable E. D. Fulton, Minister of Justice

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

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OTTAWA, 1960

23582-0—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noel Dorion, Esq.

and Messrs.

Aiken,
Argue,
Badanai,
Batten,
Browne (*Vancouver-Kingsway*),
Deschatelets,
Jung,
Martin (*Essex East*),
Rapp,
Stefanson,
Stewart,
Weichel,
Winkler.

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

WEDNESDAY, July 27, 1960.
(19)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.37 this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Argue, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart, Weichel and Winkler.—14

In attendance: The Honourable E. D. Fulton, Minister of Justice, assisted by the following *from the Department of Justice:* Mr. E. A. Driedger, Deputy Minister; Mr. D. H. W. Henry, Director, Advisory Section; and Mr. H. A. McIntosh, Legislation Section.

Following a discussion of procedure and future business of the Committee the Minister was again asked to comment on the provisions and effect of Clause 4 of the Bill.

At 10.58 a.m. the Committee adjourned to meet again at 2.30 p.m. this day.

AFTERNOON SITTING

(20)

The Committee reconvened at 2.34 p.m. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Argue, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart, Weichel and Winkler.—14

In attendance: The same as at the morning sitting.

The Chairman read a report from the Subcommittee as follows:

WEDNESDAY, July 27, 1960.

The Subcommittee on Agenda and Procedure met at 11.50 a.m. this day. The following Members were present: Messrs. Badanai, Browne (*Vancouver-Kingsway*), Spencer and Stewart.

Your Subcommittee recommends as follows:

1. That the Committee accede to the request of Mr. Martin (*Essex East*), that no meeting be scheduled for this evening and, having regard therefor, recommends the scheduling of meetings on Thursday, July 28th at 9.30 a.m., 2.00 p.m. and at 8.00 p.m. if necessary, in order to conclude the deliberations of the Committee.
2. That letters received from Professor Edward McWhinney of the University of Toronto, and presently in Heidelberg, Germany; Mr. F. A. Brewin, Q.C. of Toronto; Mr. J.-Auguste Pépin of Ottawa; Orillia Chamber of Commerce; Windsor Chamber of Commerce; and Associated Investors of Canada Ltd. be filed with the Committee and copies distributed to Members.

23582-0—1½

On the motion of Mr. Stewart, seconded by Mr. Rapp, said report was adopted unanimously.

The Committee proceeded to the further questioning of Mr. Fulton concerning Clauses 5 and 6, and discussed the drafting of a Preamble to the Bill.

Agreed,—That officers of the Department of Justice review suggested drafts provided by Members of the Committee and present at the Committee's next meeting a Draft Preamble embodying these views.

Mr. Badanai read a suggested wording for a Preamble.

The Chairman instructed that a draft Preamble prepared by Mr. Winkler be taken as read and printed in the record of this day's proceedings.

Mr. Martin (*Essex East*) read into the record wording for a suggested Preamble.

The Chairman called for consideration Clause 1 of the Bill. Following discussion Clause 1 was allowed to stand.

On Clause 2—Moved by Mr. Batten, seconded by Mr. Deschatelets, "That lines 5 to 7 inclusive be deleted and the following substituted therefor:

> These human rights and fundamental freedoms shall continue to exist in Canada.

The amendment was resolved in the negative, YEAS: 4; NAYS: 6.

Moved by Mr. Aiken, seconded by Mr. Stewart, "That in line 6 the word "always" be deleted.

The motion was resolved in the affirmative, YEAS: 8; NAYS: 1.

On Clause 2—Paragraph (*a*)—Moved by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), "That the words 'by due process of law' be deleted from lines 10 and 11 and the words 'in accordance with law' be substituted therefor."

The motion was resolved in the negative, YEAS: 4; NAYS: 9.

On Clause 2—Paragraph (*b*)—Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That the following words be added after the word "law" in line 12, "and to life, liberty, security of the person, and enjoyment of property".

The motion was resolved in the negative, YEAS: 4; NAYS: 7.

Moved by Mr. Badanai, seconded by Mr. Batten, "That the following be added as paragraph (*c*):

> The right of the individual to the protection of the law against arbitrary interference with privacy, family, home or correspondence and against attacks upon his honour and reputation

and that the remaining paragraphs be relettered accordingly".

The motion was resolved in the negative, YEAS: 4; NAYS 7.

On motion of Mr. Stefanson, seconded by Mr. Batten,

Resolved,—That the number of copies in English of the Minutes of Proceedings and Evidence authorized to be printed be increased from 750 to 1,000.

At 5.45 p.m. the Committee adjourned to meet again at 9.30 a.m., Thursday, July 28, 1960.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

WEDNESDAY, July 27, 1960.

The CHAIRMAN: Gentlemen, please come to order.

Mr. MARTIN (*Essex East*): Mr. Chairman, do we have a quorum now? I see there is only one Conservative member here, so I wonder if we have a quorum, apart from yourself.

The CHAIRMAN: We did have one.

Mr. MARTIN (*Essex East*): The Minister of Justice, I suppose, and you, both are—do we have a quorum now?

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): Mr. Chairman, events seem to be moving with some rapidity and importance in so far as our deliberations are concerned. I know we are all anxious to see a bill of rights that will be as total in its embrace as possible.

Yesterday morning Mr. Argue had proposed that we adjourn our sittings until the present conference between the federal and the provincial governments had terminated its sessions.

In view of the initiative taken by the provincial premiers who had expressed: (*a*) the desirability of seeing our constitution amended under procedures in Canada and (*b*) that they were anxious to have a bill of rights embodying the powers of both the federal and the provincial governments, and to have the same embodied in the constitution, the committee, however, did not accede to what I thought was a constructive proposal. But since that time we have now had an announcement by the Prime Minister of Canada of the greatest significance, an announcement, I am sure, that all of us in this committee will welcome.

The purport of that announcement was that the government proposed, in view of the initiative taken by Premier Lesage and some others, to call a constitutional conference at which time there could also be discussed, as Mr. Lesage pointed out yesterday in the conference, a bill of rights and embodying it in the constitution, thus having a bill in consequence which would affect the totality of human rights and freedoms in Canada.

Now, that confronts us with what course shall we propose to adopt in this committee. I recognize at once that the course is one which will have to be determined by the government; and as the Conservative members of this committee have a greater locus standi with the government than those of us in the opposition parties in this committee, we will have to look for some direction in this matter from that quarter. But I feel now that we must have some direction.

What is the intention? I hope it will not be argued, as you suggested yesterday, that this is a matter which does not concern this committee. I hope it will not be suggested by you or by anyone else that the terms of reference given by parliament to this committee provide for a consideration by the committee of this bill and of nothing else.

If that were to be the reaction, I think it would be an unfortunate one; it would be unconstructive. But I do derive some hope from your observations yesterday that the fact that some witnesses had suggested that this bill, or that

a bill of rights should be embodied in the constitution provided ground for our considering that as one of the means by which there could be provided the mechanism for a satisfactory bill of rights.

Technically, it may be argued that this is not a matter for the committee, but we can get over that technicality quite easily.

What we want to see in Canada, I take it, all of us, is the most comprehensive bill of rights possible. The Prime Minister favours such a bill. The Prime Minister as head of the government favours a constitutional amendment. He now has the opportunity of getting it, as a result of the course taken yesterday and the day before in the conference between the heads of the governments at the two senior levels of government.

So the situation now is, I am sure, in the minds of all of us in this committee, since that is our objective and our desire: where do we go now? We should receive some direction from this committee. I hope our objective must surely be to have the most comprehensive bill of rights, now that the provinces have expressed their willingness to participate, and I hope that we in this committee will take no action which will make it impossible to act upon the first break-through in our constitutional history.

Mr. RAPP: Mr. Lesage also stated—

The CHAIRMAN: Excuse me, Mr. Rapp. Mr. Martin, you indicated in your statement that this is a matter for the government to decide.

I think I would like to ask the Minister of Justice at this point whether he has any comment to make in regard to your suggestion.

Mr. MARTIN (*Essex East*): I suppose the fair thing to do would be to ask other members of the committee if they agree with the point of view expressed.

Mr. ARGUE: I am quite agreeable to hear from the Minister. I put forward our position yesterday, and I repeat it in one sentence, especially when the Prime Minister and the premiers have agreed to a constitutional conference this fall.

I think it would be a great mistake for parliament to rush through this bill in the dying days of the session. It is an inadequate bill, and it would make it impossible for us to have a constitutional amendment. So I am quite prepared to hear from the minister as to the government's position.

Mr. DESCHATELETS: May I say a few words?

The CHAIRMAN: I think we should first hear from the minister at this point, Mr. Deschatelets, because I have already indicated what my view is in regard to its relevancy, as has been said by Mr. Martin, I believe it is a decision for the government.

We have the responsible minister with us this morning, who is familiar with the bill, and he may wish to make some comments. I do not know whether he will or not.

Mr. MARTIN (*Essex East*): May I suggest one thing: if a member of the committee wishes to speak, he ought to be allowed to do so. Of course, the minister has to make a statement, but I think it would be more appropriate after the members of the committee have expressed themselves, and Mr. Deschatelets wishes to say something.

The CHAIRMAN: Well, is it going to be repetition?

Mr. MARTIN (*Essex East*): If it is repetition, that is democracy. What is wrong with it? Let us not start off like we did yesterday, please.

Mr. DESCHATELETS: I intend to say only a few words. I would like to say that our course of action will have to be examined in the light of what happened yesterday at the federal-provincial conference, and also in the light of certain events which have taken place in the province of Quebec, and in the province of Ontario a few days ago. I shall refer here to a particular matter.

I am going to cite that matter in a very brief way, just to show the reason why our bill of rights should be more comprehensive and more complete. A few days ago, not very far from here, a French-speaking witness was denied the right to testify in French, and the right to have an interpreter.

If you will remember, Mr. Chairman, we have also suggested that this bill of rights should include the right to have an intepreter. This regrettable event which took place not very far from here a few days ago shows the urgency of the need for having a more comprehensive bill of rights, with the help and cooperation of the provinces.

I refer to the newspaper *La Presse*, which was reporting on the case of Samure vs. the Attorney General of the Province of Quebec.

Mr. MARTIN (*Essex East*): That is the name of the old case.

Mr. DESCHATELETS: Yes, where Judge Lizotte decided that in his opinion religion was in the category of civil rights, which are reserved to the legislature by the constitution.

Here again, with these two cases which have happened only a few days ago, it shows, I think, the need for a more comprehensive bill of rights, and with the cooperation of the provinces, I think that we should now modify our course of action.

At the end of my remarks, will you permit me to cite again this statement by the Prime Minister in the House of Commons at page 5648 of *Hansard*, July 1, 1960, where he said:

> They say, if you want to make this effective it has to cover the provinces too. Anyone advocating that must realize the fact that there is no chance of securing the consent of all the provinces.

We have said repeatedly, time and again, that the provinces should be consulted, and that they have not been consulted. Yesterday what took place in another room in this building has confirmed what we had already thought and said; that the provinces were ready to cooperate in respect of a national bill of rights through an amendment to the constitution.

The CHAIRMAN: Mr. Fulton, would you care to comment in this regard?

Hon. E. D. FULTON (*Minister of Justice*): Yes, Mr. Chairman.

I think perhaps it is desirable that the position of the government be stated so that the committee will have it before it in the deliberations which it wishes to carry on.

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: May I point out to you first that the Prime Minister suggested at the conference yesterday that consideration be given first to the convening of a dominion-provincial conference, probably of the attorneys general, to discuss the possibility of devising a way to amend the B.N.A. act in Canada, and amending all portions of it in Canada. He indicated his readiness to call such a conference this fall, at the first convenient opportunity. He suggested then, that after consideration had been given to that, and progress made on that point, and a way devised to amend the Canadian constitution in Canada, then there might be a further conference convened to discuss a comprehensive bill of rights which might form the first such Canadian constitutional amendment.

Both his suggestions were received with general expression of support, although there were some reservations.

I think your deliberations should be conducted in the light of what the suggestion actually is. The suggestion is first for a conference to be convened to consider and devise, if possible, a method of amending the constitution in Canada. Then, having succeeded in that, a conference convened to consider

the subsequent question in respect to a comprehensive bill of rights, with the hope that that should be the first such Canadian amendment.

Under these circumstances, it seemed to the government, and I report it to you, that there is no reason why we should hesitate in or delay the further consideration of this federal bill of rights, and that its enactment as a federal statute in no way prejudices the position of the provinces, and in no way inhibits either conference, which the Prime Minister has suggested, and as I have outlined. Indeed, there is every reason why we should proceed now in the light of some of the reservations expressed by the provinces.

It was reported in the papers, I think yesterday—I do not have that report before me—that Premier Frost, while not taking a firm position, did raise some question as to whether a bill of rights was necessary for Ontario.

Mr. MARTIN (*Essex East*): That was reported on Monday.

Mr. FULTON: So you have that fact to bear in mind and consider. Certainly the government has borne it in mind in deciding its position.

Although Mr. Frost did, yesterday, indicate immediately his readiness to attend conferences to discuss the overall question of devising a method to amend the constitution here in Canada, Premiers Bennett and Manning are reported as having reserved their position with respect to either conference.

I have the *Gazette* of today before me, and I find on the first page it is reported:

> All provincial chiefs except Social Credit premiers Manning of Alberta and Bennett of British Columbia expressed support for Premier Lesage's suggestion and a second one by the Quebec premier for discussion to find a way to amend the constitution in Canada.
>
> Premier Manning said his government has not given consideration to either suggestion by Premier Lesage. Premier Bennett said he will reserve comment.

So there is some uncertainty as to whether such a conference would be convened—such a general conference, in the first place. There is some reason to anticipate that there would be real difficulty in getting agreement of all the provinces on a comprehensive bill of rights even if we are successful, as I hope we would be, in devising a method to amend the constitution of Canada.

Under those circumstances, it is the view of the government, which I am authorized to place before this committee, that this parliament should proceed at this session with the consideration and completion of the federal bill of rights in order that human rights and fundamental freedoms in the federal field will be covered and protected as quickly as possible and, that being done, without prejudice to all provinces, it would then be the hope of this government, that such a constitutional conference could be convened, and that that would be successful; and after that, then, the first Canadian amendment would be a comprehensive bill of rights.

There are such imponderables still facing us with respect to both these subsequent questions; namely, a constitutional conference; a bill of rights conference, and that it would be undesirable to postpone action in our field within our responsibility at this time.

Mr. ARGUE: Mr. Chairman, I wonder if I may make a brief comment in respect of the position taken by the government.

I do not think there is any question, in the mind of anyone in this committee at any rate, that a constitutional amendment is the preferable way of proceeding. The question is whether or not there is a real chance for a constitutional amendment.

In the House of Commons when the debate was on we moved a motion having to do with consultation with the provinces. This government has not taken any initiative whatsoever to discuss it or consult with the provinces

on the question of a constitutional amendment. All that has happened is that after Mr. Lesage made his position clear, and made a very constructive effort, the government has been smoked out, and has now said that it is prepared to discuss this question at a constitutional conference which will be held later this year. The Minister of Justice has quoted, from the press, statements attributed to certain premiers, not one of which shows any opposition to a constitutional amendment, and some of which did not commit themselves. Others raised some questions, but there is no opposition. I would think the government would have been better advised to have canvassed the provinces in respect of these conferences to see whether or not a constitutional amendment is possible. If the provinces turned that suggestion down, then I think the federal government would be on exceedingly strong ground in proceeding with the kind of bill of rights we have now before us, but I would like to tell the minister what I am afraid will happen if the government pushes this inadequate bill through the House of Commons and then holds a constitutional conference. I feel that the position of the provinces will be to wait and see. They will say: we have a bill of rights on the statute books, let us give it some time; let us see what happens in the courts. In that event, the chance of having a constitutional amendment will have been missed, and the Canadian nation will have to wait for some years before the possibility of a bill of rights embodied in the constitution presents itself once again. I hope I am mistaken; but if I am not, then this government will have to accept the responsibility for not having taken the course which would lead to a constitutional amendment, but has taken a course which in fact has helped impede the possibility of a constitutional amendment.

I think the government is making a very great mistake and is in great error, and I would hope that even at this late date the government would decide to postpone consideration of this measure until after the constitutional conference, which we all welcome.

Mr. FULTON: Mr. Chairman, may I just add one thing which I intended to add, and omitted, before Mr. Argue spoke. That is, that in reaching this decision it was in our minds—in the minds of the government—that although Premier Lesage had made his suggestion, and other provinces had echoed it, and although there was general approval for the Prime Minister's suggestion of a constitutional conference later this fall, followed by a conference to discuss the bill of rights, not one premier here, in any of that discussion, put forward the suggestion, so far as I am aware, that we should defer action on the bill of rights, which they know is presently before parliament. There was not one suggestion that there would be any misunderstanding, or any desire on their part for us to defer action—no such suggestion was made in the course of this discussion.

Mr. ARGUE: I can understand the provinces not wishing to direct the federal government what to do; but I think the minister's statement now would have been much stronger if the government had consulted with the provinces and asked them about this question. But the government is taking the position that unless the provinces make objection to this bill, they are not going to follow the more preferable course.

The position of the Saskatchewan government is perfectly clear. I do not think it is necessary that the Premier repeat it on every possible occasion. The Saskatchewan government feels this is not the way to deal with a bill of rights. They have stated their position on a prior occasion, and as far as I know there has been no change. They think the government is in error in embarking upon this kind of course, rather than trying to get agreement from the provinces for a constitutional amendment.

The CHAIRMAN: I am going to give Mr. Martin an opportunity of making a comment in regard to this; but may I reiterate that this discussion has indicated quite clearly that this issue that has now been raised is a matter of government policy and, in my opinion, this committee is without power whatsoever to deal with it.

I think the discussion that has taken place thus far may serve to clear the air. But I do hope, inasmuch as we have had the minister here on two occasions, and most of the time has been taken up on the discussion of this issue and we have not been proceeding with the bill, that this morning we can limit this discussion and at least make some progress in dealing with the bill before us.

Mr. MARTIN (*Essex East*): Well, Mr. Chairman—

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, before Mr. Martin begins, I want to take the strongest objection to this course.

Mr. ARGUE: Mr. Chairman, how can he speak? You gave the floor to Mr. Martin.

Mr. BROWNE (*Vancouver-Kingsway*): I am speaking on a point of order.

Mr. ARGUE: Oh!

Mr. BROWNE (*Vancouver-Kingsway*): This matter was raised long ago in the committee, and I refer the committee to page 16 of the proceedings, where this matter was dealt with very fully by the chairman. Notwithstanding the position which was set out, which showed quite clearly that it was beyond the terms of reference of this committee to go on and deal with this constitutional amendment, in order that everybody should be heard and their views expressed thoroughly we spent considerable time in this committee in going over and over this ground, while it is quite beyond our power to do anything about it.

It seems to me that we have gone on again this morning. We have had the opinion of the government, which is unchanged. We can refer to the motion moved in the house on second reading, which was defeated at that time, on the principle of the bill. Inasmuch as it is beyond the powers of the committee to raise a matter again that was defeated in the house, there is no reason whatsoever for any more discussion taking place, and I would ask for a firm ruling from the chairman that this be declared out of order at the present time. Or, failing that, I would make the motion that we now proceed to the clause by clause discussion of the bill, as we have been instructed to do by the terms of reference of this committee.

Mr. MARTIN (*Essex East*): Mr. Chairman, I would like to speak to that motion.

The CHAIRMAN: Mr. Browne, would you agree to Mr. Martin making a short statement, and then I will deal with the point?

Mr. BROWNE (*Vancouver-Kingsway*): I have never yet heard him make a short statement.

Mr. MARTIN (*Essex East*): I would not want my intervention to preclude any other hon. member expressing himself on a matter that the Minister of Justice and you, Mr. Chairman, have recognized as being very important. We are not going to solve problems such as this by schoolboy tactics which prevent other members speaking.

The CHAIRMAN: Mr. Martin, I do not think you should make references like that in the committee. I think we can conduct our deliberations here without casting reflections on members. I do not think that is right.

Mr. ARGUE: The word "schoolboy" is scarcely unparliamentary.

The CHAIRMAN: That is a matter of opinion.

Mr. MARTIN (*Essex East*): In a matter such as this, if anyone should suggest it is not a matter of important discussion, then I just do not understand the attitude. I appreciate what the minister has said, and I thank him very much. As far as I am concerned, if after we have discussed this matter—and I think we are entitled to discuss it—he feels that the government should go on with the present bill, I do not think there can be anything done except for us to do that, and we will endeavour to make it the best possible bill, from our point of view, in the circumstances.

But it is important, as the chairman suggested, that the air be cleared; and it is important that we understand exactly what the situation is now.

When the Prime Minister made his announcement yesterday—and I have carefully read what he said, and what others said—it is clear at the outset that he only referred to a conference for the purpose of having domiciled in Canada the power to amend the constitution, whereupon the Premier of Quebec suggested that at such a conference the question of a bill of rights might be discussed. It was after support of this point of view by Mr. Douglas that the Prime Minister of Canada acknowledged that that could take place.

Mr. Frost yesterday supported that position, although it is true that on Monday he said there was no difficulty in the province of Ontario; there was no violation of human rights and fundamental freedoms. I think his language clearly established that he was not too enthusiastic about a bill of rights in any respect; but yesterday he did change his position.

I do feel that the point Mr. Argue has mentioned is of great importance, and, of course, if the government decides on this course, we have no other course, as I say, open to us but to try and bring forward the best possible bill—and that will be the endeavour, I am sure, of all of us. But the fact is that the government, in spite of its desire, as stated by the Prime Minister, to have a bill embodied in the constitution, has not taken any initiative whatsoever to consult the provinces. That is, I think, regrettable, and I cannot understand, in the face of the initiative taken by the provinces with regard to taking the necessary steps to bring about a cooperative arrangement, why the government does not seize on that. That is a responsibility of the government, and it will not be the responsibility of any member of this committee.

I simply invite the Minister of Justice to consider this. Assuming we go on—as I presume now we will—to consider this bill and to make it the best possible bill that we can devise, within the limitations provided for under section 91 of the British North America Act; having in mind what Mr. Dorion said; having in mind what many witnesses said, that this is a bill that does invade provincial rights, even though I recognize at once that the minister does not agree with that—

Mr. ARGUE: I do not think it invades provincial rights.

Mr. MARTIN (*Essex East*): Yes, it does—and the witnesses say that. This is a very serious point. The Minister of Justice, in fairness to him, does not agree with that. Mr. Dorion does.

Mr. ARGUE: I do not agree with it, either.

Mr. MARTIN (*Essex East*): I recognize your high legal attainments.

Mr. ARGUE: I am sorry, Paul; I have been doing well, without any help from you.

Mr. MARTIN (*Essex East*): Yes, you have been doing very well. But the point I am making now is that we must not do anything that will block or close the door on a comprehensive bill of rights based upon cooperation with the provinces, and covering powers under section 92, as well as section 91, of the British North America Act—and I hope that the minister has considered that.

For instance, we heard over the radio this morning that in a current case the counsel in that case was anxious that this bill should be passed so that he might provide a defence for that case based upon the bill of rights presently before the committee. Are we not going to have a situation result where there will be all sorts of confusion, all sorts of litigation, and all sorts of uncertainty? These are the dangers that will flow from this, and I can only hope the minister has considered all that; and if he has, and says so, then it seems to me our task will be to do what he suggests, and that is to go ahead. But, I do not think we should proceed without knowing, and bearing in mind, all of these considerations.

The CHAIRMAN: Gentlemen, I am going to ask the minister if he would care to make any further comment, and at the conclusion of his statement, I am going to ask the committee if it will support me in calling for questioning on clause 4 of the bill.

Mr. FULTON: Mr. Chairman, in response to Mr. Martin's invitation, I can only repeat what I said before; we did consider very carefully this whole question and when we came, for the reasons I gave, to the conclusion that we should proceed with the bill of rights in the federal field alone, we directed our own attention and instructed the draftsmen to direct their attention to producing a statute which would not constitute an invasion of provincial rights. I, as well as my officials, have studied carefully the opinions expressed by the witnesses who have appeared here. I have indicated that, in my view, the fears are exaggerated, and I also have indicated that we will consider carefully all suggestions of a concrete form that may be made in order to make it clear, or clearer, if that can be done, that this bill is confined to the federal field of jurisdiction alone.

If you will remember, we had a discussion in connection with making that clear in the preamble, or by a possible amendment to clause 2. Those matters are still before the committee, and they are before the committee, I hope, in the light of my indication that we will be glad to cooperate with the committee in any concrete suggestion that can be devised which we believe would have the result of making that clearer, although we think it is clear in the bill as it now stands.

The CHAIRMAN: Now gentlemen, when we adjourned on Monday, the minister was being questioned on clause 4 of the bill, and I am not sure whether or not we concluded our question on that clause.

Mr. MARTIN (*Essex East*): No, we did not. We were dealing with clause 3, and then we were going to go on to clause 4.

The CHAIRMAN: No, we were on clause 4.

Mr. FULTON: I have been asked a number of questions about this matter of the national human rights commission.

Mr. MARTIN (*Essex East*): Yes, Mr. Badanai's proposal.

Mr. FULTON: And matters such as that. I have dealt with quite a number of questions on clause 4.

Mr. BROWNE (*Vancouver-Kingsway*): In connection with clause 4, where it is set out that the minister shall peruse the legislation in order to ascertain whether any of the provisions are inconsistent with the purposes of this bill, would the minister feel it is an obligation on his part to report to the House of Commons if there is an inconsistency in the bill, or what action would he feel obligated to take, having ascertained an inconsistency? Would he file it away and forget about it?

Mr. FULTON: I think I indicated on a previous occasion that I regarded it as an obligation on the minister to report to the House of Commons. I said

we had not any firm or fixed views as to whether that report should be made orally—at the time, perhaps, that second reading was moved, or whether it should be done by a written report filed as soon as possible after the bill had been given first reading. Of course, we do not see private members' bills until they are given first reading. However, as I said, I regard it as an obligation to report to the house, whether it be a written or oral report, and the exact manner and time it should be done are matters on which we have not any firm views.

Mr. BROWNE (*Vancouver-Kingsway*): Do you feel, perhaps, that a future minister, who may not be of the same view, would be obligated by this wording to report, or whether it should not say "to ascertain, and to report to the House of Commons"?

Mr. FULTON: My thought there is that the method would be worked out in the regulations. As you know, clause 4 says:

> The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the Regulations Act and every bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent—

and so on. I think the procedure would be worked out in the regulations. It must be worked out in the regulations, which would cover not only the procedures for examination, but also the procedures for reporting to the house. That regulation would be tabled and brought to the knowledge of the house, and no subsequent minister could change the regulation without that becoming known, and an opportunity for discussion given.

Mr. BADANAI: Are we discussing clause 4?

The CHAIRMAN: Yes.

Mr. BADANAI: I would like to move an amendment to this clause, by adding thereto:

(*a*) The Minister of Justice shall report any inconsistency to a standing committee on Human Rights and Fundamental Freedoms.

(*b*) All petitions to the House of Commons under Standing Order 70 which purport to be based on the Canadian Bill of Rights shall be classified and condensed by the standing committee on Human Rights and Fundamental Freedoms in such a form and manner as shall appear to it best suited to convey to the house all requisite information respecting their contents. The committee shall have power to report the same from time to time to the house, to report its opinions and observations thereon to the house.

The committee may make no recommendation, or recommend that the petition

(*a*) be rejected;

(*b*) be referred to the government for
  (i) consideration
  (ii) favourable consideration
  (iii) most favourable consideration

(*c*) be granted in whole or in part

Or the committee may recommend that the petitioner(s) take action in the courts.

Will you second that motion, Mr. Deschatelets?

Mr. DESCHATELETS: I will second the motion.

The CHAIRMAN: It has been seconded by Mr. Deschatelets.

Would you mind sending that up to the table?

Mr. MARTIN (*Essex East*): Mr. Chairman, on a question of procedure; although this is a very important amendment, I did not know we were going to deal with amendments right at this time, or put them now. I thought we were having a general discussion at this time. We have quite a number of amendments we wish to have considered.

The CHAIRMAN: I think you are quite right, Mr. Martin.

At the inception, Mr. Badanai, I think we decided we would go over the bill clause by clause and question the minister without making any attempt to pass any of the clauses, which would mean, of course, not dealing with any amendments. If it is agreeable to you, Mr. Badanai, would you let that motion stand over until later on, when we come to the consideration of clause 4, after having passed the previous clauses, or having dealt with them.

Mr. MARTIN (*Essex East*): I think, possibly, I have been somewhat responsible for this. What I meant, Mr. Badanai, is that perhaps you had some questions to put to the minister in connection with the proposals you made.

Mr. BADANAI: Well, I questioned him in that connection at a previous meeting.

The CHAIRMAN: You are quite free to ask any questions to found the object of your anticipated amendment.

Mr. BADANAI: I have no further questions on clause 4.

Mr. FULTON: I do not want to depart from the committee's decision but, since the matter has been placed on the record, and certainly will be one for me to consider, I would like to make the preliminary comment that it does seem to me that the amendment contains a difficulty. This is dealing with rules and procedure of the House of Commons, and I am not certain that a statute apart from the House of Commons Act, is the proper way to do that. I would think there would be supplementary action that the house itself would consider taking by way of an amendment to the rules. However, I make that only as a preliminary comment at this stage.

I would like to come back to a point I made earlier, that it seems to me it is desirable, in the end, to let us have some experience on this. I have indicated in the clearest manner possible my view, which is the government's view, of what would be the responsibilities of the Minister of Justice under this section and how he should discharge those responsibilities. We will have to work out procedures. There will be heavy responsibilities, especially in the field of regulations. I feel the best way of dealing with that is to let us accumulate some experience. We cannot be working in secret on what we are doing. I think the sounder way of proceeding is to let us proceed by way of accumulating experience, and if it is found there is a necessity or the desirability of statutory amendment or enactment we could deal with the problem at that time.

The CHAIRMAN: Shall we go on, gentlemen, now to clause 5?

Mr. MARTIN (*Essex East*): I have some questions on clause 4.

Mr. BATTEN: Just one question, please.

After the minister has ascertained whether or not a given bill is a contravention of the bill of rights, what happens from there on?

Mr. FULTON: As I have indicated previously, if it is a government bill he reports that matter to his colleagues in cabinet, and it is for cabinet then to make its decision. If it is a private member's bill the minister would not

see the bill until it was given first reading in the house, and it would be his responsibility to give that to his officers to examine that bill at once. The minister's report would be made, in the first instance, to the House of Commons.

Mr. BATTEN: I want to go back to the discussion we had the other day. It seems to me there is a weakness in this section of the bill of rights if the government, particularly, were permitted to bring in a bill which is clearly a contravention of the bill of rights. I agree, if a private member wants to bring in a bill and that contravenes it, that is his responsibility.

Mr. FULTON: Yes.

Mr. BATTEN: I think that he should be told it does contravene the bill of rights. But the minister having ascertained there is a contravention, I would think that the bill of rights would be made stronger and would have greater effect if the proposed bill to be brought in to the House of Commons were not brought in until it was revised in such a way that it would be in agreement with the bill of rights.

Mr. FULTON: That would be the responsibility of the minister and of the government, to say, after having received the report of the Minister of Justice, as to whether or not the bill is in accord with the bill of rights. If at that time, the time the cabinet receives the minister's report, it feels that notwithstanding the indication that this bill is contrary to the bill of rights, nevertheless it should be proceeded with, because the interest to be served is so important that it warrants proceeding with it, then cabinet could only do that, as I see it, by inserting a clause which is contemplated in clause 3 of this bill, or the words: "notwithstanding the bill of rights the Senate and House of Commons enacts as follows:". That would then make it clear this bill is being submitted to parliament for its approval, notwithstanding the bill of rights. The whole issue would be out in the open for parliament to assess.

Mr. BATTEN: Agreed; but that does not add any strength or "teeth" to the bill of rights if, concerning every act you are going to bring in which contravenes the bill of rights, you are going to get over the hurdle by using the word "notwithstanding".

Mr. FULTON: You cannot get over the hurdle unless parliament agrees it is appropriate to legislate in this way, notwithstanding the bill of rights. But the strength of the two provisions, 3 and 4, taken together, is that parliament cannot be left in the dark and no one can try to deceive or mislead parliament. It will be out in the open and clear for all the country to understand that what parliament is being asked to do it is being asked to do notwithstanding the bill of rights.

My understanding of the constitutional principle involved here, however, is that no parliament can bind a subsequent parliament. Therefore, we did not want to pretend that our bill of rights would prevent a subsequent parliament from overriding it if it decided to do so. But what our bill of rights does do is to ensure that no subsequent parliament can override the bill of rights without that fact being clearly in its mind and out in the open, as it were, so that it cannot be done inadvertently or by concealment, either from parliament or the country.

Mr. BATTEN: I think, Mr. Chairman, that this section of the bill, clause 4, could be strengthened somewhat because I do not think that giving the minister the authority to ascertain whether or not there is any contravention between the bill of rights and any proposed bill in the House of Commons is sufficient. I am not a lawyer and, maybe, I do not see the thing in the same way as the minister does. In the meantime, I do not know how this

could be strengthened in proper words; but it does seem to me to be a little bit weak. The minister ascertains there is some contravention and then stops there, according to this clause.

Mr. FULTON: I do not know what power you could give the minister beyond this power which implies, as I say, the obligation of reporting his information. I do not see what power you could give him beyond that, unless you make him a dictator and sole arbiter of what there should and should not be in all bills introduced.

Mr. BATTEN: I think the section could be strengthened if he were instructed—

Mr. FULTON: The principle upon which we have founded this section is to impose an obligation on the Minister of Justice to examine specifically the question of whether or not statutes or regulations are contrary to the bill of rights, which implies the obligation to report his opinion to parliament or the other appropriate authority, and then leave to parliament to decide what action it should take in light of that information. Otherwise you make the minister a dictator and put him in a position, for instance, of saying that a private member could not introduce a bill. I do not think parliament would or should accept that.

Mr. BATTEN: But do you think that, having ascertained whether or not there is any contravention, this section should also instruct the minister to report to parliament? I know that is implied, but it is not written down. To me all this section does is to ask the minister to ascertain whether or not there is any contravention; and there, according to this section, his duty is finished.

Mr. FULTON: Well, you see, your suggestion—that there be an insertion in the clause, a provision requiring the minister to report to the House of Commons—does not, as I see it, cover the question of regulations, which is a very important field. It would cover the question of statutes because there the House of Commons can immediately question the minister. But in the case of regulations, all regulations which the minister is obliged by this bill to examine, are also tabled in the House of Commons, under the provisions of the Regulations Act, which also contains provisions for members—

Mr. MARTIN: In draft form?

Mr. FULTON: Not in draft form, but after they are finally passed. The Regulations Act contains provisions for members to raise a debate on these regulations, if they object to them. After that time, if any members felt the regulations, notwithstanding the scrutiny previously given by the Minister of Justice, did contravene the bill of rights, then they could raise it in debate, and the Minister of Justice could then be questioned in the House of Commons as to what his opinion is on these regulations with respect to this question of whether or not they contravene the bill of rights. So there are procedures now for covering the whole field, but it is difficult to reduce them into the compass of one clause in the bill of rights. This clause, however, is drawn bearing in mind the machinery which now exists in respect of the regulations.

Mr. DESCHATELETS: Mr. Minister, along the lines raised by my friend Mr. Batten, there is, at page 112 of the proceedings, a suggestion by the Canadian bar association on this particular point. I quote:

> This section might be more useful if it were to require the Minister of Justice to report to parliament those bills and regulations which might be considered to abridge the enumerated rights and freedoms.

Are the explanations the minister already has given applicable to this, or would he care to comment on this suggestion.

Mr. FULTON: I think my comments already cover the points made in that passage. I have indicated that in my view there is implicit in the clause the

obligation to report to parliament. I have indicated that the manner, both of examination and report, would be worked out and covered in the regulations which themselves would be tabled and thus known to parliament, so that the procedures would be known to parliament.

Mr. DESCHATELETS: On this point also at page 29, of the evidence, Professor Scott had a suggestion to make. I quote:

> I would like to see, in the Department of Justice, a special division on human rights, or a special section in the department itself; that is to say, personnel employed by the department for the specific purpose of keeping an observant eye on not only the legislation coming through parliament and the regulations issued under that legislation, but indeed on the future goings-on in the country to see whether they could not initiate procedures that might improve the general observance of human rights in Canada.

Would the minister say a few words on this.

Mr. FULTON: The Department of Justice has certain responsibilities now, as you know, in respect of the drafting of government bills and in respect of the drafting of any regulations and the further supervision of all regulations. This imposes upon us in any event the obligation of ensuring that they are in conformity with the existing statutes and existing constitutional provisions. In addition, now, we will have the function of ensuring they all are in conformity with the bill of rights. To that extent it is not a change in our function; it is an extension of the basic application of our function. It may be that as this function develops, and as we have experience with it, that we will find we need to enlarge the personnel of the department. I think that is a distinct possibility, but we do not know at the moment how much of an enlargement of our physical responsibilities there will be, although as I say it indicates the particular application of what we must do. If we find we do need more personnel, the necessary measures can be put in hand. It might be that the extra personnel could be formed into the beginning of the sort of body Professor Scott has in mind, but we are not in a position at the moment to tell this committee or the house how many extra people we would need or whether we would need any extra people. I do not think it would be wise at the moment to commit ourselves to the establishment of a special bureau. As you know, once you provide for something like this you have to staff it and it grows. We have had strong views, and others have expressed strong views, about the tendency towards increase in the civil service. So I do not think we want to commit ourselves at this time to a special bureau, but it may become necessary.

Mr. AIKEN: I would like to repeat what I previously said. I would not like to see a large committee of any kind set up on this section such as was suggested by several witnesses. The only thing I would like to say about this section is—and it concerns the word "ascertain"—I think we should put forward as strong a bill as possible, and I wonder if there is not some additional word that might make the responsibility of the Minister of Justice just a little more definite. True enough, one minister may accept his responsibilities and another may not. I think we are establishing a bill of rights, I hope, for a long time, certainly until there is an amendment to the constitution. I would like to think that in the provinces, if this were adopted, perhaps the attorneys general would have the same responsibility. There again, if their responsibility was only to ascertain, if these words were used, they might not take their duties too seriously, and the regulations might not provide the same type of responsibility that there is now. I have a feeling somewhat of unease about this particular clause and the particular wording. I feel we would be lax in

our duties if we did not try to make something a little more definite in respect of the responsibilities of the Minister of Justice in connection with any bills or regulations which he feels are contrary to the provisions of the bill of rights or on which he is requested to report by the house, or on which he is requested to give an opinion. It may be that this is sufficiently strong, but I wonder if the minister would consider again, before we pass this clause whether there might be some improvement in the wording.

Mr. FULTON: Mr. Aiken, I appreciate your concern because it is my view and the view of the government that where you can be specific you should be specific. I can assure you, however, that it is very difficult to be specific about this matter in a statute. Take, for instance, the field of regulations. We supervise them now and scrutinize them in draft form in our department, and if we find any inconsistency with other statutes—and from now on with the bill of rights —we take it up with the authorities sponsoring the regulations. It would be my very firm expectation that if we showed any inconsistency with the bill of rights in any regulation that that inconsistency would have to be removed before the regulation had the approval of the governor in council. So when the regulation comes out any potential infraction has been removed, at least in our view.

If you put in a provision to the effect that the Minister of Justice shall report all infractions of the bill of rights in regulations, that is a self-defeating requirement, because there would be no such infraction in the regulation itself. Well then, would we have to be reporting discrepancies or inconsistencies that were in draft form? That would seem to be requesting us to give ourselves a pat on the back by saying that we have had the inconsistencies, have taken them out, and the regulation is now consistent. It is very difficult and I think somewhat dangerous to put specific requirements on this matter in statutory form; but we appreciate what you have said and will have a look at it to see if we can strengthen it, perhaps not by changing the word "ascertain", but by some elaboration of the obligation to report. We will have a look at it and see if we can put it in in such a way that it makes statutory sense, but we would not care to guarantee that.

Mr. AIKEN: There is the possibility of giving an opinion upon request in the house.

Mr. FULTON: Yes.

Mr. AIKEN: If a situation arose it would obligate the Minister of Justice to say: "I looked into this and we are satisfied that it does not contravene the bill of rights, or that it does"; but this is just a suggestion.

Mr. BATTEN: I think the word "ascertain" here is a good one. I do not know whether I would or would not suggest that the word "ascertain" be changed; but I think something else should be added to it; and whether or not the word "insure" is a good word, is a question. It is a pretty strong word. But if we are going to continue with the word "ascertain", I think some additions to this clause might remove some of the fears which we have for it.

Mr. FULTON: We will have a look at the suggestions and comments made and see if we can devise anything that could improve the Statutory wording that we already have.

Mr. MARTIN (*Essex East*): I share the concern of Mr. Batten and Mr. Aiken on this subject, that one of the weaknesses of the bill throughout is that it has no sanctions whatsoever. Here is an opportunity to have sanctions. Admittedly, it is not easy, but I would suggest that it is possible.

I believe the suggestion put forward by Mr. Badanai, that it is possible for some complexities to arise in so far as the orders of the house are concerned, is one which should be carefully looked at by the law officers of the crown, and possibly it could be modified in some detail.

But I think it is a very desirable suggestion. I hope that, when the minister says he will examine this clause, he will examine that proposal, because it has been possible to embark on this proposal in Great Britain, in Denmark, and in New Zealand. It should not be any less possible for us.

I recognize that there are difficulties in this, particularly in so far as draft regulations are concerned. I do not think there is any difficulty in regard to regulations; but in so far as draft regulations go, there would be, in so far as they are intended ultimately to empower the governor in council; and I do recognize the difficulty. But what I have to say will not apply to those regulations in draft form.

In any event I would presume that the regulations in final form, before reaching the Governor in Council, are at least theoretically examined by the minister. I do not mean by the minister personally, but by his officers in one form or another.

But if those regulations are tabled in the House of Commons pursuant to the requirements under our procedures, surely the Minister of Justice—again I do not mean the minister personally—but the Minister of Justice should examine them to see whether or not before those orders are tabled there are any inconsistencies in them vis a vis those in the bill of rights.

Mr. FULTON: May I just indicate that I agree with you so far as you have gone.

Mr. MARTIN (*Essex East*): Yes. But I think that clause 4 is really a meaningless clause. It does not change what is now the fact. The minister has indicated in what he has said with regard to regulations that this is now the practice. It must be implicit in the authority given to the Minister of Justice that he would examine every proposed regulation submitted in draft form to the clerk of the privy council, pursuant to the Regulations Act. It must be assumed that that is an obligation which he now has.

With regard to bills, I can see a dilemma. The minister does not want, nor do we, to be placed in a position, vis a vis, his colleagues where he would seem to have a sort of veto power over them in respect of legislation which is suggested by the legislative committee, if that body still exists in council. That body did exist when we were there. We used to have a committee of four or five members, under the Minister of Justice, who examined all legislation prior to discussion in the cabinet as a whole. While I recognize the difficulty, I do feel that there should be an obligation on the part of the Minister of Justice, not to veto, but to point out in cabinet, or in whatever instrument there is, that a particular bill proposed by a particular minister, is contrary to the bill of rights. I would think that anything short of that would be incomprehensible, and I would think that that now is the practice, and has always been the practice.

Mr. FULTON: You are quite right.

Mr. MARTIN (*Essex East*): I think the Minister of Justice would suggest to his colleagues that a specific bill could not be put forward in its present form. It would be a matter for the cabinet to decide. The Minister of Justice would not decide over his colleagues. It would be a matter for the cabinet to decide whether or not a specific bill should be put forward, because it violates, up to now, the judicial principles of justice, and if this bill is passed, the bill of rights. I would think it is clear that once a government bill has gone to the House of Commons, or to parliament, one would not expect the Minister of Justice then to get up and say that the bill presented, let us say by the Minister of National Revenue, is contrary to the principles of the bill of human rights: no one would suggest that. I would presume that any

parliament. But when it comes to a question of scrutinizing these things before they reach parliament, then you are in difficulties, especially with regard to regulations.

Mr. DESCHATELETS: I had in mind that a committee of this kind might study and examine complaints arising out of this bill. Your department will surely receive many complaints from all parts of the country. Some of them will not be justified; maybe some will be justified; and a committee of this kind might be very useful, I think, in making recommendations to you.

Mr. FULTON: I would not, for a moment, dispute your point there. I am not sure, and there have been suggestions made, that this is a field which might be reviewed by the committee to assist Mr. Speaker on the rules—but perhaps there should be a method by which parliament could effect an over-all scrutiny of what is laid before it or tabled in parliament. If this is a matter which the House of Commons feels they should act upon, then the government would not have the right or desire, as I see it, to make any objections; and that is for parliament to decide.

The CHAIRMAN: Gentlemen, is it agreeable to adjourn now until 2.30 this afternoon, subject to the house at that time being engaged on the estimates? Otherwise—

Mr. MARTIN (*Essex East*): What estimates?

Mr. FULTON: That is the Northern Affairs and National Resources estimates, I think.

Mr. MARTIN (*Essex East*): I think we want to cooperate with the chairman, as we have. I want clearly to establish this, though, that there are two departments in which I have an interest, and in which I will have to take the active part; and I would hope that when those matters are up that that will be taken into account. I am not interested in Northern Affairs.

Tonight it will be impossible for the members of our party to meet. It would be impossible for our group to meet because we are honouring those new hopes in other places who are visiting in Ottawa.

The CHAIRMAN: That being agreed, we will meet at 2.30. The clerk does not know exactly the room, and we will try to get notices to you; but I think it will be one of the Senate rooms.

May I have a meeting of the steering committee immediately after the questions on orders of the day are completed?

Mr. FULTON: So that I shall not be in any uncertainty or appear disrespectful to the committee, I take it that the committee will meet at 2.30 subject to the combines legislation being concluded in the house at that time?

Mr. MARTIN (*Essex East*): Your filibuster is over now?

Mr. FULTON: Is yours?

AFTERNOON SESSION

WEDNESDAY, July 27, 1960.

2.30 p.m.

The CHAIRMAN: Gentlemen, we have a quorum. The minister is on his way down. But before we continue with our questioning of the minister I would like to present a report of the subcommittee on agenda and procedure which met this morning. The report reads as follows:

> The subcommittee on agenda and procedure met at 11:40 a.m. this day. The following members were present: Messrs. Badanai, Browne (*Vancouver-Kingsway*), Spencer and Stewart.

Your subcommittee recommends as follows:

1. That the committee accede to the request of Mr. Martin (*Essex East*), that no meeting be scheduled for this evening and, having regard therefor recommend the scheduling of meetings on Thursday. July 28 at 9:30 a.m., 2:00 p.m. and at 8:00 p.m. if necessary, in order to conclude the deliberations of the committee.
2. That letters received from Professor Edward McWhinney of the university of Toronto, and presently in Heidelberg, Germany; Mr. F. A. Brewin, Q.C. of Toronto; Mr. J. Auguste Pepin of Ottawa; Orillia Chamber of Commerce; Windsor Chamber of Commerce; and Associated Investors of Canada Ltd. be filed with the committee and copies distributed to members.

Mr. STEWART: I move the adoption of this report.

Mr. RAPP: I second the motion.

Motion agreed to.

Mr. MARTIN (*Essex East*): Subject of course to the exigencies of the house.

The CHAIRMAN: I think Mr. Martin has raised the possibility of the labour department estimates being reached tomorrow. It is possible that they may not, but if they do arise and we are engaged at the time in a serious discussion of clauses, when Mr. Martin has to absent himself, I am sure, the committee will try to accommodate themselves to the situation and perhaps take a short recess.

Mr. RAPP: On division.

The CHAIRMAN: At the time we adjourned I believe we may have concluded consideration of clause 4. If so, I suggest that the questioning now proceed on clause 5.

Mr. STEWART: Might I ask the minister if there is any particular reason why clause 5—as he himself has mentioned—is placed in part II rather than in part 1.

Mr. FULTON: Yes. As I indicated before, we thought it was desirable to have a bill of rights and a declaration of fundamental freedoms and liberties for all Canada, and one which might be copied or was suitable for framing or hanging on the walls of schools, for example, or church halls, assembly halls, and similar places; and we felt that such a bill of rights should be as simple and uncomplicated as it is possible to make it.

So the statute, in so far as we could do it, is an uncluttered declaration of those rights, with the addition only of a statement of how they are to be inforced and protected. That is clause 3; and perhaps something about the responsibility of the executive to ensure the healthy observance of the spirit of the bill of rights.

So we felt that clauses 1, 2, 3, and 4 should themselves constitute the Canadian bill of rights and that the more purely legalistic provisions such as the saving provision, and the impact of the War Measures Act, which we contemplate, should, while part of the act, be placed in a separate part, and not form a part of the Canadian bill of rights. So we adopted the two divisions, of having parts I and II with clauses 5 and 6 in part II.

Mr. MARTIN (*Essex East*): May I suggest that when we come to deal with clause 3, when dealing with the matter, clause by clause, in so far as the possibility of amendments are concerned, and of the comments which the minister has just made, those things can be done, and I have an idea as to how we can do them; but what I think is a desirable objective—and this is not for propaganda; I am sure the minister would not have that in mind—but for the purpose of the psychological effect of the bill, we would want the bill of rights

to be in such form that it would create an impression, for example, on the minds of school children. So I shall have something to propose.

I did not quite understand the minister when he mentioned something about the executive.

Mr. FULTON: I explained before that the framework of the bill is a statute which covers the three branches of government, the legislative being covered in clause 2, the judicial, being covered in clause 3, and the executive, being covered in clause 4.

Mr. MARTIN (*Essex East*): Was there not some suggestion made about putting something at the bottom of the bill itself?

Mr. FULTON: You do not mean "The bill was passed by the Diefenbaker government?" No, we do not have that in mind.

The CHAIRMAN: That is a good suggestion.

Mr. BROWNE (*Vancouver-Kingsway*): There has been some concern about where the jurisdiction of this bill went, and there was a suggestion in the earlier clauses that if there was need to clarify the matter in any way—and I am not saying that there is but that if that were to be considered, clause 5 might be a convenient place to put that in, to show that it applied to those things within the jurisdiction of the parliament of Canada. If it was felt there was a need to clarify that position, it would seem to be a suitable place to have it inserted.

Mr. FULTON: I think that is an interesting and valuable suggestion, perhaps taken in conjunction with the suggestion that there might also be a short phrase in the preamble. This would be in the act itself, and it might be a very useful way to make it clear to the courts what the intention of the legislature is.

Mr. MARTIN (*Essex East*): If it were put in the preamble, that would take care of it.

Mr. FULTON: There is room for difference of opinion there.

Mr. MARTIN (*Essex East*): I think the courts would have to look at the preamble.

Mr. FULTON: I think the rule is that, notwithstanding what is in the preamble, if the courts feel that the section has a definite effect, a definite legal effect, then they cannot avoid or refuse to give effect to the interpretation of the simple language of something in the preamble. But as I say, there is room for difference of opinion, and we could consider the two together.

Mr. BROWNE (*Vancouver-Kingsway*): I am not sure that everybody will have a difference of opinion as to what should be in the preamble, but it would seem to me that those words would not add anything to the poetic value of the preamble, and that a better place to have them would be just where they are here in the bill.

Mr. FULTON: I think that is right.

Mr. MARTIN (*Essex East*): There are some very good preambles which are in the embryonic stage.

The CHAIRMAN: Then, gentlemen, may we direct our questioning to clause 6?

Mr. BROWNE (*Vancouver-Kingsway*): I think I asked earlier a question of the minister on this point: I had said that clause 6 provides that when the proclamation is made for the War Measures Act to come into operation, provision for it—

Mr. DESCHATELETS: I am sorry to interrupt, but I have a question on clause 5. There are two terms in clause 5, "abrogate" and "abridge". I wonder if the term "limit" should not be added. Abrogate or abridge do not have the same sense as "limit."

Mr. FULTON: We have used the words "abrogate" or "abridge" throughout the act. They are used, for example, in clause 3, where it reads "abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement".

If you are wondering why we did not put "infringe" in here, I suggest that in this case the word is not applicable.

Mr. DESCHATELETS: Is the minister satisfied that with those two terms, abrogate or abridge, we are covering the whole field of existing rights, apart from those under the section?

Mr. FULTON: I have not looked at the Oxford dictionary or any other dictionary at the moment, but "abrogate" surely means to wipe out, while "abridge" to put a limitation upon, or to shorten. So I think that we have covered the field pretty thoroughly.

Mr. MARTIN (*Essex East*): It seems to me that Mr. Dorion had something to say on this point.

The CHAIRMAN: Should we not refer to the French version to see how it is expressed therein?

Mr. MARTIN (*Essex East*): I think Mr. Dorion had something to say, but he is not here today.

Mr. DESCHATELETS: We might go on in the meantime, Mr. Chairman.

Mr. BROWNE (*Vancouver-Kingsway*): I had started to raise a point, Mr. Chairman, with respect to clause 6, where there is a provision made by proclamation, whereby the War Measures Act would be brought before parliament within 15 days after opening of the next session if it was not sitting at the time. I do not know how long the government might ask to have that measure enacted for. I was just wondering, assuming that the members of parliament felt that the emergency had passed, if the measure had been put into effect for one year, or two years, whether some limit should be placed on the amount of time for which it could be passed at one time, such as a year, or perhaps some provision could be made so that the question could be raised again, the emergency having passed.

Mr. FULTON: Mr. Browne, I think I see your point. Your point is that clause 6, as it is drafted here, gives the members of parliament the absolute right to bring the matter up for debate only if they had put down a notice of motion expressing that desire within ten days after the proclamation is laid on the table.

Mr. BROWNE (*Vancouver-Kingsway*): Yes.

Mr. FULTON: Your question is, that this covers the commencement of the alleged state of emergency, but what would happen if the government continued such a proclamation in effect for some time after the emergency might be considered to have passed?

Mr. BROWNE (*Vancouver-Kingsway*): That is right.

Mr. FULTON: In this respect I am advised that it would be open to the courts to entertain an argument that at that point the exercise of the emergency powers was not warranted on the grounds that the emergency no longer existed. That would be one protection. It might be suggested that is still not sufficient, and that members of parliament should have the right to debate it. Of course, subject to the ordinary rules of debate, any member can put down a notice of motion at any time. The difference between that kind of notice of motion, after the ten days had passed, and the motion made under the provisions of this act, within the ten days, is that the act itself here provides that such notice of motion will be brought on for debate within four days, and that any other motion would only have the rights of debate afforded by the ordinary rules of the House. I do not know that we could do much better than that because, if you went much further

than that you would then have the situation where perhaps such a motion could be brought up once a month, or once a week, or at any time any member felt it necessary, whether the purpose be for obstruction, or for valid reasons. So we have felt that the proper thing to do is give the members of parliament the right to have the validity of the proclamation tested by debate immediately the proclamation is made, or immediately parliament assembles after the proclamation is made. We did not think it was sound to carry that special provision forward so as to give members of parliament the right to challenge, in a special way, the existence of an emergency at any time after the proclamation was made, and after the right of initial challenge had expired.

Mr. BROWNE (*Vancouver-Kingsway*): In raising that point I appreciated the difficulty as to a member raising this at any time, so that it might be perpetual; but it did seem to me that when a certain matter was first proclaimed as a general emergency, in the heat of that emergency parliament might be willing to extend the provision for perhaps two or three years, assuming that it would be required for that length of time; and I was just wondering whether a member should be able to bring this up, not every week, or month, but perhaps every year.

Mr. FULTON: The War Measures Act never has been brought into effect by proclamation for a fixed period of duration. The proclamation merely states that there is a state of war, invasion or insurrection. I think it would be a little dangerous, and certainly an unusual innovation, for a government by this proclamation, to attach a length of time during which they felt that the emergency would exist, or after it felt it had ceased to exist; because who is to say how long it will exist?

Mr. BROWNE (*Vancouver-Kingsway*): That is why I suggest perhaps it should be made possible for members of parliament to deal with the matter after the provision had been in effect for a year, for instance, and it was felt that the emergency had then passsed. I felt that there should be a provision allowing a member of parliament to raise the question perhaps a year later. I am not suggesting it should be allowed to be raised at any time, but after it had continued to be in existence for a considerable period of time and it was perhaps felt that it should be debated again to determine whether the emergency had passed.

Mr. FULTON: How are you to determine how many members are necessary before this debate can be raised? Are you going to have the question as to whether a war exists debated at every session? If there is a war, it seems to me that the government should be given the power to carry on, or to carry out the measures necessary for successful prosecution of the war, and that if the question of the existence of the war is to be challenged at almost any time the members wish to challenge it, it will be a problem.

The CHAIRMAN: I was wondering, Mr. Minister, if that situation could not be met by simply eliminating the words "within 10 days", because when the proclamation is laid before parliament it is quite feasible, or quite possible that no question would be raised about the fact that an emergency exists, and there would be no need, or no desire to have a debate in respect of it within that period of 10 days. The desire to do so might arise six months later, or nine months later. Mr. Browne's point might be met by simply eliminating those words "within 10 days"?

Mr. FULTON: If you did that, of course, then the effect would be that it could be debated not only shortly after the proclamation, or alternatively, shortly after parliament met, but at any time thereafter. This would happen if you cut out that limitation.

I would like to point out that from the point of view of an administration, the urgency of taking out the War Measures Act is, it is true, not as great as the urgency for bringing it into effect; but on the other hand, parliament could always debate it in any event, or discuss it in debate on the throne speech, on the estimates of the Department of National Defence, for instance, on supply motions, and by attacking the regulations tabled in the House of Commons under the War Measures Act as an encroachment of the provisions of the Regulations Act, and by various other methods. What we have thought important to ensure is that parliament should have the right to challenge the declaration of emergency itself in order that parliament should have the right to raise the question of whether it is not a false emergency brought in or created for the purpose of enabling the government to get around the bill of rights.

Mr. MARTIN (*Essex East*): Have you given any consideration to the suggestion that Professor Cohen made—this follows what you have just said—that we ought to devise—I am not putting this forward as a view that I support; I am not putting it forward as a view I am in disagreement with; I am just putting it forward now for clarification—namely, that parliament should be, during the period following the declaration of war until its termination, in continuous session so that the rights of parliament, which you have just recognized as being capable of being forced through by one procedure or another, might be met?

Mr. FULTON: Yes, we have considered that, and I would think there are probably about as many opinions that could be expressed as there are possibilities that arise under the circumstances that might be envisaged.

If you had an atomic war, an international war, in the first place you might have your facilities for holding a session of parliament destroyed, wiped out, by the atomic attack. We have felt, in drafting this, that with any government that is still in existence, having any sort of national, organized effort at all, it should not be beyond the capabilities of the government to arrange for holding session of parliament within a year. There, of course, the government is under the constitutional obligation to hold a session of parliament in a year.

But whether you could get parliament in continuous session is an open question. The temporary facilities might, again, be wiped out in the course of the war.

So we have felt that because of the imponderables of the situation it would be unwise, in legislation, to impose upon the government the obligation of calling parliament and providing the facilities whereby parliament could be kept in continuous session.

Mr. MARTIN (*Essex East*): The argument you have just put forward does not, it seems to me, really address itself to this point, any more than it covers some of the concerns that Mr. Browne has just mentioned. The suggestion, as I understood it, was so that parliament would always have the opportunity that you have acknowledge should belong to parliament; there should not be any gap during which it would not be possible for parliament to exercise its right of discussion in order to preserve these human rights and fundamental freedoms.

We had one experience of entering a war where parliament had adjourned; it was prorogued immediately before, on the same day, or the day before—I forget which—and a new parliament was summoned. It would be possible to revise that technique. You could have the address from His Excellency at the end, one day or an hour before, and you could have the opening of a new parliament, with the address by His Excellency following that. As a matter of fact, in the British parliament that frequently happens.

Mr. FULTON: I think we are confusing two terms here—to keep parliament in continuous sittings, or sitting continuously, and to keep parliament in continuous session. You cannot—I think you will agree with me—provide for the summoning of a new parliament the day after the old parliament is dissolved, because a new parliament means a parliament just recently elected. I think we have to be careful of our terms here. In order to elect a new parliament, you have to dissolve the old one, and you have to have a period of election.

Mr. MARTIN (*Essex East*): As far as the election is concerned, I agree.

Mr. FULTON: What we are really discussing is the keeping of parliament in continuous session, in a formal sense. That could be done. Let us take a parliament that has just been elected and has its first session. If you have a state of war, that session, instead of being prorogued, could be adjourned. You are quite right. So technically parliament is still in session. All that needs to be done is have the members recalled, and then it continues sitting.

Then the session could be adjourned, I agree, until 364 days after that session began. Then that session could be formally prorogued and the new session commenced the day after.

That could be done. But I felt that what Professor Cohen was getting at was the suggestion that parliament be kept continuously sitting, which is the point of view I was discussing when I referred to the possible physical difficulties in arranging facilities for a continuous sitting. If you merely mean parliament be kept in a continuous session, in the technical sense that I have just recently referred to, I can see no obstacle to that, during the life of a parliament.

Mr. MARTIN (*Essex East*): I really think that is what he meant.

Mr. FULTON: I think that probably it is, on reflection. I had put the other interpretation on it, that he had in mind continuous sitting.

The CHAIRMAN: I think that did occur on two occasions about 1952.

Mr. FULTON: It has occurred since I have been a member, I know; and I think Mr. Martin is quite right, it occurred during the war, 1940-1941, and—although I am not sure—at the time of the Korean emergency, or some time around there. Instead of being prorogued at the normal time, it was adjourned and then prorogued the day before the next session began again the next year.

Mr. Martin, may I ask for time to ponder that thought?

Mr. MARTIN (*Essex East*): Yes. I just mention it, because we are not dealing with any amendments at this stage and I just put forward the idea to get your comments on it.

Mr. FULTON: I appreciate the opportunity of this discussion, because it has certainly clarified my thinking. I know that in directing my thoughts to it until now, I had directed them to the idea of keeping parliament continuously assembled and sitting, which I had foreseen as a very difficult thing to arrange.

I think the other is much easier, and I would like an opportunity to think it over and see if it is appropriate to put in the bill of rights.

Mr. MARTIN (*Essex East*): I have one more question on this clause. Have you given consideration to the suggestions made by the Leader of the Opposition?

Mr. FULTON: With regard to the amendments to the War Measures Act?

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: Yes; and, indeed, the other suggestions that have been made. I would suggest, though, that that is a question of the amendment of the War Measures Act itself. You will remember that Professor Lower—and, I think, Professor Cohen—had observations to make in that connection,

the effect of which was that, quite regardless of the bill of rights, the War Measures Act should have a good scrutiny and probably an amendment.

For the time being, therefore, it seems to me that the soundest approach is to enact this one amendment, which we have included in the bill of rights, which safeguards the right of parliament to question a declaration of emergency itself, and then to embark upon what the Prime Minister has indicated he would like to see done, namely, a general revision of the War Measures Act itself, at which time consideration would be given to views raised by the Leader of the Opposition and all other questions that may arise.

Mr. MARTIN (*Essex East*): We can deal with that when we come to it at a later stage, because I have some suggestions to offer.

The CHAIRMAN: Are there any more questions on clause 6?

Mr. MARTIN (*Essex East*): Perhaps Mr. Chairman, I should just put one more question.

Have you given consideration to the suggestion that clause 6 should not be in this form, and that there should be a simple statement in the section providing something along this line: this act shall not in any way affect the War Measures Act.

Mr. FULTON: What was the last part of your sentence?

Mr. MARTIN (*Essex East*): Just a brief section saying: this section shall not affect the operation of the War Measures Act,—so as to give the bill of rights itself as pure a form as possible.

Mr. FULTON: Well, if that was all you did, you would not be able to put in the provision we have—that parliament shall have the right to review and debate the very declaration of an emergency under which the War Measures Act is invoked.

Mr. MARTIN (*Essex East*): I agree. I just wanted to have your comments.

Mr. WEICHEL: Mr. Minister, could you give us a little explanation on No. 4?

Mr. FULTON: Subsection 4?

Mr. WEICHEL: Yes.

Mr. FULTON: Well, perhaps, I had better read it, so my remarks will be in context:

> If both houses of parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5—

and that is of the War Measures Act itself:

> —shall cease to be in force until those sections are again brought into force by further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

And, going through that stage by stage, if parliament should decide that the invocation of the War Measures Act was unjustified and that there is no real emergency on the basis of which emergency powers should be relied upon and the bill of rights set aside, then parliament would so decide by resolution. That immediately would have the effect that the proclamation under which the War Measures Act was invoked was of no effect, and from that date forward the War Measures Act would cease to be in effect—or, rather, sections 3, 4 and 5 of the War Measures Act would cease to be in effect. Those are the sections under which the government is given the emergency powers. But you have then reserved the right to the government to reconsider its position and to preserve its right to another proclamation bringing the War Measures Act into effect, if there should be a genuine emergency. If parliament had then

decided the emergency on which the government had purported to rely was not a genuine emergency, I imagine the government would regard itself as having been defeated, because of this far-reaching reversal of government decision—and that would take care of any further action by that particular government. But, we did want to make it clear that such a resolution by parliament does not deprive any government of the further right to invoke emergency powers under the War Measures Act. It would have to do it by the solemn decision to issue another proclamation when it felt itself justified in doing so.

That brings you to the result that those sections of the War Measures Act shall cease to be in force, but without prejudice to the previous operation of those sections. That is to take care of those situations in which a proclamation had been issued by a government, possibly in good faith. They really felt there was an emergency, even although parliament might have subsequently decided, in accordance with the rights given to it, that there was no such emergency. You would then have had in the interim a situation under which things were being done by virtue of the powers vested in the government officials who were acting under instructions, and had no alternative but to do that, and would be acting in accordance with and taking measures under special powers so conferred upon them. In the absence of those powers and that authority, it could well be held that those officials, acting beyond the scope of their authority might be personally liable for their actions. Therefore, it was necessary to protect what was done in good faith while the proclamation was in effect because, if you did not protect that, you would have chaos resulting, and a wide variety and an unforseeable number of situations and complicated claims made against people who had acted in good faith while the proclamation was in effect. That is why the words:

> . . . without prejudice to the previous operation of those sections or anything duly done or suffered thereunder. . . .

and so on, have been included.

Mr. WEICHEL: Then, sections 3, 4 and 5 refer to the War Measures Act?

Mr. FULTON: Yes, which are mentioned in subsection 1 of this section, as you will see.

The CHAIRMAN: Are there any further questions on clause 6?

Mr. JUNG: Mr. Chairman, I am not clear on subsection 5. Am I to take the interpretation, in reading subsection 5, that the War Measures Act will override a bill of rights?

Mr. FULTON: Well, it will so long as it is in force under a proclamation issued, and not revoked by parliament.

Mr. JUNG: I wanted to make sure that that was the intent.

Mr. MARTIN (*Essex East*): Do I understand you are saying, Mr. Minister, that the War Measures Act will revoke the bill of rights?

Mr. FULTON: Not revoke—override it, while it is in force.

Mr. MARTIN (*Essex East*): I would have hoped that we could so revise the War Measures Act that it will not in any way affect the bill of rights.

Mr. FULTON: It will not revoke it; but if the War Measures Act is operative, giving the government emergency powers, it seems to me impossible to provide that it does not, during that period, override the bill of rights.

Mr. MARTIN (*Essex East*): I wonder if you have carefully considered that. I cannot envisage that. Certainly, I have some views about what we should do about the War Measures Act in so far as section 6 is concerned, and I would hope, with those corrections, it would be possible to provide that the War Measures Act would not affect the bill of rights and that it would not,

in any way, as a result, interfere with the official operation of the War Measures Act.

Mr. FULTON: That, it seems to me, is going to be entirely determined upon the emergency powers that a revised War Measures Act may contain. If a revised act contains in it no powers under which the government could act contrary to the provisions or spirit of the bill of rights, there will not be a conflict. But the War Measures Act, as on the statute books, gives the governor in council power to do things which are contrary to the bill of rights. That is why we think it essential to put into these provisions the right of parliament to review the proclamation on which the War Measures Act is brought into effect. If the War Measures Act now or in future, did not contain things contrary to the bill of rights, then, from that point of view, parliament would have no cause for concern whether the act was in force or not. I do not think anyone has suggested yet, whether it be the present War Measures Act, or a revised War Measures Act, that such a statute should not contain provisions giving the government some emergency powers; and the very existence of that situation surely connotes, by necessary inference, that the government has power to do things which a bill of rights, in all its implications, would not contain. I do not thing anyone has suggested that you can have a War Measures Act or an emergency act which does not, in at least some degree, transgress the spirit of a bill of rights.

Mr. WINKLER: I would be very surprised if an intelligent man like Mr. Martin would have any other views than those expressed by you in the first place.

Mr. MARTIN (*Essex East*): What I meant to say is, subject to sections 2, 3, 4, 5, 6 and 7 of the War Measures Act, nothing in the War Measures Act should abrogate any of the provisions of the bill of rights?

Mr. FULTON: Well, I think that, of course, leaves sections 8 and 9 of the present War Measures Act, so that I really am not able to grasp the implications of what you have in mind.

Mr. MARTIN (*Essex East*): Perhaps we ought to wait until we get to the actual amendments of the section. In the meantime, perhaps you could give consideration to that, because I do recognize it is a very important one. I submit, at any rate, subject to those sections, that the bill of rights should not be regarded as abridging, infringing or abrogating any of the rights or freedoms recognized by the bill of rights.

Mr. FULTON: Sections 3, 4 and 5 are the sections which confer the powers.

Mr. MARTIN (*Essex East*): Subject to those.

Mr. FULTON: Section 6 is the limitation on the duration of the War Measures Act. Section 7 is procedure, Section 8 relates to forfeiture of vessels, or goods, et cetera, moved or dealt with contrary to any order. Section 9 provides for rules of court. So if you take out sections 3, 4 and 5, let alone sections 6 and 7, you have pulled all of the "teeth" from the War Measures Act and you have not any emergency powers.

Mr. MARTIN (*Essex East*): Under sections 2 to 7?

Mr. FULTON: Under sections 3, 4 and 5.

Mr. MARTIN (*Essex East*): I would say, subject to all those sections.

Mr. FULTON: What you mean is that those sections, while in force, can be taken to override the bill of rights—but only while in force?

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: We had—

Mr. MARTIN (*Essex East*): I forgot to mention the subsections to which the bill of rights would be subject.

Mr. FULTON: I do not think sections 8 and 9 could operate as overriding the bill of rights.

Mr. MARTIN (*Essex East*): I do not think so either. We can consider that in detail; but I want to put it under consideration now.

The CHAIRMAN: Now, gentlemen, can we turn our thoughts to the question of a preamble?

Mr. MARTIN (*Essex East*): I wonder, on the preamble, if I could make a suggestion? I know we have all been working on a preamble. It is not the easiest task. I was wondering if we could not leave the preamble until after we have examined all the sections, because it may be that out of this discussion we might find some things that we either want to exclude or include in a preamble. I know now—from what the minister said this morning, and I think that he is right, though I am not positive—that I want to modify something in my preamble. I am making the suggestion now that we should leave that and go ahead with the sections, and then come back to it and see whether or not we have got everything we want included in the preamble. We should have the whole act before us, I think, before we deal with the preamble, to make sure we are not putting in the preamble something we do not want to.

The CHAIRMAN: The only thing that occurred to me, having regard to the discussions that have taken place before the committee, is that it might well be that some of the members will feel that, for instance, section 2 should be amended if there is to be no preamble.

Mr. MARTIN (*Essex East*): Yes.

The CHAIRMAN: But if there is to be a preamble, then section 2 would be considered to be satisfactory. So I am inclined to think that some decision ought to be made now as to whether or not we can agree upon a preamble. That is just a suggestion.

Mr. MARTIN (*Essex East*): I think that a preamble is really something that we are not going to be able to work out here, around this table. It seems to me, that the suggestion of the minister, that a committee be appointed to consider various suggestions, was a wise one. Then you would not only consider those suggestions but, perhaps, also do some formulating. Then we could have before the committee oral discussion on the sections. I think we would save a good deal of time.

If we devise a preamble now, in the light of not having had the detailed discussion on the sections, we may find we have agreed on a preamble that does not fit in with some of the conclusions that we have arrived at with regard to the various sections. I think that is very important.

I think we could assume, for instance, the possibility in the preamble—to meet the objection I had to clause 2 and Mr. Dorion had—of working in some words clearly to establish that section 2 refers to matters only within the competence of the federal parliament. I think you would find that would be—

Mr. STEWART: Was the point not to decide whether we are going to have a preamble?

Mr. FULTON: Not to fix the terms of it now.

Mr. STEWART: We have not decided yet whether we are going to have a preamble.

Mr. MARTIN (*Essex East*): That is right.

The CHAIRMAN: I think if we are going to have a committee to work on the matter of a preamble, we should make that decision now.

Mr. MARTIN (*Essex East*): I agree.

The CHAIRMAN: And perhaps even have that committee begin deliberations right now. The main committee would then stand over until they could report later this afternoon or first thing in the morning.

Mr. BATTEN: It is my opinion, in a procedure of this nature, that where you are trying to get some of your thoughts down in actual words everybody knows it is not a very easy thing to do.

I think the sound thing to do is to have this committee draw up some kind of preamble, and then when the committee sits on it, they will have something to discuss, something which they can get their teeth into.

Mr. FULTON: I have an alternative suggestion to the ones already made, if it is of any help to you. If you thought it was a more practical way of proceeding, you could ask all those who have preambles to make their suggestions, or file them, as you wish. Then, my department could take them and try to amalgamate them and come back with a suggested preamble. That might be easier than having a group of members sit down around a table.

Mr. STEWART: That is perfectly satisfactory to me.

Mr. MARTIN (*Essex East*): That is agreeable to me, expressing my view, subject only to the right of any member, at any time, to offer a contribution to this committee.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): Or to the office of the crown?

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I think that is a good suggestion.

Mr. FULTON: I think it might save the time of the committee, instead of having them form into a sub-committee. I know that Mr. Martin will appreciate what I say when I say that he knows some of the difficulties of men sitting down and trying to draft something—people who hold strong, divergent views trying to propose acceptable compromises. Our department would try to do that job for you, holding the balance between the various points of view that have been suggested.

The CHAIRMAN: And have it brought back to the committee?

Mr. FULTON: Yes, and have it brought back to the committee. Anyone can suggest amendments to it, or further alteration.

Mr. BATTEN: I would agree to that.

The CHAIRMAN: I think that is unanimously agreed, then?

Agreed.

Mr. FULTON: We will go to work on that whenever the suggestions are made available to us.

The CHAIRMAN: I think the officers of the department should get at it right away. I believe there are five which have been filed and distributed.

Mr. MARTIN (*Essex East*): I think that the minister would want to have some of his officials here, not that he is not capable because I think he is. I think some of us would want to have them here. I do not think they should meet right this afternoon.

Mr. FULTON: No.

The CHAIRMAN: I would suggest that the members who have preambles ready turn them in by the time we adjourn today, let them work on them, and then they will be reported back subject to the right of any member to offer other additions.

Is that agreed?

Agreed.

Mr. FULTON: Might I suggest, Mr. Chairman, in amplification of that, that if any member has a preamble with him he might like to have it placed on the record as being his contribution. Would it be agreeable that they be read out

now so that they will be on the record and after the 6 o'clock adjournment my officials can go through everything that has been produced.

The CHAIRMAN: Would you like to read yours, Mr. Badanai?

Mr. BADANAI: It is very short:

> In recognition that the Canadian people believe in the dignity of man and are composed of many races and religious beliefs, the parliament of Canada hereby declare and re-affirm the people's fundamental liberty to work and to worship his God to the satisfaction of his conscience and Her Majesty, the Queen, with the advice and consent of the Senate and the House of Commons of Canada enact as follows:

The CHAIRMAN: Thank you, Mr. Badanai.

I think it is most commendable that so many members have taken the time to work out a preamble. It is not an easy matter.

Mr. FULTON: So that we may know that we have everything the members wish us to have may I mention the ones of which we have notice. I am not selecting these in any order. They are in the order they have been handed to me: Mr. Aiken, Mr. Dorion, Mr. Drysdale, Mr. Martini, Professor Cohen, the one Mr. Badanai has just read, and Mr. Stewart. Those are all those of which we have notice so far; and Mr. Martin has one.

Mr. WINKLER: I too have one. Would you wish it now?

The CHAIRMAN: It would be just as well to put it in at this point.

Mr. FULTON: So long as Mr. Driedger has it before 6 o'clock.

Mr. WINKLER: Yes. I will make sure it is in by 6 o'clock.

Mr. BATTEN: Could it be put on the record at this point and taken as read?

The CHAIRMAN: Could we agree that Mr. Winkler's suggested preamble be taken now as read and appear in the proceedings of the committee at this point?

Mr. WINKLER: I would appreciate that.

The CHAIRMAN: And that it be delivered to the officials of the Department of Justice.

Mr. WINKLER:

> Canadians being a proud and vigilant people, of many lands, desire the maintenance and preservation, against government, of their spiritual and democratic Institutions, their traditional respect for the rule of law, their love of freedom and cultural ties. Recognising their responsibilities one to another, and internationally through the United Nations charter regarding the sovereignty of the individual in his relationship to the state as the highest aim of Canadian nationhood and of fundamental rights and freedom request Her Majesty by and with the consent of etc.

Mr. MARTIN (*Essex East*): May I ask the minister a question. In respect of the preamble is it essential, for purposes of drafting and acceptance of the draft, that there be a "whereas" clause in it?

Mr. FULTON: I would say it is the customary form, but we are writing a bill of rights and I think whatever we decide as being more appropriate should be the form.

Mr. MARTIN (*Essex East*): I thought it might be a requirement.

Mr. FULTON: I do not think I would care to lay that down as a requirement.

The CHAIRMAN: I think we are getting away from the "whereas" style.

Mr. MARTIN (*Essex East*): So do I, but—

Mr. FULTON: It has an appeal on the basis that it is the traditional form and one that people understand. But I only say it has an appeal and if one can bring one in with more appeal without the whereas we would certainly consider it.

Mr. MARTIN (*Essex East*): I have a suggested preamble here I would like to put in:

> Before God the Canadian people, united for the common pursuit of their well-being, composed of persons of various races and religions from many nations; intent on preserving (the heritages of the past), especially that of the dignity of the individual in his rights and freedoms which have been secured through the institution of parliament and the law, desire to reaffirm their faith in these human rights and fundamental freedoms.
>
> Having joined with other nations and their peoples in the universal declaration of human rights, the people of Canada hereby rededicate themselves to the principles of that charter in their human, social, political, economic and legal terms, particularly those concerning the sanctity and inviolability of the family as the fundamental unit of society, the right of the individual to participate in government and to earn a living for himself and his family.
>
> The Canadian people, therefore, believe that it is meet and proper that, for the better understanding of all, the parliament of Canada declare before man and God, on behalf of the nation, those human rights, fundamental freedoms, and objects of national purpose that are within its competence so to do.
>
> Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, therefore enacts:
>
> *The Canadian bill of rights.*

The CHAIRMAN: Thank you, Mr. Martin.

Does that preamble pre-suppose the elimination of clause 1 of the bill?

Mr. MARTIN (*Essex East*): No. As a matter of fact I was going to suggest that clause 1 be at the end of part I. It would have to be at the end of part I. The reason is to make it as attractive a document as possible. I know the practice is to see it at the beginning, but I thought in this particular situation it would add to the attractiveness by taking out something that is purely procedural.

Mr. STEWART: You would put one as four?

The CHAIRMAN: To keep the discussion in order, I shall now call clause 1. I think this would be the appropriate time to discuss it.

On clause 1—Short title.

Mr. MARTIN (*Essex East*): I would suggest that having in mind what the minister said about the desirability of a short form, that to put almost in the middle of the act the title, the short title, is to put in something which is not of substance; it is more by way of nomenclature, and it seems to me that it would be more fitting in form if it came at the end.

The former practice always was to put it at the end, although the draftsmen always put it at the top.

Mr. FULTON: Well, that could be done, and we would simply renumber 2, 3, and 4, as 1, 2, and 3, and put 1 in as 4.

I agree that the words "this part may be cited as" could be described as pretty dull legal terminology. But when you read the whole, that is, they may be cited as the Canadian bill of rights, they are not really difficult to understand.

I wonder if there is not some desirability to have that at the beginning of the bill of rights, so when you put it on the wall the impression is that this is the Canadian bill of rights, because it appears right at the beginning?

Mr. MARTIN (*Essex East*): In the preamble which I put forward I did that, but my preamble would have to be modified if my suggestion were to be accepted, obviously. But this suggestion came to me after I had drawn the preamble. There is no insistance about this.

Mr. BROWNE (*Vancouver-Kingsway*): Might I suggest that the point be considered in the light of the preamble, and if an acceptable preamble is brought forward, we might consider it, and if the clauses need to be renumbered, it would not change the content of any of the clauses. Either way we might discuss them now, and then if they have to be renumbered, it would be only a minor change.

Mr. MARTIN (*Essex East*): My suggestion would be more effective in the preamble than the way I have proposed it; but if it is not accepted, we might give consideration to putting it this way. I agree with Mr. Browne.

Mr. FULTON: The difficulty or the point of criticism, if I may put it that way, is that if you have your title in the preamble, and say that this is the Canadian bill of rights, then it applies to both parts I and II. But, as I explained before, we did not want to have part II as part of the Canadian bill of rights. That is why we resorted to the device of having a part I and a part II, and having the title in part I, because the preamble is presumably the preamble to a whole statute. It cannot just be a preamble to part of it.

I do not think there is any obstacle from the position of drafting procedure to our putting it in as clause 4, if you like.

Mr. MARTIN (*Essex East*): Will you give it consideration?

Mr. FULTON: Certainly, we will.

The CHAIRMAN: I was just wondering how we can finalize it.

Mr. MARTIN (*Essex East*): Do not finalize clause 1.

The CHAIRMAN: Is it agreeable then to the committee that clause 1 stand over for subsequent consideration?

Agreed.

Then I shall now call clause 2.

On clause 2—Recognition and declaration of rights and freedoms.

Mr. BATTEN: On clause 2, there has been some considerable discussion here concerning the words in the first three lines, lines 5 to 7. A number of us have been concerned about the meaning of the word "always".

You will remember on page 25 of the evidence given by Professor Scott, that he referred to this as a legislative lie, because he contended that these freedoms about which we are talking have not always existed in Canada.

Then again if you will look at page 376, at the evidence given by Professor Cohen, you will see that he referred to it in a similar manner, but he also expressed a different or alternative view.

I, too, would think, Mr. Chairman, that if, the minister has it in mind that the first part of this bill is to be considered a Canadian bill of rights—

Mr. RAPP: What page is that?

Mr. BATTEN: I am referring to clause 2 of the bill of rights. You said what page? It is page 376 of the evidence.

Mr. RAPP: Thank you.

Mr. BATTEN: I would think that is the evidence given by Professor Cohen. If this first part is going to form what is known as the Canadian bill of rights, I hope it would be made available to all Canadians, particularly our

younger people, and that every centre in this country would have a copy of it.

I would think that the historic statements made in the beginning of this bill would be something that nobody would be in a position to criticize. Again, due to the fact that we may have a preamble to this bill, it might be better if we were to change the first three lines altogether, lines 5 to 7.

I would therefore propose, Mr. Chairman, seconded by Mr. Deschatelets, that clause 2 be amended as follows: that lines 5 to 7 inclusive be deleted, and the following substituted therefore:

> These human rights and fundamental freedoms shall continue to exist in Canada.

Mr. FULTON: We have given a lot of thought to this and it was our view that there should be one change made in lines 5 to 7, namely, the deletion of the word "always" in line 6.

In coming to that conclusion I did not get the view of those who say that simply because rights and freedoms might have occasionally been abridged by executive action here, there, or elsewhere, that they would for that reason, cease to exist. In my view, those rights and freedoms have existed in Canada, notwithstanding that they may occasionally have been abridged.

I think one should distinguish, and properly distinguish, between abridgement, improper abridgement, and a continuing existence. Abridgement merely means that somebody arbitrarily has refused to recognize them, or to have given them effect. It does not mean that in the body politic they have ceased to exist.

For that reason I think it is important for us to make it clear that we are not saying that they come into existence only by the enactment of this bill. I am, however, prepared to recognize that they have always existed.

"Always" means uninterrupted, or it could be said to go that far. But I would think we should recognize that they have existed previously, and our view was that the only change which should be made was that the word "always" should be eliminated so it would read:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist the following human rights and freedoms, . . .

Now, the advantage of that, as the amendment suggested, is that "we recognize and declare" the existence of these rights. After listening to the discussion and to the view that there is advantage in declaring, I agree with Mr. Batten in part that the word "always" should be eliminated, but I do not think the amendment should go as far as he has suggested.

Mr. MARTIN (*Essex East*): Mr. Chairman, may I suggest to the Minister something that I think is important in respect of what Mr. Batten has proposed. This does not in any way take issue with the statement of the minister that this clause has legal effect. The purpose of this is to state that proposition, with which we concur, in a form that will, it seems to us, have greater appeal. The minister, I think, has very happily suggested that he was anxious to see the first part of the preamble arranged so as to place it within the visible perception of those who might be confronted with it, and it seems to me we want to do that in a manner that will be as striking as possible without in any way delineating its legal effect. If you say "it is hereby recognized" and so on—

Mr. FULTON: It says "it is hereby recognized and declared".

Mr. MARTIN (*Essex East*): Yes, "it is hereby recognized and declared" is legal jargon. We have to have legal language, of course, and we have got to state our position in a form that is legally effective. The proposal made by

Mr. Batten does that, but it does it in language that is simple and understandable, and I think which has appeal. The proposal is that it read: "these human rights and fundamental freedoms shall continue to exist in Canada", whereas you say here, "it is hereby recognized and declared". Children will not know what that means, but they will know what it means when you say: "these human rights and fundamental freedoms shall continue to exist in Canada".

Mr. FULTON: I would think it would not take a very great mental age to recognize plain words such as "it is hereby recognized and declared".

Mr. MARTIN (*Essex East*): I suggest you try this on your boy,—and I understand his I.Q. is very high. You might find that he has some apprehension.

Mr. FULTON: Well, you are very complimentary, Mr. Martin, but you put me in an impossible situation because I only have three daughters.

Mr. MARTIN (*Essex East*): Well they have a very bright mother too.

Mr. DESCHATELETS: Mr. Martin had the future in mind.

Mr. FULTON: I would suggest that while simplicity of language is desirable, and we have agreed on that, we should have, not a poetic, but a fairly forceful declaration which is also desirable. I do not want to try to catch anybody out on words, but I do recall the suggestion that the words being used should be in poetic and striking language. I do not think we can do this with poetic language; but I think we might make an effort to reach striking language so long as it does not become complicated and incomprehensible. I do suggest and recognize the view of others, nevertheless it is my view that the form "it is hereby recognized and declared that in Canada there have existed and shall continue to exist the following human rights and fundamental freedoms" is not overly complicated, and somehow has a more ringing sound than the words "these human rights and fundamental freedoms shall continue to exist in Canada". I think that can be criticized on the grounds that they are rather pedestrian.

Mr. BATTEN: Mr. Chairman, if there was not going to be a preamble to this bill, and the bill were to start off just with the words "it is hereby recognized and declared", I think that I would go along with the minister; but I think if you look at these words when following a preamble, then the meaning becomes clear, because they would just be the first words of this bill. If the bill remains as it is now I think there would be meaning to what the minister has said; but in having a preamble which describes what you are doing, then the words as I have suggested on clause 2 would fit in very nicely.

Mr. BROWNE (*Vancouver-Kingsway*): I would just like to say that we do not know what the preamble is going to say, or if we will find one that will be acceptable to everybody. We have not yet come to a decision in this regard. My personal opinion in respect to the form of the wording is favourable to the wording as it is now. I personally like the word "always" as it appears now. I certainly agree with what the minister has said in connection with the word "always", and that because some of these rights were abridged from time to time does not mean that they ceased to exist altogether. I believe that the word "always" does not have accuracy looking at it from that point of view.

Mr. MARTIN (*Essex East*): It is not historically accurate.

Mr. BROWNE (*Vancouver-Kingsway*): I do not agree that it is not historically accurate.

Mr. MARTIN (*Essex East*): You look up some of the cases, and see.

Mr. STEWART: Does this amendment not limit, or have a tendency to limit the extent of clause 2?

Mr. MARTIN (*Essex East*): In what way, Mr. Stewart?

Mr. STEWART: To say that these human rights and fundamental freedoms shall continue,—would that mean that those are the only ones, as they are set out?

Mr. MARTIN (*Essex East*): Those are the only ones that have been set out. We are just dealing with the words that appear here:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely,—the right of the individual to life, liberty, security of the person, and enjoyment of property,—

Just the same as it is there now.

Mr. STEWART: But when you make a positive declaration that these human rights and fundamental freedoms shall continue to exist—I know you have a saving factor in clause 5—in my opinion it does limit it to some extent, but does not limit it to the extent which your suggested amendment would.

Mr. FULTON: I think to have a limitation here is something to which one might object with equal if not greater force. Whilst it is true that we are contemplating a preamble,—and I make no argument about the possibility of not having one,—I still say that your amendment takes no account of the past, and gives no recognition to it. That, I suggest is a limitation which is even more objectionable than the limitation along the lines Mr. Stewart has suggested. The statute as drafted does at least look to our past, and does give it that added statement that in the past we had these human rights and fundamental freedoms, and we shall continue to have them.

The CHAIRMAN: Are there any further statements, gentlemen?

Mr. BROWNE (*Vancouver-Kingsway*): Put the question.

The CHAIRMAN: Do you wish me to read the amendment?

Mr. STEWART: I have it here.

The CHAIRMAN: The question is on the amendment: moved by Mr. Batten and seconded by Mr. Deschatelets, that clause 2 be amended as follows: that lines 5 to 7 inclusive be deleted and the following substituted therefor: these human rights and fundamental freedoms shall continue to exist in Canada.

All those in favour of the motion? Those opposed?

I declare the motion lost, 4 to 6.

Mr. FULTON: Mr. Chairman, I have indicated that the government would be prepared, in the light of the discussions which have taken place in this committee, and in view of the fact that we have endeavoured to get the nearest common expression of the committee that we could, to strike out the word "always". I have no strong views on it, for the reasons that I have indicated here. I have no views as to whether it should be struck out and replaced by something else, such as "heretofore" or "hitherto", or merely struck out and left out. Therefore, I do not want to influence the committee in that regard. But if there is a motion to delete it, I should indicate to you now that it is quite acceptable to the government.

Mr. AIKEN: Mr. Chairman, I originally suggested that the word "heretofore" be substituted. On consideration, I think probably the word suggested by the minister, or someone in the committee, "hitherto", might be grammatically more correct.

I would move that the word "always" in the second line be—

Mr. FULTON: It is line 6.

Mr. AIKEN:—in line 6 on the first page of the bill, be deleted, and the word "hitherto" be substituted.

The CHAIRMAN: May I make a suggestion, that this matter be dealt with as two motions—because I am inclined to think that we may have unanimity on the elimination of the word "always."

Mr. MARTIN (*Essex East*): Yes.

The CHAIRMAN: And then you may make a second motion, to add the word "hitherto", and we may deal with that as a separate motion. Would that be agreeable to you, Mr. Aiken.

Mr. AIKEN: Yes, Mr. Chairman, if I can find a seconder to the motion.

Mr. STEWART: I second it.

The CHAIRMAN: As I understand it, you are moving, Mr. Aiken, that the word "always" be struck out in line 6?

Mr. AIKEN: Yes.

The CHAIRMAN: And that motion is seconded by Mr. Stewart. Is there any discussion on this point gentlemen? All in favour? Contrary? The vote was eight in favour, and one opposed.

Motion agreed to.

Mr. DESCHATELETS: Is there any other motion in relation to this clause, Mr. Chairman?

Mr. MARTIN (*Essex East*): Lines 5, 6 and 7.

The CHAIRMAN: We have only dealt with lines 5, 6 and 7. I will entertain another motion, as I persuaded Mr. Aiken to revise his motion to the simple elimination of the word "always".

Mr. AIKEN: Mr. Chairman, I think the elimination of the word "always" would meet the situation, perhaps, and I would not choose to make a second motion.

The CHAIRMAN: Very well.

Mr. DESCHATELETS: On clause 2, Mr. Chairman, many witnesses have taken strong objection, in clause 2(*a*), to the term "by due process of law."

I refer you to page 26 of the minutes of proceedings and evidence, to a statement by Professor Scott, who had this to say:

> I think the last thing I referred to was the phrase "due process of law" in clause 2, paragraph (*a*), and I pointed out it would have more than one meaning. Since the protection of the declaration of property is a matter mostly decided, although not exclusively, by provincial law, and since we know, under the Canadian constitution, that a person can be deprived by a province of his property in any manner the province decides to adopt, including outright confiscation, it would seem to me that the phrase "due process of law" there can only mean "according to law";—

And I refer you also, Mr. Chairman, to page 110 of the evidence, where the representative of the Canadian bar association had this to say:

> Section 2(*a*) of the bill includes a "due process of law" clause which has created uncertainty.

Many other witnesses, Mr. Chairman, also took exception to this phrase. I think that it could be easily improved by a new term, and it is with this intention that I move, seconded by Mr. Paul Martin, that paragraph (*a*) of clause 2 be amended as follows: that the words "by due process of law" be deleted from lines 10 and 11, and the words "in accordance with law" be substituted therefor.

Mr. FULTON: Mr. Chairman, we have considered this very carefully, especially in the light of the evidence given by Professor Scott—and I think one or two others; but I think it was he who made the main attack upon the words "due process of law."

They were also considered very carefully in the course of the drafting and reconsideration of the bill between 1958 and now. It did occur to us that it might be suggested that we use the words "by law" or "in accordance with law," as Mr. Deschatelets has now moved.

I think that the words "by law" or "in accordance with law" would have much the same effect in this case.

The CHAIRMAN: Or even "according to law," as has been suggested?

Mr. FULTON: Or even "according to law." But we felt it was desirable to import the words "due process" here, for what we considered to be a valid reason; that is, that if you say "except in accordance with law" or "except by law", or any of those phrases, it is surely open to suggestion that all that is necessary is for parliament to enact another law, and away goes your protection, because if parliament did enact such another law, then the deprivation of the rights would be by law. Or if parliament enacted a law giving an administrative officer the right to take away somebody's rights, that deprivation would be by law.

But the words "due process" have, we think, inescapably a different connotation. It is true that we cannot say that our courts would follow all the American jurisprudence; but our courts could not fail to take account of the fact that these words are in the American constitution, that they have been given judicial interpretation; and I state as a reasonable certainty that our courts, in considering how they should interpret the words "due process of law" would look to see how the Americans had interpreted them, and by what process of reasoning and judicial deduction they had come to give them their present application.

Our courts might not accept the full implication of that reasoning, but they would be guided by it. It is important, therefore, we think, to have these words in our statute, because of what the American courts have developed as an interpretation out of the "due process of law" clause.

I put some of this on the record before, as part of a paper which we had prepared when we were considering this matter in my department. "The authorities indicate that the "due process" clause in the United States constitution is intended to perpetuate old and well-established principles of right and justice, and judicial interpretation of the expression has gone far beyond the literal meaning of "due procedure", and has given it a more expanded meaning.

In applying the "due process" clause to substantive rights, the courts in the United States have interpreted the provision to mean that the government is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary excercise of governmental power. The "due process" clause is intended to protect against arbitrariness." I cannot think of a better expression to import into our bill of rights, having in mind that one of its fundamental purposes is to protect the citizen against arbitrary excercise or interpretation of powers by administrative officers or members of the government themselves, and it was for that specific reason we came to the conclusion it is better to say "by due process of law" here than any of the other phrases that have been suggested.

Mr. DESCHATELETS: May I say that I have just read over the commencement of Professor Cohen's statement on this phrase, and he pointed out that, as far as we are concerned in Canada, we have not used these terms very often in our system of law. Since we are dealing here with the very important matter of the bill of rights, I wonder if it is a good thing to open the door to some uncertainties which were pointed out by Professor Scott. This is the intent of the amendment which I have presented—to avoid any uncertainties, in trying

to replace the words with "in accordance with law", which we use very often, instead of "due process of law".

The CHAIRMAN: Are you referring to Professor Scott or to Professor Cohen?

Mr. DESCHATELETS: Well, Professor Cohen has no particular objection to these words, but he outlined we are not using very often in our Canadian system of law, this phrase. Then I referred back to Professor Scott, who states definitely that, in his opinion, this phrase opens the door to uncertainties. That is the argument.

Mr. STEWART: I take it, Mr. Chairman—and according to the minister—that the "due process" clause, as interpreted in the United States, is broader than appears in the old statute of Edward—the law of the land. Is that right?

Mr. FULTON: I think it is a little broader, yes.

Mr. STEWART: It deals with procedure.

Mr. FULTON: It embraces procedure as well as substance—procedural law as well as substantive law, yes.

The CHAIRMAN: I think that is the point Professor Cohen made.

Mr. STEWART: Yes.

The CHAIRMAN: Would you like to comment on this, Mr. Martin?

Mr. MARTIN (*Essex East*): Well, I have listened to what the minister said, and I must say he has put forward an argument on this subject which I have heard for the first time. It may have been put forward before and missed my attention, or perhaps I was not here. However, I do not think it is a valid point. He says that if you were to put in "in accordance with law", "according to law" or "by law" you would run the risk of some subsequent act by the legislature which might abridge or reduce in some way the enjoyment of this right. All I can say is that I cannot conceive that parliament would resort to this method of abridging a right here guaranteed; but, if it does, parliament has supreme and sovereign power—and even then I think that it would be open to an interpretation other than the one the minister has made.

Mr. Deschatelets, who has proposed this amendment, has as his witnesses Professor Scott and Professor Cohen, and to that should be added, of course, Mr. Mundell, who last Saturday spent some very considerable time on this. Mr. Mundell is a man who has not only academic and professional experience, but has had great administrative experience as a colleague of Mr. Driedger and his colleagues in the Department of Justice—and a rather distinguished service. Mr. Mundell was rather insistent that the use of "due process" here was open to much uncertainty because we would rely, apart from the statute of Edward II, largely on American decisions.

Now, although I have not read these American decisions recently—and at one time I knew them pretty well—they (a), as Mr. Deschatelets reminds you, are not binding—although I recognize at once they have a persuasive effect and our courts are entitled to look at those decisions in the absence of decisions of our own courts—certainly courts of at least coordinating jurisdiction. Now, the decisions in the United States are not uniform. "Due process" in the United States means a number of things,—I was going to say "many things",—but it means a number of things.

I tried to put my finger on an article I remember seeing in the *Canadian Bar Review* on this subject a number of years ago, and I remember quite well the distinction being made between "due process" as interpreted by the supreme courts in the state of Michigan and the state of New York, involving a decision of Mr. Justice Cordoza. The only case that I know of in the Supreme Court of Canada, where "due process" is referred to *in extenso* is a case involving the interpretation of, I think, section 66 of the Bankruptcy Act. I forget the

case, but it is about 15 years ago, and it was referred to in the *Canadian Bar Review*. I will try to get it in order to show it to the minister afterwards. In that article there is a very careful review of these differences of "due process", as understood in the United States, and there are some cases in Canada in which the judges have specifically said they do not refer to the concept of "due process" because of these variations in meaning. And I think it was former Chief Justice Rinfret who said that on that account he would prefer to say "in accordance with law", and the phrase "in accordance with law" comes from his own language.

Now, the minister has acknowledged all this. He has acknowledged these different shadings of meaning, and our courts will not be called upon to begin from the beginning a whole jurisprudence in Canada as to what we mean by "due process". There cannot be any such difficulty if we use the phrase "in accordance with law" or "by law".

There is another difficulty upon which you have not touched, and that is the point made by Bora Laskin, in his article, and particularly by Mr. Mundell last Saturday, that "due process" not only means different things in law, but also in the political science concept.

Do we mean here "due process according to law" or do we mean "due process according to natural justice" which is quite a different thing? And, when you take into account human rights, the determination of these rights often will be as vitally affected by consideration of natural justice as they will be by consideration of "due process according to law".

The Canadian bar association has submitted its views on the subject, and I think that they ought to be given careful note. While I do not recall whether Mr. McInnes mentioned it, there was a division in the bar association on the use of this phrase.

To put my argument in its strongest, minimum form, I would say a substantial number of the members of the Canadian bar—and they are, after all, the ones who are going to assist the courts in the interpretation of the statute—would prefer "according to law", about which there can be no doubt on the meaning whatsoever.

I do not know there is any more I can usefully add in support of Mr. Deschatelets' motion, and I do urge the Minister of Justice to accept it.

Mr. FULTON: May I reply, in part, to what is being said? I think I should make it clear that I take an entirely different view of what Professor Cohen said from the interpretation placed on it by Mr. Martin. I shall be referring the committee to relevant passages of Professor Cohen's evidence.

Mr. MARTIN (*Essex East*): I did not refer to Professor Cohen.

Mr. FULTON: Mr. Deschatelets, I am sorry.

To go back for a moment to the fundamental difficulty I see in confining ourselves to the expression "due process of law," or "by law", or "in accordance with law". It seems to me that if you said that a person has the right not to be deprived thereof, except in accordance with the law, it would be argued before the courts, in justification of any action arbitrarily or otherwise depriving somebody of his rights, that all the courts should look at is, "Is there a law which might be said to authorize what was done?" Because it says he may be deprived, it would be said that he may be deprived of it if you have a law which seems to indicate he may be deprived of it. We think the courts would then be urged to look only at the question of whether there was a law somewhere upon which this could be based. And if there was that law the courts should be satisfied and should not look at the question of whether the power of the administrator was exercised arbitrarily or not; because they have not been directed to look at the question of whether it was done by due process of alw, or whether it was done by law, or in accordance with the law.

So we think that the protection given by "due process of law" is wider than the protection given by the words "by law" or "in accord with law".

Mr. Martin pointed out that Professor Laskin—and I dare say others—have raised the question of what due process of law means. They have asked: does it mean, due process according to law or according to natural justice? It seems to me, with respect, that to ask this question is simply the same as to ask, "What do you mean by law?" Do you mean written law, or natural justice? There is no difference between the two questions. If you are going to have conflict or difficulty on the part of the courts in interpreting what "law" means, then they will have difficulty interpreting what "due process of law" means. The existence of the particular question, as framed, is not going to complicate the task of the courts, because they have always to interpret what the law means.

May I refer to the evidence of Professor Cohen, which was very interesting on this point, and upon which I questioned him.

I questioned him particularly on his views as to what would be the attitude of our Canadian courts, as to whether they would look at the American experience or not. I think I should read the record at some length.

Professor Cohen said at page 377:

> I wish to point out there are two implications from American experience to the phrase "due process of law", because the words "due process of law" have both a substantive implication and a procedural implication.

That is exactly the same view as expressed in the paper prepared by my department, from which I have read.

He went on:

> That is, when you say you cannot deprive someone of his life, liberty or property, except by due process of law, you mean there must be a rule of law of deprivation, or you must mean that the process by which he is deprived must itself fit some decent standard; he must have a hearing, a proper hearing, proper notice given to him. Therefore, that phrase is both substantive in implication, and procedural in implication. The Americans have done a great deal of work in this field. They are the experts here. There is an immense body of case law, and a large amount of literature on "due process of law", because of the fifth and fourteenth amendments.

I want to read the whole of it, and realize this sentence is going to be seized upon by those who take the opposite point of view; but I think, when read in context, with his later answers, that it is capable of interpretation in accord with my view.

He went on to say:

> I do not care if you leave it in, or use the words "according to the laws of the land", or any other phrase that has the same significance.
>
> Clause (*b*) deals with the problem of discrimination, and a quick reading of that clause may think you have got—

Then I questioned him:

> Before you leave clause (*a*) may I ask you a question: is it your view, or would you give us an opinion on whether the courts in Canada, when they come to interpret this due process clause and apply it to issues which may be before them, will be tempted to take as illustrative and guide rules the jurisprudence as worked out in the United States?

To which Professor Cohen replied:

> That is a very interesting question which I am glad you have raised.

He referred briefly to the difference in degree of authority given to American decisions, as between the Privy Council, on the one hand, and Canadian authorities on the other. Having compared the two, he went on:

> But whether or not the Supreme Court of Canada would be as narrow, I would doubt it—

By "narrow" he means, as narrow as the Privy Council indicated it would be in giving effect to Supreme Court decisions.

> I think we are living in a far more flexible generation now; and I think that the Supreme Court shows a scope, a breadth of view which would make it interested in what the similar language has resulted in in the United States; and we probably might find something in the nature of a penetration into our system of their constitutional laws and ideas.
>
> If you ask me whether this would be good or bad for our public law and our system, I would say that the story of the due process in the United States is one which suggests great benefit in the protection of the individual.

He did point out there had been a development in the interpretation of the United States and, in the initial stages, after the enactment of the amendment, it had received a rather narrow interpretation. But he ended up by saying:

> But I do not think that—
>
> —a narrow interpretation—
>
> —will apply here. It is in a quite different historical context.
>
> So my net answer then is that probably our courts would look at it, and if they took a look at the recent doctrine, it would do us no harm to be aware of it.

Well, I suppose one might say you can take your choice of authorities. I do not intend to imply that because here is one authority in my favour, he is necessarily the final word on the matter; but I do think it is interesting that certainly this expert in the field has expressed himself unequivocally. When you analyse his evidence, the effect of it would appear to be that no harm and great good will probably come from the American doctrine of "due process of law". It is an expression wider in scope and coverage, in the American field, than it might well be by using the words from our own or English tradition.

That is why, in this case, we have felt it appropriate for the purpose of our bill of rights—in seeking to protect citizens against the arbitrary exercise of administrative authority—to support these words.

Mr. MARTIN (*Essex East*): I think what Professor Cohen said is to give us a sort of umbrella explanation of the situation. I submit that our courts undoubtedly will have to look at the American decisions. There is no other jurisprudence for them to look at. They do it continually on other matters. But we have sought in this country to develop our jurisprudence primarily on the basis of our own decisions and on decisions of Her Majesty's courts in the United Kingdom and the Commonwealth. We have been able to preserve, particularly in Great Britain, a measure of liberty, in standards of liberty and protection of human rights, that has not been exceeded in the United States

or in any other country. I cannot believe at this stage that we will not be putting into the hands of the Supreme Court of Canada, in particular, an instrument that for some time perhaps unintentionally will cause some abuse,—as indeed Professor Cohen mentioned happened when the "due process" clause was introduced in the United States.

Mr. FULTON: He said that in his view some of our judges now tended to be—and I think he applied this mostly to the lower courts—too executive-minded. He did here modify the apparent part of his criticism by saying that a judge does have to bear in mind the problems of administrative convenience; but he said he thought he could establish in many areas a danger that judges would be too executive-minded. If his fears be well grounded I think it might not hurt at all to direct the attention of our courts to the full implication of "due process of law". I am certain our courts will not be incapable of giving it a proper Canadian interpretation. They will not take the American jurisprudence holus-bolus and apply it in areas and under circumstances where it is obviously of their own application, but they will look at the American jurisprudence to see under what circumstances or reasoning it was applied, and I am sure they will give it a Canadian application.

Mr. DESCHATELETS: In order to complete Professor Cohen's statement may I read one more sentence at page 378 where he says:

> But shortly after its passage in 1870 or 1871, when the fourteenth amendment was passed, it was abused, and the fifth amendment when it was passed, was abused, in that they left it to be used to protect, to a very large extent, the rising corporate structure in the United States from the effects of such federal and state regulatory measures. But I do not think that will apply here. It is in a quite different historical context.

Mr. FULTON: May I remind you that I summarized the earliest part of that paragraph and read the last sentence. I was not at all selective in what I took from Professor Cohen's evidence.

Mr. WINKLER: Notwithstanding this, and the jurisprudence which exists in the United States, surely it will be judged in Canada as having been set up for the Canadian citizen, and will be used for the highest degree of decency in dealing with Canadian problems.

Mr. MARTIN (*Essex East*): Do you not think that our courts will be the same if we use the phrase "according to law".

Mr. FULTON: Is it not a fact that the American courts in their earlier interpretation of the "due process" phrase actually did interpret it to mean simply "in accordance with law", and that all you have to show is that there is a law somewhere which authorizes this, and then there is no power of review. It was not until they came to the more general interpretation that they extended the "due process" clause to mean, in effect, prosecution for arbitrariness, and that it gives the courts the right to review decisions, even though properly authorized by law, to make sure there was nothing arbitrary and unfair about them. So now the "due process" clause has a wider meaning. It is that wider meaning of the phrase "in accordance with law" that we want to import into our bill of rights.

Mr. BROWNE (*Vancouver-Kingsway*): May I bring to the attention of the committee a statement by John H. Ferguson, professor of political science at Pennsylvania State college and Dean E. McHenry, professor of political science of the university of California, Los Angeles, on page 152 of a book The

American Federal Government, under the heading Due Process of Law. It states as follows:

> The fifth amendment forbids Congress to deprive any person of "life, liberty, or property, without due process of law," and the fourteenth amendment imposes the same limitation upon the states. This is one of the most important, as well as controversial, of all guaranties. The protection extends both to natural persons, i.e., ordinary human beings, and to artificial persons such as corporations.
>
> Procedural due Process. Procedural due process means that in dealing with people governments must proceed according to "settled usages and modes of procedure." The standards are fairly definite. The constitution specifically mentions certain steps that must not be omitted, and others have crystallized from experience dating back to the days of Magna Charta. Among other things, proper procedure requires that (1) government, or subordinate agency, have jurisdiction over the person or object with which it seeks to interfere; (2) the legislation or order be properly enacted or prepared and published; (3) crimes must be clearly defined; (4) those accused must be properly apprehended and notified of the nature of the accusation and the time and place of the hearing; (5) opportunity must be given for the accused to prepare and present his defence; and (6) the tribunal before which the trial or hearing is to be conducted must be so constituted as to ensure an honest and impartial decision.

Mr. FULTON: Those are not bad things to have in a bill of rights.

Mr. BROWNE (*Vancouver-Kingsway*): It seemed to me to discuss that phrase "due process of law" and to offer some very adequate protection.

Mr. DESCHATELETS: I understand Mr. Browne has just cited from American jurisprudence. Is that right?

Mr. BROWNE (*Vancouver-Kingsway*): Two professors of political science in universities in the United States.

Mr. DESCHATELETS: I do not dispute anything said there, but the main objection we have is that this phrase "due process of law" is unusual in our Canadian system of law, and we think it will open the door to different interpretations. This is the basis of our motion and our objection to these terms. That is why we would like to close all possible doors on any interpretation and would like to have a bill of rights as solid juridically as it is possible to have it.

Mr. FULTON: Mr. Deschatelets, may I suggest to you again that it is precisely in that frame of mind that we approached the problem of drafting in this particular context and decided to recommend the use of the phrase "due process of law", because it seemed to me that if you are talking about what phrase may be least open to doubt, the doubt lies with the phrase "in accordance with law", rather than with the phrase "by due process of law". The expression "due process of law" has received a broader interpretation and development in the United States, to which our courts may look for guidance although not accepting as absolute authority; whereas there is very little guidance in respect of the bare phrase "in accordance with law". I think the question would be asked: does "in accordance with law" mean "due process of law", or does it mean, if we use the phrase "due process of law", that we have the guidance which it has received elsewhere.

The CHAIRMAN: It seems to me that the addition of the word "process" connotes procedure. I think that these rights should not be denied unless the proper procedure has been taken, such as the giving of notice and all of the

things which are involved procedurally. I am inclined to think that "due process" has a broader meaning. That means, of course, that these rights will not be readily denied to an accused person.

Mr. MARTIN (*Essex East*): All I can say is that that is your interpretation as an Anglo or common law lawyer, and I understand it. But unfortunately the history of the adjudication of due process has not been that.

The English judges, who have a long history behind them, and a pretty solid one, have preferred not to use that phrase, but to rely upon the strength of the law which connotes both procedural protections as well as substantitive ones.

I do not know if any more can be said. I hope the minister will recognize the validity of some of our amendments.

Mr. RAPP: Question?

Mr. FULTON: We have agreed to accept the principle of a preamble.

Mr. MARTIN (*Essex East*): Very good.

The CHAIRMAN: Of course, it is not a phrase which has just been used in American statutes. It has origin in English statutes. Coke's Institutes were published in 1603, which is a long way back.

Mr. STEWART: Question?

The CHAIRMAN: Are you ready for the question, gentlemen? The question is on an amendment moved by Mr. Deschatelets and seconded by Mr. Martin, that the words "by due process of law" be deleted from lines 10 and 11, and that the words "in accordance with law" be substituted therefor. All those in favour of this amendment?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: Contrary?

The CLERK OF THE COMMITTEE: Nine.

The CHAIRMAN: I declare the motion lost.

Mr. MARTIN (*Essex East*): The law has been made by long and tiresome effort.

The CHAIRMAN: Now we are on clause 2 subclause (*b*).

Mr. MARTIN (*Essex East*): I have a suggestion here. I am not satisfied with the phrase "protection of the law", and I am reinforced in my argument now by a statement of the minister in answer to the amendment moved by Mr. Deschatelets in respect to the previous subclause.

The minister objected and said that they had carefully considered "due process" in relation to the suggested phrase "by law", and he thought that in the future it would be possible for parliament to abridge this by enacting a new law, which would be contrary to the strength involved in the phrase "due process".

For that and for other reasons, I move, seconded by Mr. Deschatelets, that subclause (*b*) of clause 2 be amended and that the following words be added after the word "law" in line 12:

> To life, liberty, security of person, and enjoyment of property

So that the whole would read:

> The right of the individual to protection of the law to life, liberty, security of person, and enjoyment of property.

The amendment as drawn now is simply an anti-discrimination clause in which there is no proposed protection.

We, by this particular amendment, would strengthen what is intended, and not only should the right of the individual to protection of the law be

accorded without discrimination, but it would be done, because of these additional words, in a manner which strengthens the situation.

The other day I mentioned some cases which have existed; one which has existed in my own community, of a negro citizen, a respected negro citizen—who had not been able to obtain a C.M.H.C. loan from a lending institution, because of his colour.

As the Minister of Public Works acknowledged, there were six such cases in Canada within the last while.

That is the situation which none of us would want to see developed. And while the Minister of Public Works did say that there was a clause put in the authorization and guarantee of loans by the federal government, this would strengthen it very considerably.

I think these words do add very great substance to the amendment, and I propose them.

Mr. Deschatelets said that when I read the entire clause 1 did not read "without discrimination". So, in order that there will be no misunderstanding, the clause as amended should read, and I repeat:

> The right of the individual to protection of the law to life, liberty, security of person, and enjoyment of property without discrimination by reason of race, national origin, colour, religion or sex.

Thank you.

Mr. FULTON: You pose a difficult problem here, because I recognize that a person taking a position against this amendment may well be said to be opposed to an anti-discrimination clause, or to an anti-discriminatory addition to a clause.

However, in taking a position against your amendment I have several grounds, on which to rely. I rely first upon the ground that we already have put an anti-discriminatory provision in the bill of rights. So I am seeking to establish the basis of objection or criticism. If we did not have an anti-discriminatory provision in our bill of rights, we would be open to the attack that we were opposed to non-discrimination. But we do have one.

Therefore I oppose what I consider to be an improper extension of it, because it is an improper extension on a number of grounds: first of all, I say that it points us directly towards matters which are within provincial jurisdiction, and that I think it would be very doubtful, lest in its inclusion it would operate beyond the purview of federal jurisdiction, by drawing it into the realm of the infringement of provincial rights. I say this with due recognition of the fact that Mr. Deschatelets is the seconder of that motion. Nevertheless, I hold that view.

I would oppose it on another ground; namely, that its effect is to confer rights again, and to confer them in such a sense that a person could not be deprived of them even by due process of law, or even in accordance with the law. In other words, you could not put a person in jail, even after a proper trial, if your amendment stood by itself, because the clause as amended would read as follows, if your amendment were accepted: "the right of the individual to protection of the law; the right to life, liberty, security of the person and enjoyment of property without discrimination by reason of race, national origin, colour, religion or sex."

So, you have in effect reconferred this. You are reenacting subclause (*a*) with respect to the conferring or declaration of the rights, but you have not reenacted that portion of subclause (*a*) which says he has the right not to be deprived thereof except by due process of law. Therefore, without that clarification, having reenacted it and reconferred it, would go so far, in my view, that you could not even put a person in jail after a proper trial. I think that is the fatal criticism of the amendment.

Frankly, I must direct your attention to the American bill of rights, where the anti-discriminatory feature is based on the principle that it is the protection of the law that we are concerned with when we speak of non-discrimination. I have urged this point before,—that this is the proper basis on which to approach a bill of rights. The first thing you do is to define the right and say that it is attached to all individuals, and they have the right not to be deprived thereof except by due process of law. Having established the rights in that way, you then give these individuals the power to protect their rights by saying that they shall be entitled to equal protection of the law, without discrimination by reason of race, colour, religion, national origin, or sex; and that, I am convinced, is as far as you can go,—and certainly as far as you should go in a federal bill of rights.

The two provisions in the American bill of rights in respect of the non-discriminatory feature are articles 5 and 14. Article 5 refers to federal law. Perhaps I had better read the whole of it so that I will not be accused of being selective.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Those last words are almost equivalent to our subclause (*a*).

Now, when you come to the further extension of the anti-discriminatory feature, in the United States bill of rights, you come to article 14. I will not read the whole of it, but section 1,—and this provision is the operative provision in this respect,—is as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

So that you see in those two provisions you have the equivalent of our (*a*) and (*b*) in so far, in our case, as they are within federal competence. We do not attempt to legislate with regard to provincial powers, but we say that the great right here in the field of non-discrimination, just as they have said in the United States, is the right to the protection of the law without discrimination by reason of race, national origin, colour, religion or sex.

So, on the basis of the precedent of the American bill of rights, which does have the authority to intrude into provincial legislation, which we do not have, even with that authority, we think it is based on the protection of the individual, and the right of the individual to the protection of the law without discrimination.

We have done just that, so I regret that I am not able to accept your amendment.

Mr. MARTIN (*Essex East*): May I seek, in reply, to try to convince you that there is merit in this. I accept what you say about (*a*). (*b*) is another subclause altogether. (*b*) is different from (*a*). (*b*) is the anti-discrimination clause. The principle of anti-discrimination is not dealt with in (*a*) at all. If there is objection, as you say, to the inclusion in the amendment of the phrase "enjoyment of property" on the ground that that is an invasion in respect

of section 92 of the British North America Act, I would remind you that the same argument applies equally to the words "enjoyment of property" in (*a*). We have already, I am assuming, safeguarded that position, in so far as (*b*) and (*a*) are concerned, by our willingness, either in the preamble or in a sub-clause of clause 2—I prefer the preamble—to clearly establish that what we are dealing with in clause 2, or in the act, are matters that clearly only come within the competence of the federal parliament. That takes care, I should think, of any suggestion that we are here invading provincial powers.

You mentioned Mr. Deschatelets in this connection, and I appreciate that there would be special reason for doing so; but I think that we are all anxious not to invade powers that are not within our competence in any way, and I believe what I have just said amply deals with that particular objection.

You said further, that if you were to accept the amendment, which I still hope you will, that we would find ourselves in a position where an individual who had committed a crime could not properly be punished; could not be incarcerated, which was your suggestion. I do not think that can stand, because the right of the individual will be governed by the law, and will have the protection of the law. If the law says that an idividual who has committed a crime should be incarcerated for a stated period, that would still be possible, because the right of that individual to life, liberty, security of the person and enjoyment of property without discrimination by reason of race, national origin, colour, religion or sex, is governed by what the law is. By the phrase "protection of the law" he is not only given protection, according to the law, but he will be dealt with, in any matter involving the violation of the law, according to the law. He cannot get any more protection than the law will afford him. If the law does not give him any protection in respect of his having committed a crime, he will not be able to get it. That, I think, should carefully dispose of the third argument that you made.

Then it seemed to me that, if you were at all justified in the arguments that you adduced in connection with (*a*), not accepting the amendment "in accordance with law" because of some possible future act by parliament, then by the use of the same argument you ought to accept this amendment, because the phrase "protection of the law" is capable of amendment in the future, just as well as the phrase "in accordance with law" in (*a*) is capable of amendment.

The amendment does this, it seems to me: not only does it give the right to the individual of protection of the law, but it says that that protection is not only with regard to discrimination on the grounds of race, national origin, colour, religion or sex; but it is tied in with that person's life; it is tied in with that person's freedom; it is tied in with that person's security and with the enjoyment of property, within the competence of parliament.

I cannot see, for the life of me, why that does not strengthen the clause, why it does not strengthen the position of the individual. It does not in any way interfere with the exigencies of the administration of justice, and it makes this clause much stronger as an anti-discrimination clause.

What you have said about the American bill of rights does not really touch the point one way or the other, I do not think. The fact that they have not dealt with it in this way does not mean this is not the way in which it should be dealt with. This is a further strengthening of the situation, and it is an amendment that is afforded, not for the purpose of just putting forward an amendment, but it is based upon consultation with people who have had very, very considerable experience in the administration of your own department. I am not referring to existing officers, naturally.

We feel very strongly that the anti-discrimination clause will be very considerably strengthened and that it will meet occurring situations, because

this is the clause about which there is more complaint than any other. There are more violations of human rights because of discrimination than anything else.

Mr. Deschatelets mentioned yesterday the reluctance to allow a witness to testify in her own language. I have mentioned the cases of the negroes who have been discriminated against. You are not going to remove those discriminations by the clause as it now stands, because the law now does not afford the anti-discrimination that will be afforded by this amendment. There is no existing law that says that a man cannot be denied a C.M.H.C. loan because of colour. This clause now, as amended, will prevent that: It will make it obligatory on the federal authority to take steps—although I acknowledge that those steps were being taken—to protect that individual.

But some such situation will arise again. If you read the discussion as reported in the *New York Times* yesterday morning on the civil rights debate in the United States, you will have seen where one of the senators from the mid-west was arguing against the abridgement of civil rights in the United States, and he pointed out the necessity, not only of anti-discrimination measures, but a measure in regard to—and he uses the very phrase—enjoyment of property.

I hope that you will see the force of this amendment, because I think it is one of the most important ones that we could put forward.

Mr. AIKEN: Mr. Chairman, I wonder if we could have this amendment? I, for one, am not sure exactly what it is.

The CHAIRMAN: Mr. Aiken, it is simply to add, in line 12, after the word "law", these words—and you can perhaps write them in:

—and to life, liberty, security of the person and enjoyment of property—

Mr. AIKEN: Thank you.

The CHAIRMAN: Nothing is struck out; it is just an addition to the clause.

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: Mr. Martin, I have been considering what you have said, and reconsidering what I said. I recognize the force of your feelings, the depth of your feelings, and your desire to see this added. But I am afraid that nothing you have said convinces me that you have not gone much further than you realized you were going in your amendment, and it would have an effect that I am sure you would not want it to have, if you realized its implications.

I am not going to repeat my argument about the possible invasion of provincial rights.

Mr. DESCHATELETS: This is not possible.

Mr. FULTON: I am not going to repeat that. For the sake of this discussion, you may be right when you say that if enjoyment of property in (*a*) is safe, on the grounds we have discussed, then enjoyment of property in (*b*) would be safe.

For the purpose of this discussion I will accept that argument, because I do not want the additional arguments to be cluttered up by misunderstandings between us. My main objection to your amendment is that it would have the effect, by the change it would make in paragraph (*b*), of re-enacting all the rights that were conferred or declared to exist and attach to the individual by paragraph (*a*).

But the great difference, and to me the fatal difference, is that whereas those rights specified in paragraph (*a*) were specified with the limitation that they are not absolute, in that they can be removed by due process of law, there is no such limitation in paragraph (*b*), and you have therefore re-enacted paragraph (*a*) without the limitation of the "due process" clause.

Therefore, you will have conferred all these rights in such a way that, as I have said, even a person convicted of a crime could not properly be incarcerated. Let me read the section as it would be if your amendment carried.

It would read—and I will read it in context with the opening words of clause 2:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely,
>
> the right of the individual to protection of the law, and to life, liberty, security of the person and enjoyment of property without discrimination by reason of race, national origin, colour, religion or sex.

So that you have re-enacted every right that was enacted in paragraph (*a*); but you have left out the limitation that says that he enjoys these rights only subject to the liability to have them taken away from him by due process of law.

It is for that reason I am convinced that the American bill of rights, in the sections which I read to you, adopted the very approach, when it came to the question of non-discrimination before the law, that we have adopted in our bill of rights, because the framers recognized that if you did not follow the form that we have followed, they would have enacted or conferred rights without limitation.

It is not because I say the American bill of rights is sacrosanct that I cited it to you; I only cited it to you as an example of the practical difficulties of the problem I have now outlined, and the recognition that you could not deal with this question of equality before the law, and non-discrimination, exception the basis of the approach that we have in our bill of rights.

I do not think any parliament, realizing what it was doing, would ever go so far as to declare that the right of the individual to life, liberty, security of the person and enjoyment of property is enjoyed absolutely and without the liability to be deprived thereof by due process of law. It is on that ground that I think there is a fundamental objection to your amendment.

Mr. DESCHATELETS: Mr. Chairman, there is no use carrying on this discussion any further: the mover and the minister made their positions very clear. But, with due respect to the minister, I think he has missed the point completely. The motion is in line with the full protection of the individual against discrimination—and it does not go further than that.

Now, the minister made certain implications in his opening remarks, after the motion was made. I wish to say I had no hesitation whatsoever in seconding this motion, because we have been told repeatedly that we are dealing here with matters within the federal competence, and all these discussions we have had, and the motions that we are making, are perfectly in line with the preamble we have submitted, where it is stated very clearly that we are dealing here with matters within the federal jurisdiction.

Mr. FULTON: Well, Mr. Deschatelets, I have indicated, at least for the purpose of this discussion, that I accept that point of view.

Mr. WINKLER: Question.

The CHAIRMAN: The question, gentlemen, is on this amendment: moved by Mr. Martin and seconded by Mr. Deschatelets, that the following words be added after the word "law" in line 12.

> ....and to life, liberty, security of the person and enjoyment of property.

All those in favour, please signify? Those opposed? Four to seven. I declare the amendment lost.

Mr. MARTIN (*Essex East*): Well, we have gained ground.

Mr. BADANAI: Mr. Chairman, I wish to offer an amendment to follow paragraph (*b*).

The CHAIRMAN: Is this going to be part of paragraph (*b*)?

Mr. MARTIN (*Essex East*): No; to follow paragraph (*b*).

Mr. BADANAI: Yes, to follow paragraph (*b*).

This amendment forms a part of the declaration of human rights of the United Nations, and I hope for that reason the Minister of Justice will give this more favourable consideration than he has so far to the previous amendments.

The CHAIRMAN: You are going to try your luck now, Mr. Badanai.

Mr. BADANAI: Now, the effect of this amenddment is to prevent, for instance, a police officer invading the privacy of a home, or being arrested on a flimsy pretext, which happens sometimes.

The amendment which I propose to move, seconded by Mr. Batten is that paragraph (*b*) be followed with the following paragraph, to be designated.

> The right of the individual to the protection of the law against arbitrary interference with privacy, family, home, or correspondence, and against attacks upon his honour and reputation.

and that the remaining paragraph be re-lettered accordingly.

In moving this amendment, Mr. Chairman, I feel I am on sound ground—on firmer ground than those previously moved.

Mr. FULTON: Is there a specific paragraph in the United Nations declaration you had in mind?

Mr. MARTIN (*Essex East*): Yes, and it reads as follows:

> No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation.

The CHAIRMAN: Do you know what the number is?

Mr. MARTIN (*Essex East*): There is no number.

Mr. FULTON: Is it from the Universal Declaration of Human Rights?

Mr. MARTIN (*Essex East*): Yes, is is embodied in that, but I am reading from a document entitled Liberalism; its Meaning and History.

Mr. FULTON: That is why it is confused and unnumbered. I am sorry, Mr. Badanai; will you proceed.

Mr. BADANAI: I did not intend to make a long speech, because the amendment speaks for itself and, as you are aware, we are not here to try to obstruct the passage of your bill, but trying to improve it. With the addition of this amendment, I think the bill certainly will be a better bill than it is at present. No one has indicated that the bill is perfect. Everyone has found some faults with it, and we are trying to make it a real good bill. I submit this is a good amendment.

Mr. FULTON: Well, if I reject another amendment, the committee is going to say it needs the protection of the law against the arbitrary attitude of the minister, but I am sure the committee would be joking if it said that. I hope not to indicate an attitude in opposition, unless I have valid grounds, which I hope will commend itself to the committee.

My preliminary comment on this amendment is that it does state those things which are desirable and right in a democracy—in a country which is governed and administered in accordance with democratic principles; but I suggest to you that those things there set forth are covered in the present bill, and particularly they are covered by the use of the words "by due process of law". If we had removed or amended those words, I think you might have a better case for the inclusion of your amendment than you have at the present time. If your amendment seeks to insert a paragraph declaring that there exists in Canada "the right of the individual to the protection of the law" well, we have already put that in paragraph (*b*)—"the right of the individual to the protection of the law". You go on, "against arbitrary interference with

privacy, family, home, or correspondence". Therefore, what you are seeking to cover is protection against arbitrary interference.

Well, we have already said that those rights which the individual enjoys under paragraph (*a*), he enjoys with the additional right not to be deprived thereof except by due process of law. So, we have protected the individual against arbitrary interference with or deprivation of his rights, because he has the right not to be deprived thereof except by due process of law. Therefore, he is protected against arbitrary interference. What is it against which he is protected under our laws? He is protected against arbitrary interference with privacy. I suggest to you this is embraced in the words "life, liberty, security of the person". That certainly covers "privacy". In connection with "family", I would say that is covered in the collection of words "life, security of the person, and enjoyment of property". You have your home, and you have the right to the enjoyment of your home without any liability to be deprived thereof, except by due process. It seems to me you are protected against arbitrary interference of your privacy and home. You are asking to be protected against arbitrary interference with correspondence. Correspondence is property, and since he has the right to property and the right not to be deprived of the enjoyment thereof, he already is protected against arbitrary interference with his correspondence. You go on "against attacks upon the honour and reputation of the individual". It would seem to me that that objective is already served by the fact that he is entitled to all his rights under the protection of the law. He has, under sub-clause (*b*):

—the right of the individual to protection of the law—

So that the law protects him against attacks on his honour and reputation, and he cannot be deprived of the protection the law gives him. Of course, that includes in there his right to the security of the person, as added protection against attacks on his honour and reputation.

I submit to you that all your amendment does is to restate, in a different form, what is already covered in a combination of paragraphs (*a*) and (*b*) and especially what is already protected by inclusion in paragraph (*a*) of the words:

—and the right not to be deprived thereof except by due process of law;

I do not want to be arbitrary, and if you can convince me by discussion there is any fallacy in my reasoning or there is, in fact, something that is included in your suggested amendment that is not covered in our bill, I would be the first to admit we should act so as to include it.

Mr. BADANAI: The present wording, if I may submit it, is by inference. There is protection by inference, by the statement "by due process of law" but it does not spell out the fundamental freedom that we want to put into this bill. That is the point.

Mr. MARTIN (*Essex East*): I would submit, in support of Mr. Badanai's motion, that our efforts here represent a collective effort to try to improve this bill, to make it as strong as possible.

I appreciate the general observations of the minister, in which he has sought to relate Mr. Badanai's articulations in the general language of paragraph (*a*), but you must remember what we are dealing with here: we are dealing with a bill of rights. We must remember the declaration of human rights of the United Nations provoked a discussion that lasted almost ten years. For ten full years—

Mr. BROWNE (*Vancouver-Kingsway*): I hope we can do better than that!

Mr. MARTIN (*Essex East*): —the human rights commission sat continuously almost considering every declaration as contained in the declaration which, as

the minister reminded us on Friday, had been adopted as a declaration by Canada.

The minister will recall that when we dealt with section 3 (*b*)—the protection providing for no torture, cruel, inhuman or degrading treatment or punishment—he reminded us of the dilemma into which he had been plunged by our accepting the declaration of human rights, and he found it difficult to abbreviate, abrogate or remove any of the terms in that subsection, because that would be regarded by certain countries—notably the Soviet Union—as a watering down on our part of our acceptance of the declaration.

Now, it is true the minister did say that he was giving consideration to the observations, notably those made, I think, by Mr. Browne—

Mr. FULTON: And by you.

Mr. MARTIN (*Essex East*): Yes, but I mention Mr. Browne because it was the only point of friendly contact between Mr. Browne and myself on the committee. I merely mention it because it is a highlight in our discussions. If that argument was applicable—and I think it is—I think it ought to be covered in the language involving the amendment Mr. Badanai has put forward. But we must remember what we are dealing with: we are dealing with a bill of rights. Any effort to delineate those rights, in a manner that will not be open to protection merely by inference, as Mr. Badanai has suggested, is certainly noteworthy and will have more appeal because these rights to the protection of the law against arbitrary interference with privacy will be argued by legislators, judges and others as not being included in the phrase

—the right of the individual to life, liberty, security of the person—

When we talk about "liberty" people have a connotation that is not suggested when we talk about "privacy". When we talk about the family, there is nothing in paragraph (*a*) that deals with the family. The family is not an individual but a group, and the basis of our society. Paragraph (*a*) simply refers to the right of the individual.

Mr. FULTON: Is the family not made up of individuals?

Mr. MARTIN (*Essex East*): Yes, but the family is also—as Gierke said—a unit. It is more than the individuals who go to make it the foundation of the society we have in this country. If you want to protect that, it seems to me we have to introduce the family concept.

If there is anything that our age suggests it is the desirability of privacy. Privacy is not a necessary connotation of liberty; it is the other side of the coin. It is not covered by a reference to the generalization in the phrase:

—life, liberty, security of the person—

The home is not covered. The home is a sanctuary to which Canadians attach the greatest importance. The home and family are not protected in many countries of the world. They are recognized, accepted and protected in Canada, but they are not in other countries.

Having in mind the turbulent times in which we live, the man is a brave person who can say that the developments in our time are not made easier because of an abridgement of liberty by ourselves. But the home, the family, privacy, those are important concepts that are not touched at all in the phrase:

—life, liberty, security of the person.

Correspondence will not be regarded by everyone as being covered by the phrase "property". It is property, but when we talk of property we do not talk of property in the sense of something so personal. We have—not frequently, fortunately,—had violations of this. We often find use of the letter of an individual by a stranger. That, fortunately, does not happen in our parliament. It did happen in parliament once, on an occasion when Sir Robert Borden took

a very courageous attitude against one of his own members who had used a letter which was the property of another individual. I do not say that correspondence is of the category of family, home or privacy; but they are fundamental rights of Canadians, and we have a right to have them protected by the law if we are going to have a bill of rights.

We could look at some of the provincial decisions under the various liquor acts. I appreciate, of course, this is not germane, in one sense, to this argument, because I am clearly touching on something outside our jurisdiction.

Since the minister looks at me in such a friendly manner, I can say we have had in Canada, under federal statutes, under federal administration, interventions in the home that have been proven and contested in the courts, and not always with great success. There is nothing in paragraph (*a*) that deals with question of one's honour and one's reputation. These are surely separate rights, just as sacred as liberty itself. If it was possible for the declaration of human rights to formulate a solemn declaration against any violation of these things, surely we ought to do that in this bill of rights.

I think that this amendment put forward by Mr. Badanai is important for many reasons, and especially important because it introduces for the first time in our discussions the desirability of protecting the family and the home as essential institutions in this Canadian society of ours. I know this does not apply to Canada at the present time and does not apply to any Commonwealth country, certainly the old colonies—I believe I can say that about Ceylon, India and Pakistan. I do not know enough about the other additions to the Commonwealth. However, while it does not apply, who is going to say, in the light of modern conditions that it could not apply to Canada in the future. Look at the situation which existed under Hitler and Mussolini. I do not say that a mere declaration of this kind would stop that, if they are bent on it; but it will certainly act as a declaration of Canadian intent which clearly divides us from any country which would segregate or discriminate against anyone in terms of home, family and sometimes life. We know the situation in South Africa. Will anyone deny there that a clause such as the one in (*a*), guaranteeing the right of the individual to life, liberty and security, would be of any value to South Africans or Indians in that country. But this particular amendment would have a very important peripherastic effect.

I suggest to the minister that while he might argue in a political science group as he did about the implication and inferential consequences of life, liberty and security, he does not address himself to the basic concept Mr. Badanai had in mind. When this matter was discussed in our group, it was Mr. Badanai's own idea. He spoke of the importance of the family in the home and privacy and these things, and he convinced us that this was an amendment that ought to be incorporated in this bill. Even if it did have some of the inferential effects, which I deny—even if it did, it is so basic in our society that it ought to be put in there for all men to see and for all men to find in that the confirmation of what everyone of us around this table recognizes as a fundamental basis of the Canadian society. I hope this amendment will be accepted.

May I remind the minister of an observation by Mr. Justice Holmes who said it is possible for a scoundrel—and I am not suggesting the minister is a scoundrel—to find refuge behind the word "liberty". You will not find that in this particular amendment.

Mr. FULTON: It is possible for a scoundrel to find refuge behind the word "honour". I suppose there are all sorts of words behind which scoundrels can find refuge.

Mr. WINKLER: I would observe, in the light of what Mr. Martin has said and remembering the past and so on—I appreciate that it was in war time—

that great sincerity he lets go with today was not very apparent when the government of that day dealt with Canadian-born Japanese. I am glad to see he has had this change of mind. I think this is good—sound.

Mr. MARTIN (*Essex East*): All I want to say to Mr. Winkler is that I do not like the Japanese thing any more than my hon. friend does. I was a member of a government, and when you are a member of a government you accept things collectively. I do not think the Japanese situation is one which warrants our regarding it as a precedent. It is, in my judgment, a sorry chapter; but since my hon. friend mentioned it I would remind him that the Minister of Justice was one of those in support of that position.

Mr. FULTON: No, no. You have gone a bit too far.

Mr. MARTIN (*Essex East*): They did it because they were sincerely concerned about the situation, coming from British Columbia. I think it was a regressive step and I hope we will never take it again. This is one way in which we could overcome that.

Mr. FULTON: You have gone too far when you mentioned that I supported it; but I will not introduce this quarrel here.

I think an additional comment which could be made against your amendment, Mr. Badanai, is this: while, as you say, it is true, that this is based on tradition in the universal declaration of rights, I think we have to bear in mind that that declaration is a declaration which seeks with great particularity to cover almost every conceivable area of human rights and freedoms. One of the reasons why they have to particularize these is because they do not have the due process clause in it. They do not have a due process of law clause in it, because they were trying to draft a declaration applicable to all sorts of countries, including countries unlike ours, which do not have our standards of legality and understanding of what due process of law means. Therefore, because this is a declaration of rights applicable to other countries, as well as countries in the Commonwealth and some in the civil law tradition, it was necessary to have a bill of rights with the greatest particularities. So you find there are a number of articles throughout the universal declaration of rights which are designed to be protective against arbitrary exercise of power. There is article 9: no one shall be subject to arbitrary detention or exile. Article 12 is the one you have reference to in your amendment. There is article 15: no one shall be arbitrarily deprived of his nationality. This is not a confirmative right; this is a series of particulars against the exercise of arbitrary powers. Then there is article 17, and so on. All of them are protections against the arbitrary exercise of power, made necessary to be specified in particular, because they do not have the due process of law clause. If one is to follow the precedent in this bill of rights then one should argue, it seems to me, that we should insert in our bill of rights provisions against the likelihood of slavery, provisions protecting the right to marry, provisions asserting the right to equal access to the public service, provisions asserting freedom from compulsion of association, provisions asserting the right to take part in government, provisions asserting the right to rest and leisure, and the right freely to participate in various activities, all of which are spelled out in the universal declaration of rights —a declaration applicable to countries whose system of law and constitution are entirely alien to our own, and a declaration in which it is necessary to have that particularity. In ours, however, it is not necessary. Our approach has been one of brevity, for reasons on which I think fundamentally we are agreed, provided that we also can be reasonably agreed that we have not left out any of the fundamental rights and freedoms which we should insert.

I come back to my point of view that things which are included in here—privacy, family, home, correspondence, and so on are covered in the great freedoms which we have declared and established in law, namely, the right to

life, liberty, security of the person, and enjoyment of property; also the right not to be subject to arbitrary interference with those freedoms, and to be protected by the right not to be deprived thereof except through due process of law.

It is that right which gives the individual protection against attacks upon his honour or reputation. He can go to the courts and assert his rights and demand compensation from anyone who seeks to deprive him of his honour and reputation; and he can go to the courts and protest against any deprivation against several privacies, such as his family, his home, or his correspondence, whether it be arbitrary or not.

He can go to the courts and protest against such interference, unless it is done on the basis of due process of law.

So if I were to agree to accept this amendment, I would be subscribing to a principle that we should have a bill of rights in particular, along the lines of the universal declaration, and not one along the lines that we have tried to draft.

It is not because the things you have specified are undesirable, but because what is done here would run contrary to the principle of our framework; and if we accept these, then we must accept any particular thing which anyone lifts out of the declaration of human rights.

I say that we should only accept it if it could be shown that it is not already included in the bill of rights.

Mr. AIKEN: Mr. Chairman, when shall we adjourn?

The CHAIRMAN: Once we have disposed of this, I think we should adjourn.

Mr. AIKEN: This is from a comment that Dr. Forsey made, and with which the Canadian labour congress agreed, that the declaration of human rights in the United Nations charter applies to many countries in different stages of political development. When specifically asked, Dr. Forsey stated that he felt the particularization in this bill was sufficient for the purpose.

Mr. FULTON: Would you prefer to use the word "generalization"?

Mr. AIKEN: Yes, I should have said generalization.

Mr. MARTIN (*Essex East*): May I ask Mr. Aiken, a sincere and devoted member, if he accepts everything that Dr. Forsey said?

Mr. AIKEN: Dr. Forsey agreed with me on this particular point. Therefore I am quoting him.

Mr. WINKLER: May we have the question now?

Mr. MARTIN (*Essex East*): Man always resorts to those authorities which meet his own desires.

Mr. AIKEN: That is quite correct.

Mr. BROWNE (*Vancouver-Kingsway*): In addition to what the minister has stated, we have in clause 3 protection against arbitrary acts of parliament. It could obviously have applied, but it woud not now apply either in respect to acts previously passed or any future acts. So it says there shall be nothing in an act of parliament which will deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

I think that that too is an added provision, in addition to the ones which are in paragraph (*b*) of clause 2.

Mr. WINKLER: May we have the question?

The CHAIRMAN: The question is this: moved by Mr. Badanai and seconded by Mr. Batten that clause 2 be amended as follows: that the following paragraph (c) be added after the present paragraph (b).:

> The right of the individual to the protection of the law against arbitrary interference with privacy, family, home or correspondence, and against attacks upon his honour and reputation;

and that the remaining paragraphs be relettered accordingly.

All those in favour will please signify. There are four in favour. All those opposed? There are seven opposed. I declare the motion lost.

Gentlemen, just before we adjourn, the clerk has brought to my attention that there is a rather unusual demand for English copies of the proceedings and evidence of this committee. I would suggest, if someone would care to move it, that a motion be made that the number of copies in English of the minutes of proceedings and evidence authorized to be printed be increased from 750 to 1000.

Mr. STEFANSON: I will so move.

Mr. BATTEN: I will second that.

The CHAIRMAN: It has been moved by Mr. Stefanson and seconded by Mr. Batten.

Mr. DESCHATELETS: Is there any shortage of the French version?

The CHAIRMAN: That has not as yet been reported, Mr. Deschatelets.

All those in favour?

Motion agreed to.

The CHAIRMAN: Gentlemen, we will stand adjourned until 9.30 tomorrow morning.

HOUSE OF COMMONS

Third Session—Thirty-fourth Parliament

1960

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.
Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 11

THURSDAY, JULY 28, 1960

RECEIVED
AUG 5 1960
Library of Parliament

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

WITNESS:

The Honourable E. D. Fulton, Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

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THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23594-5—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

and Messrs.

Aiken,
Argue,
Badanai,
Batten,
Browne (*Vancouver-Kingsway*),
Deschatelets,
Jung,
Martin (*Essex East*),
Rapp,
Stefanson,
Stewart,
Weichel,
Winkler.

J. E. O'Connor,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

THURSDAY, July 28, 1960.
(21)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.35 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart, Weichel and Winkler—14.

In attendance: The Honourable E. D. Fulton, Minister of Justice, assisted by the following *from the Department of Justice*: Mr. E. A. Driedger, Deputy Minister; Mr. D. H. W. Henry, Director, Advisory Section; and Mr. H. A. McIntosh, Legislation Section.

Following further discussion on Clause 2 of the Bill, Mr. Batten moved, seconded by Mr. Deschatelets, "That, following Clause 2 (*b*) there should be inserted as paragraph (c) the words

'the right of the individual to freedom of movement and residence within the borders of Canada'

and that the remaining paragraphs be re-lettered accordingly."

Following discussion Mr. Batten withdrew the motion reserving the right to again present it to the Committee.

Moved by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), the insertion of the following paragraph (c) immediately following paragraph (*b*):

'the right of the Canadian citizen to leave the country and to return to the country'

and that remaining paragraphs be re-lettered accordingly."

The motion was resolved in the negative, Yeas: 4; Nays: 9.

Moved by Mr. Badanai, seconded by Mr. Batten, "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'the right of nationality and the right to change nationality'

and that the remaining paragraphs be re-lettered accordingly."

The motion was resolved in the negative, Yeas: 4; Nays: 9.

Mr. Fulton read to the Committee suggested amendments to Clause 2.

Moved by Mr. Martin (*Essex East*) seconded by Mr. Deschatelets, "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'the right of men and women of full age, without any limitation due to race, nationality, or religion, to marry and found a family'

and that the remaining paragraphs be re-lettered accordingly."

At 10.55 a.m. the Committee recessed in order that Members might attend the opening of this day's sitting of the House of Commons.

At 12.22 p.m. the Committee reconvened and, following further discussion, Mr. Martin (*Essex East*) withdrew the said motion.

23594-5—1½

Moved by Mr. Jung, seconded by Mr. Stewart, "That lines 5, 6 and 7 appearing in Clause 2 be deleted and the following substituted therefor:

'It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,'

and that paragraph (*b*) be deleted and the following substituted therefor:

'(*b*) The right of the individual to equality before the law and the protection of the law;"

The motion was resolved unanimously in the affirmative.

At 1.00 p.m. the Committee adjourned to meet again at 2.00 p.m. this day.

AFTERNOON SITTING

(22)

The Special Committee on Human Rights and Fundamental Freedoms resumed at 2.10 p.m., the Chairman, Mr. N. L. Spencer, presiding.

Members present: Messrs. Aiken, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart and Winkler—13.

In attendance: The same as at the morning meeting.

Mr. Fulton read further suggested amendments.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'The right of the family to protection by society and the state as the natural and fundamental group unit.'

and that the remaining paragraphs be re-lettered accordingly."

The said motion was resolved in the negative, Yeas: 4; Nays: 7.

Moved by Mr. Batten, seconded by Mr. Deschatelets, "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'The right of the individual of equal access to public service.'

and that the remaining paragraphs be relettered accordingly."

The motion was resolved in the negative, Yeas: 4; Nays: 6.

Moved by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'The right of the individual to social security and his entitlement to realize the economic, social, and cultural activities indispensable for his dignity and the free development of his personality.'

and that the remaining paragraphs be re-lettered accordingly."

The said motion was resolved in the negative, Yeas: 4; Nays: 7.

Moved by Mr. Badanai, seconded by Mr. Batten, "That the following be inserted as paragraph (c) immediately following paragraph (*b*):

'The right of the individual to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.'

and that the remaining paragraphs be re-lettered accordingly."

The motion was resolved in the negative, Yeas: 4; Nays: 6.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That the following be inserted as paragraph (*c*) immediately following paragraph (*b*):

> 'The right of the individual to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection.'

and that the remaining paragraphs be re-lettered accordingly."

The said motion was resolved in the negative, Yeas: 3; Nays: 7.

Moved by Mr. Batten, seconded by Mr. Deschatelets, "That the following be inserted as paragraph (*c*) immediately following paragraph (*b*):

> 'The right of the individual to a standard of living adequate for the health and well-being of himself and his family and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.'

and that the remaining paragraphs be re-lettered accordingly."

The said motion was resolved in the negative, Yeas: 4; Nays: 7.

Clause 2, as amended, was adopted.

Clause 3 was called, and discussion continuing, at 4.05 p.m. the Committee adjourned until 9.30 a.m., Friday, July 29, 1960.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

THURSDAY July 28, 1960
9.30 a.m.

The CHAIRMAN: Order gentlemen.

Mr. MARTIN (*Essex East*): Mr. Chairman, before we continue, I do not want to retrace anything I said yesterday, and I do it only with the indulgence of the committee, because we are seeking to arrive at a collective effort, and I feel pretty strongly about the last thing we were discussing yesterday. I wonder if the Minister of Justice has had his attention directed to the situation confronting Mr. J. E. Tertullian, a negro citizen of Ottawa and an economist in the government service. He was refused admission to a high rental housing project in Overbrook in the environs of this city. I mentioned the discrimination that prevailed amongst certain groups. I mentioned six cases involving coloured people, one referring to a citizen of Mr. Spencer's city and my own, and I feel that the amendment we had offered yesterday in respect of the anti-discrimination clause would be strengthened by this amendment, I wondered if the Minister of Justice's attention has been directed to this case, which was widely reported in last night's press.

Hon. E. D. FULTON (*Minister of Justice*): Mr. Chairman, I am afraid I am not in a position to comment on the specific case, but I should like to say for the information of the committee, and I hope it will receive the support of the committee, that in the light of the discussions yesterday, while still I am afraid I am unable to accept the amendment in the form in which it was drafted, I have given instructions that the department prepare and have available for submission to the committee a further amendment to strengthen the non-discriminatory provision of the draft bill of rights.

Mr. MARTIN (*Essex East*): I thank the minister for that statement, and when this proposed amendment comes in we will examine it in the light of the events which I have brought up.

Mr. FULTON: Incidentally, may I say that I also have two preambles. We have now boiled the suggestions down to two, and we ourselves have not decided which of the two we think is the one we should recommend to the committee. I hope to be able to do that early in the course of today's meeting.

Mr. MARTIN (*Essex East*): I think we ought to deal with that when we finish.

May I say that in view of this situation, this Tertullian case will undoubtedly focus what we are doing here more than anything else we have done. The Minister of Public Works, as mentioned the other day, has given me the assurance in the House of Commons that he was preparing a formula that would take care of the federal government's responsibilities in this matter of housing discrimination. I do suggest to the Minister of Justice that the formula ought to be placed before the bill of rights committee. Perhaps we could survey the whole matter a little more clearly if that were done. I wonder if the minister would give consideration to that suggestion between now and when we next meet later today or tomorrow, to see if that is possible, so we could consider whether or not this formula that the Minister of Public Works in cooperation with the Minister of Justice has in mind is one that meets our approval; otherwise we could have a discussion in the House of Commons. I intended to raise the matter in the House of Commons but I would prefer to do it here.

Mr. FULTON: Yes, I would consider that. I think I would have to reserve my position on the question as to whether or not this committee has the authority to review matters of detail coming within the purview of another department.

Mr. MARTIN (*Essex East*): Yes. I am suggesting this only in so far as it has relation to clause 2 (*c*).

Mr. FULTON: Yes. I think you will appreciate, Mr. Martin, that a formula applicable to the central mortgage and housing corporation, which has its relations with the people by virtue of contract and agreement, might well not would arise out of that bill of rights on the matter of giving specific protection be a formula capable of insertion in a bill of rights. Nevertheless the spirit that to the point which you have in mind is obviously something that is going to influence the contracts and agreements that the Central Mortgage and Housing Corporation enters into, as well as their interpretation.

Mr. MARTIN (*Essex East*): In so far as a contract between the lending institution and a Canadian citizen, that is true. That obviously is a matter that could concern only the provinces. But the point I am making now is that since the federal government guarantees such a substantial portion of the monies loaned, it ought to insist that no lending institution should be able to derive any benefit from any act of the federal government unless there is the absolute pursuing by that lending institution of a policy of non-discrimination against coloured people.

Mr. FULTON: That is the objective of the Minister of Public Works; but my point is simply that the method by which he carries out that objective has to be one having relation to contracts and agreements, and not so much by way of a general declaration. The method evolved will reflect the spirit and principles of the bill of rights.

I will give consideration to the matter.

Mr. MARTIN (*Essex East*): Thank you.

The CHAIRMAN: Gentlemen, we are still on clause 2 of the bill.

Mr. BATTEN: Mr. Chairman, yesterday we were considering the subclauses in clause 2, and we, in this group, were attempting to strengthen the clause by making some additions to it. I recognize the argument which the Minister of Justice put forward in respect of the last amendment, but having read some bills of rights, and having looked at some of the articles which are therein contained, I think it would be possible to strengthen clause 2 by such additions. There are many citizens in countries in the world who, for example, do not have the right to freedom of movement. They do not have the right of residence within the borders of their own countries. We just heard about the case mentioned by Mr. Martin which was given such prominence yesterday in the press and again over the radio this morning. I believe that an amendment to clause 2 having relation to this problem would strengthen clause 2, and also bring the bill of rights nearer to those things which concern our people directly. I would, therefore, move, Mr. Chairman, seconded by Mr. Deschatelets, that clause 2 be amended as follows; and this paragraph follow subclause (*b*), and be known as subclause (*c*):

> The right of the individual to freedom of movement and residence within the borders of Canada, and that the remaining paragraph be relettered accordingly.

Mr. FULTON: Mr. Chairman, the first comment I would make in respect of the amendment is that this is another particularization and is, therefore, subject to the same observations I made yesterday. If we start particularizing in this respect, you simply cannot draw the line, but you wind up with something like the universal declaration on human rights, which I am not condemn-

ing in any way as a document for its own purposes. I am simply saying this is not an applicable, necessary or desirable pattern of drafting for us to follow in Canada.

The second comment is that, again, I think this is pointed pretty directly to matters which are within the provincial field—the right of the individual to freedom of movement and residence within the borders of Canada. You are getting very much there into the realm of property, and that part of the realm of property which is within provincial jurisdiction under section 92 of the British North America Act. I would think this would be extremely dangerous. It is true that I have said this bill is a bill within the competence of the Parliament of Canada; but within that framework we have had to be very careful in drafting it, and all particulars that were put in were framed in such a way as to stay within federal competence and not to trench upon provincial competence. I would be of the opinion, looking at this quickly, that this is so broad in its implications that it steps over those boundaries and would in fact trench upon that part of property rights which is within provincial jurisdiction.

My third comment is that this is another move—understandably another move—in the direction of strengthening the provisions against non-discrimination. I think you will find, when you see our amendment, that that objective is satisfactorily achieved, but in an amendment that does not have the danger of infringing upon provincial jurisdiction. So for those reasons I would be unable to recommend the acceptance of this amendment.

Mr. BATTEN: Mr. Chairman, there are sections of this clause 2 which, I suppose widely interpreted, might be interpreted as encroaching on provincial rights; but it is generally understood that we are talking about those matters within the federal field. There are some housing schemes—as Mr. Martin has already indicated this morning—that are within the federal field.

Mr. FULTON: They will be covered.

Mr. BATTEN: And, while I understand that in such a housing scheme there has to be agreement in the federal field with whomever it may be, whether it be a city or a province, or whatever the case may be, some consideration might be given to such a paragraph here in clause 2 as "in so far as the federal government is concerned".

Mr. FULTON: It will, indeed; and I think you will find in the amendment that I hope to be in a position to present this morning, or at any rate later today, that the question of non-discrimination within the field of federal competence is covered by that amendment and made perfectly clear.

I think it is covered in the bill as presently drawn; but there have been expressions of opinion, that I must take seriously, that there is uncertainty on that point. I have taken those views seriously and have, in the light of those views and our discussion yesterday, given instructions that the bill be strengthened so as to point attention to non-discrimination in a manner which will not take us outside the field of federal jurisdiction.

I think you will find, when that amendment is presented, that it covers the broad field of non-discrimination as effectively and as thoroughly as it is competent for the federal parliament to do.

The CHAIRMAN: I wonder if I might suggest Mr. Batten, if it is agreeable to you, that you might in the light of what has been said by the minister, withdraw your motion for the time being, without prejudice to your right to renew it at any time in the future after you have considered the draft amendment of which the minister has spoken.

Mr. BATTEN: Yes. Well, may I ask this question, Mr. Chairman. I do not want to know what the amendment is now; but I think it might be fair for me to ask this question: will the amendment be another paragraph to clause 2?

Mr. FULTON: That is one of the difficulties that we have not quite resolved. It is being resolved at the moment in the preparation of the amendment. We were of two minds—as to whether to add another paragraph, or expand paragraph (*a*) or (*b*).

Mr. MARTIN (*Essex East*): Mr. Chairman, I would recommend to Mr. Batten that there would be no difficulty in allowing this clause to stand, in the light of the request from the minister. But as the minister has not given us an indication of the kind of amendment it is, and as I have a suspicion that it will not satisfy the problem we have raised, and what it may seek to do is put something in the preamble—which I believe would be a dangerous and completely unsatisfactory procedure—I think we might now give the minister some indication of our thinking.

This particular amendment moved by Mr. Batten could have an added discriminatory consequence, or effect: it is not necessarily an anti-discrimination amendment. It would apply to discrimination, to those kinds of isolations that we see on this continent and in this country, situations that apply to certain groups that are denied the opportunity of living in sections of our cities, and so on. It could apply to that. But it could have many other applications.

This, of course, would cover the Japanese problem, to which Mr. Winkler directed our attention—and I am not complaining about that; he directed our attention, quite properly, to it yesterday, and it may be regarded as a very progressive step. But if the minister just thinks of this in terms of anti-discrimination, he will miss, I think, the substance of the amendment.

There are tendencies in our country that make this very desirable. This has nothing to do with property. The minister mentioned that, in commenting upon Mr. Batten's earlier statement. I suppose what the minister was thinking of was that the word "residence" connotes proprietary interest. Well, "residence", in the context of this amendment, does not have that significance. It is movement and residence, residence having the quality of domicile, residence in terms of status, and not in terms of proprietary interest.

I believe that Mr. Batten is right, that the Tertullian case is also applicable to this particular amendment. However, I would suggest that, if Mr. Batten is agreeable, we might just hold this over and see whether or not the amendment the minister has in mind is one that would cover that. Would that be agreeable?

Mr. BATTEN: Yes, Mr. Chairman. While I was thinking over this amendment, I thought of the many references that have been made to Japanese Canadians. I do not propose to make any comment on that, other than to say that it does annoy my sense of fairness when these things happen in Canada. I was not a member of the House of Commons, and neither was the province which I represent part of Canada, and for that reason, even though I feel I would like to say something about this, I shall refrain from doing so.

I do feel that consideration should be given to some amendment of this type. But in view of the minister's consideration of an amendment to this clause, an amendment which we will have later on in the day, I am quite prepared, Mr. Chairman, to hold this over—with the reservation that I have the right to refer to it again, of course.

The CHAIRMAN: Exactly. I thought I had made that clear, that it will be strictly without prejudice to your right to present this motion again.

Mr. BATTEN: I would be quite willing to do that, Mr. Chairman.

The CHAIRMAN: Thank you.

Mr. DESCHATELETS: Mr. Chairman, I have in mind that we should add to clause 2 some mention of the right to leave the country and to return to the country.

What I have in mind is to emphasize the full exercise of citizenship. We have nothing right now in the Citizenship Act which covers, for any Canadian citizen, the assurance of return to this country.

If I understand well, this is a right which is already mentioned in the declaration of human rights, and, as Mr. Martin has pointed out, this right, with the others mentioned in the declaration, is the result of very serious discussion which has lasted over the years. I feel that in this bill of rights there should be some mention of this very important right.

Maybe, at first sight, it does not seem so important, but it is so obvious—and this is recognized among themselves—that the Canadian citizen should have the right to leave, and should have the right to return to this country. However, there is nothing anywhere in our constitution which guarantees that right. Also, there is another angle which gives more importance to this right. We have received during the past ten years more than one million new Canadians. These people very often think of going back to their countries to see their relatives and parents for a while, and they would appreciate, I think, that their right to return to this country be recognized in this bill of rights. I think that a mention of this kind would give more emphasis to the climate of liberty which, no doubt, exists right now in this country. However, we are thinking in terms of the future, and I think that if we do not put into this clause 2 any mention of this right we are missing a great opportunity.

Therefore, Mr. Chairman, I move, seconded by Mr. Martin, that the following paragraph be added to clause 2, after the present paragraph (*b*)—and I quote.

Mr. STEWART: After paragraph (*b*)?

Mr. DESCHATELETS: Yes.

> The right of the Canadian citizen to leave the country and to return to the country.

Mr. FULTON: Mr. Chairman, again, as with two of the previous amendments, including the one of Mr. Batten's which is now standing, we are getting here into a bill of particulars.

We had a suggestion yesterday that we particularize with respect to privacy, security of correspondence and other matters which relate to the security of the person and the enjoyment of property. Then, we have an amendment, now stood, particularizing with respect to the right of residence and movement. Now, we have offered a further amendment particularizing with respect to the right of departure and return. These are all particulars. I do not think I can add very much to what I said yesterday when I was discussing the framework and the concept of our bill of rights in comparison with the framework and concept of the universal declaration. One is a form applicable to Canada, and the other is a form applicable to a situation where you are dealing with countries that do not have our system of laws and constitutional institutions. If you start particularizing in one respect, you must particularize in all respects, in my view. If you start particularizing, you change the framework and concept of your bill of rights, and if you are going to do that, you throw the whole thing overboard, because you cannot stop at one particular point.

In my view—and this is a view I hold firmly, and have come to hold more firmly in the course of this discussion—the fundamental rights which it is essential should be guaranteed and protected in Canada are the rights of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law, with the addition of a provision against discrimination—whether with respect to the enjoyment of those rights or the protection of the law. These are the fundamental rights from which everything else springs, and to add anything after that is, as I say, getting into a bill of particulars—matters which really should

be embodied in separate statutes. If it is a question of individual attributes of citizenship, surely these individual attributes should go into the Citizenship Act and so on. So, if you open the door to this process, as I say, you simply cannot stop; and then who is to say what are the particulars that should be included and what are the particulars which should be excluded, and you are not going to have a bill of rights within this concept, but a bill of particulars which does not serve the purpose for which this bill was drafted.

Every one of these things which have been mentioned are good and desirable things in themselves, but also they are things which are embraced within the concept of the working that has been submitted to parliament in the present bill.

Mr. MARTIN (*Essex East*): The minister has quite courageously and frankly stated the issue that more and more now appears to divide us. He says he does not fail to recognize the importance and the substance of this and some of the other amendments, but that this would involve what he calls a bill of particulars, and that this bill of rights now before parliament seeks to deal with those rights which would be embraced by the phrase:

The right of the individual to life, liberty, security of the person and enjoyment of property, and the anti-discrimination clause. Well, I just point up what Mr. Lang had to say about a bill of rights as an instrument in itself. He pointed out—and I do not agree with his conclusion—that if a bill was projected and formulated, it would be apparent in time that we had not covered all of the rights involved, and that there was a danger in such formulation, because we would be excluding new rights which would arise in the future, in the light of new circumstances. But, that is not the situation which now confronts us, because the minister admits that this is a right, and that it is a known right. On that account, how can we say that a bill of rights is at all comprehensive when it does not acknowledge and cover, in the manner at least proposed, what we have in mind. Now, the minister, in his last statement, has decided the *ratio descidendi* for all of us in this committee. He has said we are confining this bill of rights to those rights that are embraced by the phrase "life, liberty, security of the person and enjoyment of property," and the anti-discrimination clause.

Mr. FULTON: Well, attention should be directed to the four specific subjects at the bottom of the paragraph, but I take it all these statements are made in that context.

Mr. MARTIN (*Essex East*): Yes, that is right. However, the value of this bill of rights is not in the creation of new law. Everything that this bill will do, when the bill is passed by parliament, will not in any way add to or alter the fundamental law of Canada. That, I think, is incontestable. The value of this bill would be that it should be in declaratory form, and in affirmation of these rights. What could be more valuable, if that is the effect of the bill, and it does not change or add to the fundamental law of the land, as I believe is the case? What is more valuable than our stating in particular form these essential, known formulations of rights that we all recognize as belonging to the Canadian citizen?

If it is right to say that there shall be freedom of the press—and it is right—is it not right also to say that the Canadian citizen shall be able to leave this country and return to the country? This is not merely an academic observation: this would have a very practical effect, as Mr. Deschatelets pointed out. We have in this country a very substantial portion of our population who came themselves, or whose forefathers or ancestors came, let us say, from such countries as the Ukraine. We know of such cases. I know of two Ukrainians, one of whom was a citizen and one of whom was an applicant for citizenship, both of whom left Canada and went to the Ukraine and have

never returned. I am not suggesting that because they have not returned the fault is that of the Canadian government: the fault is not that of the Canadian government. Any government in Canada would do everything they could to provide for repatriation in the circumstances. But the Soviet Union in these two cases, for reasons best known to themselves, have refused to allow these people to come back. I personally have made representations with regard to this situation, as has the government, but if we had in our bill of rights a document that clearly stated what the situation was in this regard, would we not be somewhat stronger in the representations that we make?

Here is another example—

Mr. FULTON: I do not think putting it in a bill of rights would change the mind of the Soviet officials, quite frankly.

Mr. MARTIN (*Essex East*): It might not, but it might have the effect of doing what the minister pointed out to me the other day, when he used this argument against me. He said: "What the member is advocating is giving the Soviet Union a chance of saying we are not living up to our international commitments." The minister used the same argument; and I am frank enough to say I am using it against him.

Mr. FULTON: Having said, in the first place, yourself, that it did not apply.

Mr. MARTIN (*Essex East*): But that is a privilege of free discussion.

Mr. FULTON: Exactly.

Mr. MARTIN (*Essex East*): Let me give you an even more forceful example of this. One of the reasons why we have not got a peace treaty in the matter involving south and north Korea—a matter in which Canada has played a very distinguished part—is because of this very principle, in part. The Chinese communists, the communists in the Soviet Union and in North Korea refused to recognize the right of a Korean citizen who was a prisoner of war under the Geneva protocol to return to his country of origin, dependent, of course, upon his wish so to do.

We have found—and the minister can verify this—in the Korea peace discussions at the United Nations—and that position has been taken by the present government—that it was part of the right of the citizen, under international law, under the Geneva protocol, who was a prisoner of war, to determine whether or not he wished, under certain circumstances and after certain eventualities, to return to his country of origin.

The Soviet Union has said, "No, once a man is a prisoner of war, notwithstanding whether the war is over or not, the host country shall have control of the situation." We know of processes of indoctrination that are going on now, and have gone on since 1945. This will not change that, as the minister says; and that is true. But this will have the effect of once again affirming how we feel about this situation.

The minister said this can be dealt with in special statutes. I would remind the minister of the position taken by the Prime Minister, when we were discussing the Citizenship Act, and that was that these matters preferably should not be strewn about in all kinds of statute law, but, in so far as was possible, they should be coordinated under one statute. I am sorry the minister does not accept this suggestion.

Mr. RAPP: Mr. Chairman, I would like to get an explanation from the honourable minister. Is it not right that under our existing laws of naturalization, a naturalized Canadian receives the same protection if he leaves Canada, except if he goes to the country of his origin? I understand that behind the Iron Curtain their law is such that once a person leaves their country they do not accept the citizenship where he emigrated to. But if a naturalized Canadian would go to a different country than that of his origin, he receives the protection of the Canadian law as a born Canadian citizen.

Mr. FULTON: That is absolutely correct, Mr. Rapp, subject to this addition, or subject to this modification of what you have said: a naturalized Canadian is entitled to the protection of the Canadian laws everywhere, in so far as that protection can be given to him, to the full extent and to the same extent as a natural born Canadian, because a naturalized Canadian is a Canadian citizen, and Canadian citizens are entitled to the protection of Canadian laws everywhere; and the only limitation thereon is the ability of Canada to extend the protection of those laws.

The situation mentioned by Mr. Martin, as to the two Ukrainians, as he himself admitted, is not a failure of or omission from the bill of rights, or any other statute, but it is a matter of policy of the Soviet authorities. We could have one hundred statutes and, indeed, one hundred bills of rights, but that would not change the situation in so far as the Soviet authorities are concerned, with respect to the practical results and their determination to follow their own policy.

Mr. Martin has misconstrued what I said with regard to the possibility of this being covered in the Citizenship Act. I was not suggesting that fundamental rights be strewn about in other statutes. My point was that when, as the Liberal party is doing in this committee, it seeks to particularize and get a bill of particulars and not a bill of rights—my point is that those specifics, concerning which we have had three amendments already—and I do not know how many more we are going to have—but in each case if they are specifics I say those specifics should be covered in specific statutes, leaving the bill of rights to cover fundamental rights and freedoms of Canadians.

May I point out another inconsistency into which this kind of amendment gets you when you seek to introduce a bill of particulars and intrude it unnaturally into the framework of the bill of rights.

Our bill of rights starts with the words, in clause 2:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist—

May I point out—because we have to look at these things carefully—that one of the rights which it is sought to embody in this amendment would not be a right enjoyed in Canada certainly a citizen has the right to leave Canada and the right to return now; but his right to return arises when he is outside of Canada.

Mr. MARTIN (*Essex East*): And surely when he touches the shore.

Mr. FULTON: Then he is back in Canada. But the right to return is a right arising outside of Canada; it is a right he has, but it does not have any practical effect until he leaves Canada, so how can you say it is a right enjoyed inside Canada. This demonstrates the unsoundness of trying to include a bill of particulars in so far as the representations made so far have suggested.

Mr. MARTIN (*Essex East*): Does the minister argue in respect of the freedom of religion which we are asserting in clause 2 that we are declaring it only in Canada. Surely, when making an affirmation of this which has an extraterritorial effect we are not restricting it. We are affirming these rights as belonging to the individual wherever he is.

Mr. FULTON: I suggest that is affirmed in the universal declaration of rights. This is a Canadian bill of rights and says:

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist—

It is true that many of these attributes of course go with the person, whether he is in Canada or out of Canada. Certainly, in our view these fundamental rights adhere to every person entitled to the protection of the Canadian

law; but my criticism of your suggestion is that you get into the kind of inconsistency which is revealed here. The right to return arises in a practical sense only when the citizen is outside Canada. So this kind of thing just gets you into consistencies.

Mr. MARTIN (*Essex East*): The minister cannot have it both ways. In the argument he has developed he is seeking to do that. He says one of the difficulties in this amendment of Mr. Deschatelets is that it has to do with the right of the individual when he is outside the country. That might be true with regard to the right to return to the country. It certainly is not true with regard to leaving the country.

Mr. FULTON: That is quite true.

Mr. MARTIN (*Essex East*): I say that this bill in its present form has no such limitation. We are not saying that freedom of religion, freedom of speech, freedom of assembly and freedom of the press, in so far as the power of the parliament of Canada is concerned is to be enjoyed by the Canadian citizen only within the country. We are asserting that these rights belong to the Canadian citizen in so far as parliament has any power, wherever he is.

Let me show you the consequence of the minister seeking to have it both ways. There are some countries where the law of contract is not, as is ours, predicated upon the unlimited right of the parties under that contract to exercise freedom. Under the law which at one time existed in Mussolini's Italy it was not possible for anyone in Italy to make a contract with respect to getting a full fee simple interest in property in certain cities of Italy. Now are we to say that the judicial interpretation in Canada which says that a contract shall be interpreted in the light of the laws of the country where the contract is made, unless the parties otherwise intended, should be allowed to apply once we have a bill of rights. Surely the bill of rights, if it is to mean anything, would mean that in such a situation the courts would not apply that construction and would say the law of the place where the contract is made shall prevail only if there is no violation of the conditions under which it is made or, the laws of the country in which it is made, contrary to the bill of rights. That is the effect of the minister's argument.

Mr. FULTON: Not at all. You are distorting things and I think trying to twist them into unnatural shape. You are getting into the field of conflict of laws in the illustration you have given. The existence of the bill of rights would not in the slightest influence the situation you were discussing, which is a matter to be determined entirely in accordance with the principles of the conflicting laws as they have been developed. We are talking about the rights of Canadians. Let us get back to realities. As you say, certainly the Canadian citizen has the right to freedom of speech; but are you suggesting that if he went behind the iron curtain he would have the right to freedom of speech, whether he was a Canadian citizen or not? What I am talking about—and you know it well—is the practical rights expressed as belonging to the Canadian citizen. I treat this amendment as an inconsistency and absurdity and as part of a dangerous pattern to force this into unnatural patterns by seeking to put in a bill of particulars. All these other arguments you have put forward, in my humble submission, have no relation to the bill of rights at all.

Mr. MARTIN (*Essex East*): I am glad you used the words "humble submission", because they have a definite application. If you ask the law officers they will tell you the point I have made is of the greatest possible consequence.

Mr. DESCHATELETS: I will come back to my remarks. I repeat that we are dealing here with the full and unchallenged exercise of Canadian citizenship rights. A few minutes ago Mr. Rapp made some remarks in connection with this amendment, but I am sure he knows, having had the experience himself as I have had, that there are many new Canadians who are afraid

to go abroad because they fear they are not protected under any statute. They do not see anywhere in our statutes an adequate protection that if they leave this country they will be able to return freely and without any difficulty. This is what I had in mind in making this motion. I think it answers a need. I cannot follow the explanation given by the minister that we are dealing here with only particulars. This amendment answers a need. It outlines a very important right arising out of the free exercise of Canadian citizenship. I think the members of this committee should be very careful in the way they dispose of this motion.

Mr. FULTON: Of course, Mr. Chairman, this recognizes an important right of Canadian citizenship; but may I point out another inconsistent and undesirable feature in this type of amendment. Our bill of rights applies, as I said, to all individuals who are entitled to the protection of Canadian laws. That, of course, embraces citizens and non-citizens. Our bill of rights is a bill of rights in Canada applying to all who are subject to and entitled to the protection of our laws without discrimination. Now you are actually introducing into the bill of rights itself a discriminatory feature because you are introducing an amendment which applies only to citizens. That is why I say this sort of thing should be in the Citizenship Act. You are just getting into inconsistencies in introducing particulars into a bill which should be non-discriminatory.

Mr. MARTIN (*Essex East*): Why do you not change it? If you want to put in the word "individual", I suggest you give consideration to it.

Mr. FULTON: This is your amendment, not mine.

Mr. MARTIN (*Essex East*): It is my amendment, but surely we are all interested in improving the situation.

Mr. FULTON: The other objection is that it is a bill of particulars which, in my view, has no place in a bill of rights. I have given you additional arguments why this particular amendment is undesirable.

Mr. BROWNE (*Vancouver-Kingsway*): If you turn the suggestion over to Mr. Khrushchev, it would be of more use.

Mr. MARTIN (*Essex East*): What was that?

Mr. WINKLER: I think we have had a pretty full discussion, and I think you should call the question.

The CHAIRMAN: I wonder if it is not indicated that you are poles apart with the minister, Mr. Martin?

Mr. MARTIN (*Essex East*): The minister has no sympathy whatsoever with our efforts. Today he is just throwing everything aside, and brushing off all our suggestions.

Mr. FULTON: The more I study your efforts, the more I sympathize with you.

The CHAIRMAN: I think the question should now be put, if you are agreeable. The question is this: moved by Mr. Deschatelets, and seconded by Mr. Martin, that clause 2 be amended as follows: that the following paragraph be designated as paragraph (c), and be added after the present paragraph (*b*):

> The right of the Canadian citizen to leave the country and to return to the country.

Mr. STEWART: Did you have the word "country" in there twice?

The CHAIRMAN: I said the right of the Canadian citizen to leave the country and to return to the country; and that the remaining paragraphs be re-lettered.

Those in favour of the motion will please signify?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: And those opposed?

The CLERK OF THE COMMITTEE: Nine.

The CHAIRMAN: I declare the motion lost.

Mr. BADANAI: Mr. Chairman, I have a little amendment here which does not affect our citizens outside of the country. It affects people living within the country of Canada.

Now, this amendment which I propose to move stems from the experience of persons from eastern countries, I mean eastern European countries, where they have a pride of citizenship and nationality.

The point is that such a person living in Canada would be given the opportunity to choose his nationality. So for that reason I move, seconded by Mr. Batten, as follows:

> That clause 2 be amended as follows, and that it be designated as paragraph (c), to follow the present paragraph (b): the right to nationality and the right to change nationality and that the remaining paragraphs be re-lettered.

I realize that the minister has not favoured particularizing this bill. It seems to me however if we do not spell out or particularize the bill, legal entanglements and disputes would ensue.

Mr. FULTON: They would certainly ensue from this amendment.

Mr. BADANAI: I recall that several witnesses who appeared before the committee freely admitted that this bill in its present form would lead to litigation and to the courts. So I think that if we will follow up and particularize every right which we wish to safeguard for our citizens, it should be spelled out in such terms that everyone will understand it.

Mr. FULTON: May I point out that we are parties to the international bill of human rights, which is the place where problems such as the right to nationality and the right to change nationality should be covered.

This, actually, is an impossibility. You cannot confer by Canadian law the right to change nationality. That is worse than a mere statement of pious hope. It is just a complete misapplication of the very intent of this bill. The right to acquire nationality depends on the law of the other nation.

How can we give a Canadian the right to acquire the nationality of the United States? It is the United States that determines that. We cannot confer upon our citizens or individuals in Canada any right to acquire other nationalities. That would be determined in accordance with the law of the other countries, or perhaps by international law.

But for us to put in a thing like that in our bill of rights would be to make a mockery of it. I cannot refrain from observing at this point that the series of amendments, if accepted, would make a mockery of our bill of rights.

That confirms me in my impression, which was shared by the majority of the committee, that it certainly would have been a dangerous thing to start to accept even the first of these bills of particulars.

The CHAIRMAN: Mr. Dorion.

Mr. DORION: I was just going to make a similar observation. I believe it is a question of international law. I do not understand how we can have such a clause in a national bill of rights, because it is surely a question of international law. And even if we have the advantage or the disadvantage to change our nationality, it would be sufficient to have in there nationality.

Mr. MARTIN (*Essex East*): I appreciate what Mr. Dorion has said, and I appreciate the way in which he has said it. I think that the further our discussion goes it shows that while we may not agree, we do feel very keenly about certain situations; and I am sure that the minister, after he has had a

good lunch, may seem less opposed to consideration of these things, and will exhibit a spirit of higher intelligence than he did yesterday.

Of course I cannot agree with Mr. Dorion or with the minister when they say that this is a right which can only be imposed by some international body. I ask them to think—

Mr. FULTON: I did not say that.

Mr. MARTIN (*Essex East*): You said it was a matter of international right.

Mr. FULTON: No, I said it was partly a matter of international law.

Mr. DORION: Or by the law of the foreign country.

Mr. MARTIN (*Essex East*): It is a right imposed by a country or by countries. I will admit that, because you can have *heimatloss*, which means no nationality, or you may have many nationalities. And this is in contradiction to what the minister said, that it is a right which is given by the state, by a national state. We are saying here that every Canadian shall have the right to nationality. We are not saying that he shall have the right to Canadian nationality. We say that any individual in Canada should have the right to adopt the citizenship of his judgment and choice. We would prefer that he be a Canadian citizen and that he have Canadian nationality, but he might, under the new citizenship act in Great Britain which followed the introduction of our citizenship act of 1946, prefer British citizenship.

Mr. STEWART: Would you have Canada confer that right on the individual?

Mr. MARTIN (*Essex East*): No, no, Canada cannot confer that right, but Canada can say that an individual shall be free enough to be able to acquire the right of nationality.

The minister has not given any attention to the second part of the proposal; the right to change nationality.

Mr. FULTON: That is the part that I was criticizing.

Mr. MARTIN (*Essex East*): The minister has not understood this problem or he would never have made that statement, because look what happened under the Nazis, and look what happened under Mussolini. The law in Italy between 1925 and the end of the war when Sforza came in, was that no Italian born in Italy could acquire the nationality of another country, and if he did acquire the nationality of another country he was presumed under Italian law to be a citizen of Italy. That was also done by Hitler. Hitler went further and denationalized people, including the Jewish people, many of whom were born in Germany.

Those were rights taken away and imposed by the governments of those countries.

It is now the law of Japan that no Japanese citizen loses his nationality in acquiring the nationality of another country. There are many countries where this right exists. We are saying that in Canada no person who comes within our competence shall be denied the right of nationality, or the right to change his nationality. In other words, that person shall be able to act as a free human being. What we are thinking now is not only in terms of the past, not only in terms of the present, but in terms of the future. I would suggest that anyone who will read the discussion which took place in the United Nations, on its declaration of human rights, will realize how untenable it is to suggest that this is something that does not belong to the power of the national state. I would ask the Minister of Justice to read the observations made by the solicitor in the foreign office of the United Kingdom at the United Nations. Mr. Driedger will know whom I am referring to. He is the little short fellow by the name of Sir Patrick—I forget his last name.

Mr. FULTON: I cannot help you.

Mr. MARTIN (*Essex East*): His observations on this very point would show how untenable it is to suggest that this is something that does not belong to the power of the national state.

Mr. FULTON: The rights of a Canadian to acquire or change nationality or citizenship, Mr. Martin, are set out, as you know, in the Citizenship Act. That is why I say you are getting into a bill of particulars here.

Mr. MARTIN (*Essex East*): You say we are getting into a bill of particulars; but that is the difference between us. We say that, since this bill of rights does not alter the fundamental law, its purpose is to state unmistakeably what these rights are in Canada.

Mr. FULTON: Fortunately, every Canadian citizen, whatever his national origin, has the rights of citizenship conferred upon him by the Citizenship Act, including the right to abandon Canadian citizenship if he so desires. That is for the protection of those who come to this country from Hungary, from the Ukraine—probably I should not mention particular nations, because I should have to mention them all. But from wherever they come—Italy, Japan, the United States, central Europe, eastern Europe, China—those people have the right to abandon Canadian citizenship, in accordance with the terms of the Canadian Citizenship Act, if they wish.

But Canada cannot, either in a particular statute or in a bill of rights, confer upon its citizens, as I see it, the right to acquire another nationality.

Mr. MARTIN (*Essex East*): We are not doing that.

Mr. FULTON: That right will be determined in accordance with the law of the nations whose nationality he desires to adopt.

Mr. MARTIN (*Essex East*): We are not seeking to do that; surely the Minister of Justice understands that. We are not trying to do that: we are simply saying to the person within our authority that he shall have the right to change his nationality. Is that to be denied a Canadian citizen? We are not conferring upon him the right to nationality of another country.

Mr. FULTON: It is open to him now; but it is a right which is described and covered in the Citizenship Act which, in my view, is where it belongs.

Mr. MARTIN (*Essex East*): No.

Mr. FULTON: You say it is not covered in the Citizenship Act?

Mr. MARTIN (*Essex East*): The Citizenship Act does not cover that at all. I introduced it.

Mr. FULTON: I know—but you must have forgotten it.

Mr. MARTIN (*Essex East*): I am not saying that this right does not now exist in Canada, any more than I am saying that freedom of speech does not now exist in Canada. I am saying that the bill of rights does not add to the law; all it does is declare what is the situation—and if that is valid for these other rights and freedoms, I say it is valid for the right that is proposed by Mr. Badanai.

Mr. FULTON: Well, I am obviously not going to be able to change your mind, however erroneous your conclusions are.

Mr. STEWART: Question.

Mr. BROWNE (*Vancouver-Kingsway*): Question.

The CHAIRMAN: I do not think the minister had an opportunity to develop his argument. I do not know whether you are satisfied with what you have said, Mr. Minister: there were some interruptions.

Mr. FULTON: I really do not think there is anything that I can add. I think I would be repeating what I have said previously.

The CHAIRMAN: Are you ready for the question, then gentlemen? The question is—moved by Mr. Badanai and seconded by Mr. Batten—that clause 2 be amended as follows:

That the following paragraph, to be designated as paragraph (c), be added after the present paragraph (b):

The right of nationality and the right to change nationality.

And that the remaining paragraphs be relettered accordingly.

Those in favour will please signify.

The CLERK OF THE COMMITTEE: Four, sir.

The CHAIRMAN: Contrary?

The CLERK OF THE COMMITTEE: Nine, sir,

The CHAIRMAN: I declare the motion lost.

Mr. MARTIN (*Essex East*): What was the vote this time, Mr. Chairman?

The CHAIRMAN: The same—four and nine.

Mr. FULTON: Mr. Chairman, may I at this moment be permitted to put before the committee a change that we have worked out with respect to this question of discrimination?

The CHAIRMAN: I think this would be an opportune time.

Mr. FULTON: So that further consideration of clause 2 might proceed, having that in mind.

Mr. MARTIN (*Essex East*): What was the reason, Mr. Minister?

Mr. FULTON: So that you will have knowledge of what we are proposing: and later, if it recommends itself to the committee, a member might move its adoption. Its effect would be to insert in the introductory words of the clause the principle of non-discrimination, so that principle would apply throughout clause 2. It would apply to all the paragraphs, including the rights specified in paragraphs (*a*) and (*b*), and all the subsequent ones. It would then be necessary to reword paragraph (*b*) slightly. Perhaps I had better read the amendment as it would be in its full form. It would be that clause 2 be amended by deleting all the words preceding paragraph (*a*), and substituting the following:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

and paragraph (*a*) would remain as now; and paragraph (*b*) would be deleted, and the following substituted therefor:

....the right of the individual to equality before the law and the protection of the law.

Mr. MARTIN (*Essex East*): Would it be possible to have those typed so that we could give consideration to it during the adjournment in order to see their implications. I do not think it covers it sufficiently, but it is an improvement.

Mr. FULTON: Although they are not available now, we could have them available for the next sitting of the committee.

Mr. MARTIN (*Essex East*): If you could do that, it would give us an opportunity to study it. We have not had a chance to do so. I am afraid it does not do what I had in mind.

Mr. BATTEN: Would you mind reading it again?

Mr. FULTON: The introductory words of clause 2 would then read:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

Then, paragraph (*a*) would stand as it now appears, but paragraph (*b*) would be changed to read:

....the right of the individual to equality before the law and the protection of the law.

So, the non-discrimination provision would apply to all the rights embraced in clause 2.

Mr. STEWART: I would move that.

Mr. FULTON: I think it would be better if it was not put in as a formal amendment until later; in the meantime it could be distributed for consideration at the next sitting.

Mr. MARTIN (*Essex East*): Thank you. This will give us an opportunity to study it.

I think the last part is an improvement, but we might as well give it consideration.

I would like to address myself to another consideration. I would like to move, seconded by Mr. Deschatelets, that clause 2 be amended as follows—that the following paragraph be designated paragraph (c), paragraph (c) to be added after the present paragraph (*b*):

....the right of men and women of full age, without any limitation due to race, nationality or religion, to marry and to found a family, and that the remaining paragraphs be relettered accordingly.

Mr. WINKLER: Would you please read it again?

Mr. MARTIN (*Essex East*): That after paragraph (*a*) we add the present paragraph (*b*), with the following paragraph to be designated (*c*) after the present paragraph (*b*):

The right of men and women of full age, without any limitation due to race, nationality or religion, to marry and to found a family.

—and that the remaining paragraphs will be re-lettered accordingly.

We do not know that in this country there certainly are no limitations or violations of this right, in so far as I am aware. We do regard the family, as I said yesterday, as the cornerstone of our society, so that I do not suggest for a moment that this right is needed in this country at this time, any more than some other rights are needed, because they are fully recognized and observed. But we have to take into account situations elsewhere, and what could develop in this country. We know there are countries now where this right does not exist. We know the situation in totalitarian countries—notably in Germany and in Italy during the war. We know the discrimination that was asserted against the Jewish people. We know of some of the limitations that now exist in some of the middle eastern countries, in some of the Asian countries, and in one Latin country now.

Since we are dealing as comprehensively as we can with the declaration of human rights and fundamental freedoms, as we see them in Canada, we believe that just as this was a part of the declaration of human rights in the United Nations it should become part of the bill of rights of Canada. That is why we say we should have the right to found a family.

There are deep connotations there that touch very vitally certain religious groups in this country—the right to raise children, recognition that children represent the greatest riches that can be given to human beings. This would be a declaration that deals with some of the dissatisfactions that are now occurring on this continent. It does not mean that people have to accept these concepts of the rights flowing from family life, but it does mean that those who have those concepts shall be permitted to enjoy them.

The CHAIRMAN: Are you finished, Mr. Martin?

Mr. MARTIN (*Essex East*): Yes.

The CHAIRMAN: Mr. Dorion.

Mr. DORION: Mr. Chairman, there are some limitations to the exercise of such a right and the limitations are determined by the provinces. This provincial right is expressed in section 92 of the B.N.A. Act. Now, I believe that if we include such a clause in our bill of rights it would lead to confusion because in section 91 you have the expression "divorce and marriage". In consequence, I believe it would be possible to have a conflict between that clause and the dispositions of the civil code of the province of Quebec. I do not believe it would be convenient to have such an article or such a disposition in our own bill of rights. This is the reason why I am opposed to it.

Mr. MARTIN (*Essex East*): I would like to know more about that. I did not realize this.

Perhaps, Mr. Chairman, we might adjourn now.

The CHAIRMAN: I think we should adjourn at this point.

Mr. MARTIN (*Essex East*): Did they finish the estimates of the Department of the Secretary of State in the house last night?

Mr. OLLIVIER: Yes.

Mr. MARTIN (*Essex East*): Now, we have defence production which I do not think will take very long, and then we will have the Department of Labour.

Mr. STEFANSON: No—legislation.

Mr. FULTON: There is a little matter of third reading of the combines bill.

Mr. MARTIN (*Essex East*): I was going to say that when the estimates of the Department of Labour come up I will have to be in the house.

The CHAIRMAN: I recognize that. I would suggest we adjourn now. Perhaps we can advance the hour of reassembly and then if the labour estimates are called I think the committee would take that matter into consideration in trying to accommodate you.

Mr. MARTIN (*Essex East*): Why can we not come here after the orders of the day? Does that interfere with the minister?

Mr. FULTON: I may have to move a third reading.

Mr. MARTIN (*Essex East*): Could we leave it this way, that after the orders of the day if you do not have to be there we will come back.

Mr. FULTON: Yes. I will have to be there until the motion is adopted. I do not know whether it will be lengthy or quick.

The CHAIRMAN: I am not sure I understand. Are we to come back at 1 o'clock or after the questions on the orders of the day have been concluded.

Mr. MARTIN (*Essex East*): I suggest that after the orders of the day, if the minister is not tied up that we would come back and proceed as long as we can. If the labour estimates come up I would hope we could adjourn.

The CHAIRMAN: The understanding is that we will come back here after third reading of the combines bill if it is done this morning. Otherwise we will meet here at 2 o'clock.

—And following a recess—

The CHAIRMAN: Order, gentlemen.

Mr. MARTIN (*Essex East*): Mr. Chairman, the situation is that we do not expect the consideration in respect of defence production to take more than ten minutes in the House of Commons.

Mr. FULTON: Could we have a message sent to you?

Mr. MARTIN (*Essex East*): Then there will be legislation.

Mr. FULTON: I am sure that it will not be finished before 1 o'clock. Could we have a message sent to you when the labour estimates are being considered?

Mr. MARTIN (*Essex East*): Let us try to go on until 1 o'clock, at which time we will know what the situation is.

Mr. Chairman, during the recess Mr. Dorion, who is, I must say—I am not saying this in discrimination against anyone else—a gentleman of the first order, was kind enough to go to very considerable trouble in pointing out to me that this amendment I proposed would affect section 92 of the B.N.A. act. I am a common law lawyer not a civil law lawyer but I now appreciate the point. I am quite satisfied with the information he has given me, and it has been confirmed by Mr. Deschatelets. I am sure now that his argument in respect of the matter is sound, and I, therefore, do not propose to proceed with the amendment. I am very grateful to Mr. Dorion for helping me with the matter.

The CHAIRMAN: Then it is agreed, Mr. Martin, that your motion, seconded by Mr. Deschatelets, is withdrawn.

Mr. MARTIN (*Essex East*): That is right.

The CHAIRMAN: We are still considering clause 2. Before we adjourned the minister had indicated, or suggested an amendment to clause 2. Do you wish to move that amendment, Mr. Jung?

Mr. JUNG: Yes, but before I do so, Mr. Chairman, I would like to say a very few words to explain my position in respect of this amendment.

Yesterday in this committee a somewhat similar amendment was moved, or certainly an amendment which might have been similar in principle. It was moved by Mr. Martin. I must confess that the amendment held great attraction for me. My first reaction was that it was something which I would have voted for, because it had a great emotional feeling. The hon. members of this committee will understand the reason for my support of that type of an amendment. However, in view of the objections raised by the Minister of Justice, I could understand the reluctance of the minister to accept the amendment as it was proposed. That, however, did not stop me from giving further thought to such an amendment, and I am happy that the minister has seen fit, after further discussion with the officials of his department, to come forward with such an amendment.

I therefore move, seconded by Mr. Stewart that lines 5, 6 and 7 of clause 2 be deleted and the following substituted:—

Mr. MARTIN (*Essex East*): Are we now dealing with Mr. Fulton's proposed amendment?

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): All I can say is I have not had one minute to look at it. I do not know about the other members of this committee, but I have not had a chance to see it at all. Could we have a chance to look at it? We just cannot do things under pressure like this.

Mr. FULTON: Mr. Martin, Mr. Jung is moving it now as a member of the committee. I think you will realize that the amendments put forward by yourself and others in the past have been put before the committee without notice, and we have had to deal with them immediately.

The CHAIRMAN: I think Mr. Martin recognizes that the minister brought this suggested amendment in before we adjourned.

Mr. MARTIN (*Essex East*): Yes, but we have not had a minute since to look at it.

The CHAIRMAN: There has been knowledge in regard to this proposed amendment for some considerable time.

Mr. MARTIN (*Essex East*): Yes, but there has been no chance to consider it, that is the point I am making.

Mr. BROWNE (*Vancouver-Kingsway*): There has been no chance to consider any other amendment that has been proposed.

Mr. MARTIN (*Essex East*): This is a major amendment. I do not know if the hon. gentlemen wish to proceed this way, but I am saying that I have not had a chance to study it, and I do not know whether other members have or not.

The CHAIRMAN: Do you wish to continue, Mr. Jung?

Mr. JUNG: Yes. The proposed amendment is to delete lines 5, 6 and 7 in clause 2 and substitute therefor:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,—

And that subclause (*b*) of clause 2 be deleted and the following substituted:

> the right of the individual to equality before the law and the protection of the law;

The CHAIRMAN: Yes.

Mr. FULTON: Mr. Chairman, might I say a word in respect to this proposed amendment?

It has the objectives of the amendment presented to us yesterday by Mr. Martin in respect to non-discrimination, as I understood them. I think that was your amendment, Mr. Martin.

Mr. MARTIN (*Essex East*): That was my amendment.

Mr. FULTON: This has the same objectives as that amendment, as I understood them on reading it and considering the discussion; that is to say, to ensure that the rights that are declared here for the benefit of the individual are enjoyed by all individuals in Canada, without discrimination by reason of race, national origin, et cetera. It is free from the objection, however, to that particular amendment—the objection that I raised—namely, that that amendment had the effect of re-enacting all the rights, without any limitation whatsoever.

In the form in which it is now presented, the amendment will have the effect of ensuring that all the rights are enjoyed, without discrimination; but they are still subject to this limitation, namely, that a person is subject to being deprived of them by due process of law. Without this limitation, as I explained yesterday, you could not, for instance, imprison a person, even though he had been properly convicted.

So I hope the committee will agree with me that it does achieve the objectives of enabling our rights to be enjoyed without discrimination, without being open to the other objections.

Mr. AIKEN: Mr. Chairman, if I may just say one word on this: I think that the moving of the words "without discrimination by reason of race, national origin, colour, religion or sex" from one of the subclauses into the main part of the clause, so that they will apply to all subclauses (*a*) to (*f*), is an excellent move. It gives this discrimination clause force throughout the whole section. I think it is a great improvement.

Mr. DORION: Mr. Minister, I would like to know your opinion on the following point. I suppose that in the labour convention there is a difference between salaries paid to women and salaries paid to men.

What would be the result of the construction of these words, "the right of the individual to equality before the law and the protection of the law", in respect to such a case?

Mr. FULTON: I think, Mr. Dorion, that my answer would be that the situation you envisage, provided there was no other accompanying injustice, would not be one of those rights covered by the bill of rights.

A good deal of this, of course, is in the field of contract—the sort of point that you have raised—and it is for reasons such as that that we have avoided including in here anything that might be called a charter of economic rights, except the right to the enjoyment of property.

Those rights are not specifically covered in this bill, for reasons which I have given before. I think the situation you are describing would be in the field of economic rights, so-called, and therefore there would be no difficulty as a result of this bill. But this bill of rights, would, I think, be a great moral force, if not even stronger than that, to assist individuals in asserting their right to protection against unfair discrimination, even in the area that you have described.

Mr. DORION: Thank you.

Mr. DESCHATELETS: We are introducing here a new phrase, "equality before the law". This is something which we had not previously.

Mr. FULTON: That is correct.

Mr. DESCHATELETS: As far as I am concerned, I would have no hesitation in admitting this new phrase, in so far as we had previously adopted a preamble where it was stated that the provisions of this bill only apply within the federal jurisdiction. If a preamble limiting the field of jurisdiction of this bill is not adopted, we can see some difficulties with section 92 of the British North America Act, as far as the province of Quebec is concerned. We all know very well that under the civil code of the province of Quebec we have not got equality before the law. So as long as there is not a preamble stating very clearly that this bill is limited to the federal jurisdiction, I would not be able to vote in favour of this.

Mr. FULTON: I appreciate your point and your difficulty, and I think it is something we should consider carefully. In the preambles we have drafted —one of which I hope to be able to put before the committee this afternoon —it will be clear that this is confined within federal jurisdiction. I hope that will take care of your difficulty. However, if it should be felt not to take care of your difficulty, I wonder if your difficulty would be taken care of by this suggestion—that while the civil code of the province of Quebec does create different status—am I using the correct words?—for men and women in certain circumstances, within certain fields, I am not certain that that necessarily means that they are unequal before the law in the sense we are discussing it here.

In the field of marriage and property rights the law of Quebec creates different status. Now, I would appreciate the views of the committee on that matter. Does it mean that men and women in Quebec are unequal before the law? I rather doubt it. I think, in context, the intent of "equality before the law" here means with respect to this broad field of rights that is covered and specified within the bill, and that then men and women are entitled to be treated, with respect to those rights, equally by the law and by all the agencies of the law. At least, that is my tentative view. I would not think there is any real conflict with properly enacted statutes of the province of Quebec. If there be a conflict, and if the views of the committee are strong on that point, and you think it is not something we can reconcile, I would have no objection to taking out the words "equality before the law" because we have ensured already that they have equal protection of the law in the words that are in here. In other words, they have equality with respect to being able to go to court, and with respect to the treatment they get in court. So, if you feel strongly there is a real doubt or difficulty created by the words "equality

before the law" I would have no strong objection to removing it, and leaving it to read: "the right of the individual to the protection of the law".

Mr. DESCHATELETS: I would have no objection to the terms "equality before the law" as long as we deal very clearly with it, and that it would be very clearly indicated in the preamble that the provisions of this bill only apply within the competence of the federal field. If that was the case, I would have no objection.

Mr. DORION: Mr. Minister, I believe there is another aspect to consider in connection with that suggestion. By article 91, paragraph 26, divorce and marriage are within the federal jurisdiction. In fact, the federal parliament never legislated in this except in respect of divorce. We have no federal legislation in respect of marriage.

Mr. FULTON: Yes, I believe that is correct.

Mr. DORION: And, in fact, the province exercises these powers. In the province of Quebec we have three or four chapters of titles in respect to this important problem. It would be possible to have a conflict, because these powers now exercised by the province maybe are within the federal jurisdiction and, in consequence, it is very important to declare, because it would be a source of new difficulty. This is very important for the province of Quebec because they have their own particular situation.

On this point, I would like to quote for the committee something I sent to Mr. Martin this morning, after the discussion between us.

Such a conflict happened in Germany. In connection with civil rights, the federal parliament and the state government seem to have concurrent jurisdiction, and if we have something which may be construed as affecting the rights in matters of marriage—between husband and wife—it may be that it would become a source of conflict. Maybe it would be a source of conflict. If you would permit me, Mr. Chairman and Mr. Minister, I would like to read just a short quotation on this point. It was cited in *The Tablet* on October 10, 1959:

> A statement given to the press at the beginning of last month by the Cologne Metropolitan Curia deplored a recent ruling of the West German Constitutional Court at Karlsruhe. The federal constitution as approved in 1949, contains a clause saying roundly, "Men and women are equal"; and to this the constituent assembly, ten years ago, attached a recommendation that the legislature should amend all laws that might be deemed to be incompatible with it. The reference was in particular to a law of marriage and the family dating back to 1896, according to which the husband has the right to take decisions in family matters. From 1949 to 1957 the revision of this law, or, rather, its replacement by a new one, was under consideration. Eventually in 1957 a new family law was passed. This included two paragraphs saying that the parental rights and duties in a family are administered by both parents, but that if the parents cannot reach agreement then the father has the last word in deciding what shall be done. But the constitutional court has now upheld the contention that these provisions are incompatible with the constitutional declaration on the equality of the sexes, and has declared them to be annulled.
>
> The decision was the occasion for the statement mentioned above, which quotes from a joint pastoral letter published by the West German bishops in 1953, when the family law was still in preparation. The statement declares that whoever denies "in principle" the right of a father as head of the family is denying the gospel and the teaching of the church, and that to say that the settlement of family problems should lie with the state or with any other "extra-family authority"

is to transgress against "the God-given independence of the family and marriage." In divine and natural law, it went on, men and women are equal in point of dignity and freedom, but nonetheless "there are differences in the juridical position of husband and wife." Whoever denies the authority of the husband disregards the "power of guidance" with which the father is endowed "in the service of love to his wife and his children." A wife has the right to protection against the abuse of her husband's authority, but there is no sufficient reason to reject his opinions "in principle and in general."

I believe this article, or this opinion given, is very important, because I believe that it will have an analogy between the situation in Germany and our own situation, if it is not clearly established that we do not intend to affect not only the jurisdiction over the provinces but also the powers actually exercised by them by virtue of article, I believe, 135, of our constitutional act.

Now I would like to suggest, in my turn, a solution to that problem. Maybe the best way would be to amend—and it is a suggestion made by my colleagues—article 5, which is the article dealing with the interpretation or construction of this statute. Maybe after the word "construed"—

Nothing in part I shall be construed to affect the provincial rights and powers, or—

—and then we go on.

Mr. FULTON: The suggestion has been made that it might be covered either in the preamble or in clause 5, or in both.

Mr. DORION: Because clause 5 is the clause which is the construction clause?

Mr. FULTON: Yes. Now, I am quite certain we can devise ways of making it clear it is intended to have effect only in the federal field. If that is satisfactory to the committee I would prefer, personally, to see it left that way, with the words "equality before the law" still in this particular suggested subparagraph, because I do feel that the expression "equality before the law" would not be interpreted by the courts so as to say we are making men and women equal, because men and women are not equal: they are different. I do not think the courts would interpret parliament—

Mr. DORION: I heard that there is a difference.

Mr. FULTON: —I do not think the courts would interpret this as an expression by parliament to do that which it knows it cannot accomplish. There are a number of differences of status even between citizens. My attention is drawn to the fact that judges are different from ordinary citizens in that they do not have the right to vote. That does not make them any the less equal in the sense of being equal before the law. They do, however, have a slightly different status and I think comparable, in the sense in which we are discussing it, to the difference in status between men and women in the province of Quebec. I do not think that any court would interpret these words as meaning that parliament said that all reasonable and logical differences in status reflecting the natural consequences of the physical position occupied or in which individuals find themselves—I do not believe the courts would hold that such differences in status were over-ruled by the bill of rights. I do not think the courts would give it that effect; neither do I think there would be any conflict with the Quebec law. If the committee would agree to leave it in, we can cover the situation I think completely and safety in the preamble or in clause 5 or both.

Mr. MARTIN (*Essex East*): I was inquiring of Mr. Deschatelets if he agreed with Mr. Dorion?

Mr. DESCHATELETS: I agree with everything Mr. Dorion has said. The only problem is to put in the act a safeguard which will protect the rights and powers of the provinces. This difficulty will remain.

I would like to ask a question of Mr. Dorion if you would permit me, Mr. Chairman. Does Mr. Dorion feel that in putting in the preamble the safeguard such as the one already described that the provisions of this bill will apply only within the federal jurisdiction? Is Mr. Dorion satisfied that, with this in the preamble, nothing in this bill would touch the provincial rights of the provinces.

Mr. DORION: I believe so, because yesterday I consulted Maxwell, the authority on interpretation of statutes, at page 47. His opinion is that preambles may be of very much assistance or help to the judges in order to construe a statute.

I believe it would be sufficient. I would like to have your opinion, Mr. Minister.

Mr. FULTON: Well, I think I have already expressed an opinion which is much in conformity with that which you express and which you quoted from Maxwell.

Mr. MARTIN (*Essex East*): When I was discussing this yesterday I believe you said there are two points of view on this.

Mr. FULTON: I did refer to the situation, which I believe also is covered in Maxwell, that where a provision in a statute, having legislative effect, speaks clearly one way, then the preamble cannot over-ride it and the courts have in the final analysis to decide what the law says. If that is clear it cannot be overridden by a preamble.

Mr. MARTIN (*Essex East*): That is true, but the courts may use the preamble to ascertain the meaning.

Mr. FULTON: To ascertain the intent. I think I said that.

May I make one final observation to set the committee's mind at rest in respect of the words "equality before the law". Perhaps it could be expressed this way; that the effect of the bill of rights is to make it clear that human rights and fundamental freedoms apply to all those under the protection of Canadian law, not that identical laws are applicable to everybody.

Mr. MARTIN (*Essex East*): Yes, that is right.

Mr. Chairman, I think that this amendment advances us somewhat. To that extent I welcome it. It does not, however, meet the amendments that we have put forward, but it does go part way. To that extent, speaking for myself, I would think that one must be grateful for the minister's acceptance to this extent. This anti-discrimination feature is in (*b*), but as I say it does not meet the fundamental issues that we raised in our amendments. It does, however, indicate that the minister has an open mind and one that I hope will open more and more as we go along in our deliberations.

Mr. BADANAI: The only thing I want to say is that while this amendment is not all we would like to see, nevertheless I am in favour of it. It is an improvement, and a distinct improvement over the original copy.

The CHAIRMAN: Are you ready for the question, gentlemen?

The question is: Moved by Mr. Jung and seconded by Mr. Stewart, that lines 5, 6 and 7 of clause 2 be deleted, and the following substituted therefor:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

then, to delete paragraph (*b*) and substitute the following—

(*b*) the right of the individual to equality before the law and the protection of the law.

Mr. DESCHATELETS: And paragraph (*a*) stays as it is?

The CHAIRMAN: Yes. All in favour, please signify?
Contrary, if any?
I declare the motion carried unanimously.

Mr. BATTEN: May I ask one question? What would be the effect of this if the comma were dropped after the word "exist" in the third line, and placed after the word "existed", which is the fifth word in the second line?

Mr. FULTON: I do not see where the second "existed" comes in.

Mr. BATTEN: It is the fifth word in line 2.

Mr. FULTON: Then it would read:

> It is hereby recognized and declared that there have existed, and shall continue to exist without discrimination by reason of race, national origin, colour—

—and so on.

Mr. BATTEN: Yes. I am not making an issue of it at this time, but my reason is that as it reads now it says that it is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination, —and so on.

Mr. FULTON: I would think that no comma at all might be just as appropriate, so that it would read:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour—

—and so on.

I have no objection to that. So may I just cross out the comma, as if the amendment had been submitted without a comma in it?

The CHAIRMAN: I must confess that when I put the question, I did not put in the punctuation. Is it agreed?

Agreed.

Mr. MARTIN (*Essex East*): May we adjourn now? What are we going to do now?

The CHAIRMAN: I suggest that we meet at 2:00 o'clock and review the situation as it then exists. We do not know what may be the situation at 2:00 o'clock, and we would not want to get out new notices, and that sort of thing.

Mr. MARTIN (*Essex East*): All right.

The CHAIRMAN: We shall review the matter at 2:00 p.m.

AFTERNOON SESSION

THURSDAY July 28, 1960.
2 p.m.

The CHAIRMAN: Gentlemen, will you come to order please.
We are still on clause 2.

Mr. FULTON: Mr. Chairman, not being a member of the committee I am not in a position to move a motion, but may I place this before the committee, not for immediate disposition, but as an outline to the committee of the

changes I would like to recommend and what I hope you will all feel will represent improvements. I do this now because they will arise mainly under clause 3 and can be considered in the meantime.

You will remember a discussion that took place with regard to the introductory words of clause 3 being too long and complicated, and not really suitable for inclusion in a bill of rights of the sort we would want, a kind that could be framed, be readily understood and appealing to children. We have endeavoured then to simplify these introductory words. Our scheme has been to remove from the introductory words in clause 3 those parts which are made necessary by the intention to have the bill of rights apply to all past statutes of Canada and all subsequent statutes of Canada that are subject to be repealed, abolished, or altered by the parliament of Canada.

What we have done is to take those words out, and we intend that they be put in an interpretation clause which would form subclause (2) of clause 5. Those words would not appear in part I, which is to be called the bill of rights.

Mr. MARTIN (*Essex East*): Are you going to distribute a draft?

Mr. FULTON: Yes, and they are available, I think.

Those words will appear in clause 5, and the result would be that clause 3 would be amended by deleting all the words preceeding paragraph (*a*) and substituting the following:

> Every law of Canada shall, unless it is expressly declared by an act of the parliament of Canada that it shall operate notwithstanding the bill of rights, be so construed and applied as not to abrogate, abridge, or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to:

Then you would have a further amendment to clause 5 renumbering the present clause as (1), and inserting the following subclause as (2):

> The expression "law of Canada" in part I means an act of the parliament of Canada enacted before or after the coming into force of this act, any order, rules or regulations thereunder, and any law in force in Canada or in any part of Canada at the commencement of this act that is subject to be repealed, abolished or altered by the parliament of Canada.

In the two places, therefore, you would have all the effect of the present provisions in the introductory words of clause 3, but the words of clause 3 would be shorter in compass and I think much more understandable.

Mr. BROWNE (*Vancouver-Kingsway*): They would be much better.

Mr. FULTON: I would also like to give notice to the committee that in light of the discussion that took place, we would be prepared to accept, if any member of the committee wishes to move, that subclause (*b*) be amended by deleting the words "cruel, inhuman or degrading", and substituting the words "cruel and unusual", thus taking care of the concern that was felt with regard to its effect on the Criminal Code.

Mr. BADANAI: Leaving out the words "inhuman or degrading treatment or punishment"?

Mr. FULTON: No, just taking out the words "cruel, inhuman or degrading". My intention was to restrict it so that it would read: "impose or authorize the imposition of cruel and unusual treatment or punishment".

Mr. MARTIN (*Essex East*): Leaving out the word "degrading", and leaving out the mention of "torture"?

Mr. FULTON: Leaving out the words "inhuman or degrading".

Mr. MARTIN (*Essex East*): Is that in a draft which you are distributing?

Mr. FULTON: I am afraid it is not quite correct.

Mr. BADANAI: You are leaving out the words "torture, inhuman and degrading"?

Mr. FULTON: That is right.

The CHAIRMAN: You are substituting the words "cruel and unusual"?

Mr. FULTON: "Cruel and unusual" are the substituted words, and it would therefore read: "impose or authorize the imposition of cruel and unusual treatment or punishment".

Mr. MARTIN (*Essex East*): That was Mr. Browne's suggestion.

Mr. BROWNE (*Vancouver-Kingsway*): And Mr. Martin's suggestion.

Mr. FULTON: I also have an amendment to suggest in respect of clause 4, if it should recommend itself to the committee.

I do not think I should perhaps mention it now. It was implicit in some of the earlier discussions.

Mr. Chairman, I have a suggested preamble. I do not know whether you wish me to present it to the committee now or whether you would prefer to wait.

Mr. MARTIN (*Essex East*): Perhaps you would like to distribute it now, but I would suggest we do not deal with it now. I think that is what was agreed on before.

The CHAIRMAN: I think perhaps we should wait.

Mr. MARTIN (*Essex East*): I would thank the minister for giving us the opportunity to look at these amendments.

Mr. FULTON: I am so sorry, I meant to give notice of all things we intended to do with regard to clause 3. We had intended to amend subclause (*f*) so as to include a reference to the right to be presumed innocent until proven guilty.

Mr. MARTIN (*Essex East*): That is very good.

Mr. FULTON: I will, if you wish, distribute that now. It is quite a simple change.

Mr. MARTIN (*Essex East*): I am very grateful for the last change. The minister will note that I questioned Mr. Mundell on that point. I thought that was one of the legal traditions that was not specifically guaranteed in law and should be included.

Mr. FULTON: I think your point is well taken, Mr. Martin. We were impressed by your view and the view of others.

Mr. MARTIN (*Essex East*): I am very grateful as my colleagues are, as I say, and I thank the minister for giving us a chance to look at these amendments which we will consider when we come to the appropriate parts.

As I said a moment ago, I am very grateful to the minister for the introduction of the presumption of innocence until proven guilty. We had intended moving an amendment in that regard when we came to that subclause by adding after (*f*) a further part. Is that the way you have suggested it?

Mr. FULTON: I have suggested adding this into subclause (*f*).

Mr. MARTIN (*Essex East*): We are very happy about that.

Mr. Chairman, I do not know how much time we are going to have, but I would like now to come back to clause 2 and move, seconded by Mr. Deschatelets that clause 2 be amended as follows; that the following paragraph be added after the present paragraph (*b*):

> The right of a family to protection by society and the state as a natural and fundamental group unit, and that the remaining paragraphs be relettered accordingly.

As we have stated on a number of other occasions providing for an amendment to clause 2 under the lettered subclauses, we felt that the value

of the bill lies in its declaratory power and not in any change that it makes in the fundamental law of our country. That being the case, we felt that we should provide as comprehensive a statement of rights as is possible. The argument made against a bill of rights is that you never can hope to comprehend all of the human rights and fundamental freedoms at a given moment, after passage of the measure, which may be considered as deserving of protection. That being the case, it seems to us that once you have decided to embark—as we believe has been wise—on a bill of rights, we should seek to cover all the rights that are apprehended. As I said yesterday, when Mr. Badanai moved an amendment in which there was, in another context, the reference to the family, the latter is the cornerstone almost of our free society in Canada.

At a time when the family, its integrity, and its very corporate existence, is challenged in so many places in the world, it does seem desirable for us—particularly as we are a country so dedicated to the concept of the family—to give recognition to this fact in a bill of rights.

I do not deny that at the present time the law of Canada does not in any way abridge this right which we seek to have entrenched. But the same argumentation would apply to the human rights and fundamental freedoms referred to in general terms in clause 2.

I have had an opportunity, during the lunch hour, of reading for the first time some of the submissions made by certain individuals who were invited to give evidence before this committee. Among them is Mr. F. A. Brewin, a lawyer of distinction in Toronto, who seems to have stated some of the principles which we have been pressing for in this committee. He makes one statement that I think is important in this context, when he says, at the bottom of his letter addressed to the chairman on July 21:

> The declaration by parliament in general terms could not be said to have the effect of repealing or amending any existing statute which might be thought to be inconsistent with it, nor, in my opinion, would it have the effect of preventing parliament in future passing any enactment inconsistent with the bill of rights.

If this statement is correct—as I believe it is—that this bill, in general terms, does not have the effect of repealing or amending any existing statute, perforce what we are doing, then, is not in any way to deal with the fundamental law; it is simply declaring what are existing rights.

I believe that for the reasons I have stated, and the reasons which I stated in greater detail yesterday on the other amendment, this is an amendment that should be accepted, and I strongly urge it on the minister.

It is an amendment that was envisaged precisely in the declaration of human rights, and it should have, it seems to me, an appeal to the members of this committee, as I am sure it will have to the people of this country.

Mr. FULTON: Mr. Martin, I appreciate very fully, and naturally, your desire to see an insertion in the bill of rights of some mention of the family and the position of the family. As you and I share certain beliefs in common, you can well appreciate what I mean when I say that.

I have discussed and studied this matter before. We came to the conclusion that this is one of those things which it is not proper to include in the operative part of the bill. Now that the decision has been taken, however, to have a preamble, in the preamble—which I shall be submitting for consideration by the committee—we have included a very specific reference to the position of the family in society. Perhaps I might just read that suggestion. It will be in the following form, in our submission:

> The parliament of Canada, recognizing that the Canadian nation is founded upon principles that acknowledge the dignity and worth of the

human person and the position of the family within a society of free men and free institutions—

So that we are intending to establish clearly the principle which parliament and the nation recognizes with regard to the family as a fundamental unit of a free society.

Coming, therefore, to the question of putting it in a bill of rights—

Mr. DESCHATELETS: Excuse me, Mr. Minister: from what were you reading?

Mr. FULTON: Part of the preamble that I intend to submit to the committee. Here you are getting into the difficult field of attempting to define rights for which, really, in the form in which they are defined, there is no way in which the government of Canada can give a sanction or an effective means of enforcement.

I think most members of the committee would agree with me, that with regard to the recognition and protection of the family unit as such, most of the rights concerned are in provincial fields: most of the specific rights upon which the family has to rely are in the field of provincial jurisdiction. I think it is an unsound principle to be defining rights, or appearing to assert rights which, in effect, you are unable to protect or enforce.

Do you not think that the difficulty is recognized in the form of your own draft, Mr. Martin? Your form is, "the right of the family to protection by society and the state as a natural and fundamental unit". The very vagueness of that definition, I think, takes account of the problem I have outlined.

Mr. MARTIN (*Essex East*): If you ask me a question, for the purpose of the record I would say, no, I do not agree.

Mr. FULTON: Then I suggest to the committee that the fact that you found it desirable—shall I say, necessary—to draw your amendment in this form indicates to me that those who assisted you in the drafting of it were aware of the problem that I am outlining. I think—although you withdrew the amendment this morning—I should refer to this same sort of problem which would exist in connection with marriage. Here you are getting into an area of rights which, if you try to define them, you find, first, that you have difficulty in enforcing and protecting.

Secondly, possibly you come into an area where there are conflicting rights of individuals, or society, that you find are not taken account of when you put in the vague right—if I may call it that—under this heading.

In the case of marriage, that can be illustrated, I think, very succinctly by saying that to speak of a right to marry puts us in an awkward position, because what about the person who cannot find a spouse? Does that person have a right to come to the government and complain? This is the sort of difficulty that you are getting into.

I have said—and I want to repeat it—that we want this bill of rights to be enforceable. We do not want to talk about rights, the protection or enforcement of which we have no certain means of accomplishing. So that, recognizing that the rights upon which the members of the family—and particularly the head of the family—would have to depend for the protection of the family unit, as such, are in the field of provincial competence, it seemed to us to be misleading, dangerous and deceptive, to put reference to family rights in the operative words of the bill.

Mr. DESCHATELETS: If you would permit me a few words on this, I really think this is a right which should be enumerated in clause 2, because of its importance.

The minister has implied, in his remarks, there might be here some constitutional uncertainties. He has not elaborated on this and, as far as I can see, there are no uncertainties that could develop in the same line as the discussion which took place this morning when we were referring to the marriage. As far

as the enforcement of such a right is concerned, we would have the same problem as for the other rights. If we have difficulties in the enforcement of the other rights in clause 2, we will have the same problem here, and I do not see why we should make any issue on this ground.

Of course, we are not trying here—and we did not either with the previous amendments which we have submitted. The minister has not said, in regard to this amendment, that we are particularizing, and surely there is no question about that. I would say, rather, that we are generalizing several rights, and protection and recognition of the family, with this amendment. As everyone will agree, the family is the cornerstone of our society.

We have to give to this bill of rights a 1960 outlook, and we should endeavour to put everything that might have a strong appeal to Canadians as a whole. Therefore, Mr. Chairman, I would strongly support this motion, and I would hope that other members of the committee would do the same, in order that it would be carried unanimously.

Mr. DORION: Mr. Chairman, I would just like to ask Mr. Deschatelets if it is possible to indicate a case, or a federal law, to which that rule, implied in his amendment, would be possible to apply.

Mr. DESCHATELETS: I am very glad to answer this question, Mr. Chairman, because I will refer to many questions which I have asked since the opening of this committee, when I was asking the minister and other witnesses time and again: could you cite any case that might happen where such a right would be involved? Actually, I do not have in mind any particular case which might have some application, but I am perfectly sure that we cannot, in a bill of rights, ignore the family.

The minister said that we have mentioned the family in the preamble. I think we have to go much further than that, and it has to be included in clause 2.

Mr. DORION: I believe that if we had that rule included in the bill of rights there would be a lot of cases which are within the provincial jurisdiction to which that rule would be applicable and, consequently, I cannot accept that rule as being applicable in the provincial field. I do not believe that we can accept such an amendment.

Now, may I say just a few more words. When it is put in the preamble, it is quite different, because it is only a furnishing of principle, and it is not going to the interpretation of any statute or any provincial law. I believe the best way would be to accept the suggestion the Minister of Justice has made.

Mr. DESCHATELETS: May I make just one further comment following Mr. Dorion's remarks. I hope that we could dispose once and for all with anything that is being put in this bill which has nothing to do with provincial matters or jurisdiction. If I understood correctly, Mr. Dorion has raised the fact that this amendment might raise again a constitutional difficulty. Well, if we have in the preamble, or somewhere in this constitution, a clause where it will be clearly stated that it concerns only the federal jurisdiction, I do not think Mr. Dorion's argument, on those grounds, is very strong.

Mr. FULTON: May I add something, Mr. Chairman, to the considerations I put forward earlier.

I said we are getting into a realm where the rights are impossible within a field of federal competence to define, so that they could be enforced, because in this area the rights upon which the individual would have to rely for the protection of the family may well all lie in provincial jurisdiction. I think that is only one side of the argument, or criticism, if I might put it that way. The other side of it is that we are trying to get a bill on which the individual may rely by way of specific action to protect important and fundamental rights.

Now, you cannot give a right, in the sense of a right enforceable by law—incapable of being protected by law, to anyone or thing which is not a person recognized by law. There is an important distinction here between a group, which is a recognition, in principle, by society, such as the family group on the one hand, and a group that has no juridical existence or recognition on the other hand. The family is not a juridical person, so the family, as such, cannot go to court. One might say, in the juridical sense, it is difficult to define family rights for that reason. It is the individual who has to go to court to protect the family. Surely, therefore, we are right in saying that what you must concentrate on is giving the individual the rights—the inalienable rights—upon which he can rely to protect his family, and to give those rights, in the juridical sense, to the individual and not to a group which has no juridical existence. Now, if the objective be, as it is, to give the head of the family the ability to protect his family unit, I suggest that on analysis you will find that we have done that in so far as it lies within the field of federal competence, because you have attached to the individual the right to life, liberty, security of the person and enjoyment of property. So that if his family is attacked in any way that deprives them or one of them of their liberty, if it is an adult person that person can go to the court and get protection of his rights as an individual; and if it is a minor person the head of the family can go to the court and obtain protection of the individual member of the family. In that way, by attaching powers and rights to the individual you have embraced in sum total the individuals who make up the family, and create all the powers to protect the existence of that family as a unit. You cannot give those rights to the family as such, because the family has no juridical existence in that sense.

I suggest, therefore, you are claiming the recognition of a principle that there is a family unit which society recognizes as the basic unit of society. But the recognition of the principle is, as Mr. Dorion has pointed out, a very different thing, trying to bestow specific rights on things or organizations that have no juridical existence. If your amendment had read, instead of "the right of the familly to protection", "the right of the family to recognition by society and the state", I think there would have been no objection to the amendment on the ground of its actual content, but I think it would be superfluous because we are giving recognition to that principle in the proposed preamble.

I rest this part of my case on twofold grounds: you cannot give rights, in the sense of juridical rights, to a unit that has no juridical existence; and, secondly, by giving the rights to the individual, as we have done, you enable all those individuals who make up the family group to have the complete protection of the law because they, as adults, or the head of the family, if they be minors, can go to court for the protection of the rights you have bestowed upon them individually.

Mr. MARTIN (*Essex East*): Mr. Chairman, I appreciate both what the minister and Mr. Dorion have had to say.

Let me first deal with what the minister has said last. If it is a fact—and I do not think I would agree it is a legal fact—that the family does not have a juridical status or a legal status by implication—

Mr. FULTON: I was careful to confine it to the word "juridical" and I do not want to get beyond that for the moment.

Mr. MARTIN (*Essex East*): Well, a juridical status, then I would say that is perhaps the most powerful argument that has been adduced so for, unintentionally, for the very amendment which is before us. Surely we want to get a juridical status to the extent it is within our competence so to do?

Mr. FULTON: You would have to define it then; you would have to define "family" then.

Mr. MARTIN (*Essex East*): But by "juridical status" we are using a term which really has no legal significance.

There are many things that our law implicitly acknowledges, without clothing the concept or the institution with the paraphernalia which goes with an enactment or a judicial decision; but I would say that the exisence of the family in our society has as strong a legal—or, in the language of the minister—a juridical status as the individual itself. I would say that it has as strong a status as anything that the law seeks to embrace.

This argument was pursued very carefully by—if the minister wants an authority—a well-known jurist who was at Oxford, Paul Vinogradoff, who, in his jurisprudence lectures, speaks of the law as closely related to the very objects that it sought to protect. All through our statutes one will find legal directions that are not necessarily directed to the object which it is intended to protect, be it by process of inference, because society is made up of something, and it is society that the law seeks to protect, either in its group form or in individuals that go to make up that form.

The first argument the minister adduced in his earlier statement was that this was a matter that was already covered in the preamble which he proposes to submit, and the words which he actually read out. I would remind him that in the proposed preamble which I had suggested—and if I remember rightly, in the preamble which Mr. Badanai suggested—reference is made to the family.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I have not Mr. Badanai's proposed preamble before me, but I have my own, and in the second paragraph it says:

> Having joined with other nations and their peoples in the universal declaration of human rights, the people of Canada hereby rededicate themselves to the principles of that charter in their human, social, political, economic and legal terms, particularly those concerning the sanctity and inviolability of the family as the fundamental unit of society—

So that in that respect the minister and I, and Mr. Badanai and others, are at one. But the preamble covers other matters as well that are referred to in section 2. We refer there to certain human rights and fundamental freedoms, which include freedom of religion, freedom of speech, freedom of assembly and association, and freedom of the press. So that we have a precedent with regard to this having been mentioned in the preamble, and we are not, on that account, alone precluded from including them as a subsection of the bill.

Mr. FULTON: I did not argue that.

Mr. MARTIN (*Essex East*): No, no; but you stated it was in the preamble, and I draw the inference which I have drawn.

The minister said, "What protection could parliament give to the family as a natural and fundamental group unit?" Well, I would argue this, and I do not for one moment deny what Mr. Dorion said, that the rights of the family certainly do involve provincial powers, possibly even more so—and I would think more so. That is covered, as Mr. Deschatelets said, by the agreed qualification which we have all consented shall either be in the preamble or section 5, or elsewhere in the bill.

But I would point out to Mr. Dorion this: agreeing with him that that is the place, and that this does touch, but for the qualification to which we all

agreed, provincial powers, he himself—I thought very effectively—argued the other day, when he was talking of freedom of religion, that there was some doubt in his mind as to whether or not the conclusions that some had drawn from some of the decisions of the courts with regard to the power of parliament over the freedom of religion, as distinct from the power of the legislature, was, at best, a doubtful situation.

Mr. Dorion would not agree, I take it, that parliament has, beyond the decisions of the cases like the Roncarelli case and the Boucher case, exclusive power in the matter of freedom of religion. Indeed, Mr. Dorion mentioned there was a current case in the province of Quebec, and he referred to it as the case of Laurier Saumur.

I have before me, Mr. Chairman, an article of *La Presse* referring to a case of the Jehovah Witnesses to which Mr. Dorion referred, and in which Mr. Justice Lizotte said that he regarded cultural liberty in the category of civil rights as being reserved for the provinces by the constitution. He said that the plaintiffs there contended that the law arose out of the Criminal Code because there were penalties provided for in case of infraction.

Now I suggest if that is the case—and I think Mr. Dorion is right—I do not think the old Saumur case—I think there are two cases; this case and the other Saumur case in which I believe you were counsel—

Mr. DORION: Yes.

Mr. MARTIN (*Essex East*): —I think it clearly does establish that the Supreme Court of Canada decisions cannot be interpreted in the face of the limited jurisprudence that exists as meaning any more than that the highest court of the land has held that religious freedom within the context of the particular sections is a matter that now, rightly or wrongly, legally may be regarded as outside the competence of the legislature. There is, however, a whole area of freedom of religion not touched by those cases which still permits the argument, and the conviction, that religious freedom is not wholly removed from the authority of the legislature. So, if that is the case, then surely we are not on sound ground in suggesting that so fundamental a unit in our society as the family—which all of us around this table regard as a natural fundamental group unit—shall not receive from all jurisdictions of government the recognition which we accord it. Even if it were true that the parliament of Canada does not have any authority whatsoever—I cannot believe that Mr. Dorion would go that far—with regard to the family, if we are reserving the power of the province either in the preamble or in section 5, or otherwise, we are not in any way attacking or invading the authority of the provinces but are making a declaration in this bill of rights. It has a declaratory effect—not the effect of granting this law, but confirming it. We will have the advantage of affirming a right which I believe all members of this committee believe is as important a right as any other right which is sought to be guaranteed by this section.

The minister said the logical conclusion of this would be that we would have to go and find a spouse for someone wishing to marry.

Mr. FULTON: I think that was in respect of your amendment.

Mr. MARTIN (*Essex East*): I have it down here. I was just going to say I did not think one could read that into it.

Mr. FULTON: No. I was referring to your other amendment.

Mr. MARTIN (*Essex East*): I think that would not be a specious amendment, because the fact that this protects society does not mean that it is guaranteeing that everyone shall be a member of a family of which he or she is the head.

Then there is the other argument made by the minister, that all we were doing in this bill of rights was to protect the rights of individuals and that what we were asking is that we protect the rights of a group—the family.

I would suggest that that is a false argument. In this section 2 we are protecting not only the individual as such but we are also protecting the individual in any capacity, in any term possible. In 2(e) we are protecting freedom of assembly and association. That surely is a protection of a group. If we say to a particular trade union that they shall have the right to be protected in the development of a trade union, if we say to the civil servants of Canada, for instance, that they shall be allowed to have an association of their own—and I do not see why we should not protect that right, because it exists—why would we not say that another association, the family, should be given the same protection, or why should we not say in general terms it has some actual application to the particular amendment.

I do not know that I can add anything more.

Mr. FULTON: Mr. Chairman, if I may, I should like to reply to that, because it is an interesting argument. However, I do suggest that its very basis establishes the real validity of my argument. Mr. Martin said that what we are doing in the bill of rights is to protect the individual. I do not think I said it in those words, because that has a restraining effect. I said the rights we are establishing and protecting are the rights which there are to individuals; we are defining what are the rights. That is perfectly true; but that is not all we are doing. The effect of the bill of rights is to go further than that. It does give protection to groups, but it gives protection to groups because every individual in the group is free and has the freedom which enables him to form the group. When you speak of freedom of association you are not protecting an association as such, but are giving freedom to the individual to associate as he wishes. You are protecting the group because each individual in that group is free so to associate. Therefore, my point is that the freedom and the opportunity of the group arises because you have protected the individuals who make up that group. If you were to put it on the basis that you now have and isolate and mention and identify groups in order to protect them, then I suggest you must not stop at the family, but must cover the case of schools, lodges, trade unions, specific churches, and so on.

The basic argument is you do not protect groups as such, but protect individuals, because you give the individual the freedom he has already to organize into groups. That brings me back to my earlier statement that the protection of the family is the sum of the rights of the individuals which make up that family, and the rights that you have given to those individuals to go to court to have their rights protected. It is in that way that you have protected the family and made it possible for the head of the family to protect his family. If you are going to say you are giving rights to a family, you are faced with the simple question: how can the family enforce its rights or protect its rights? The next question is: does the family sue in its own name? It cannot possibly do that for the reason, as I said, that it has no juridical existence.

Indeed, there is I think a very real requirement, if you are going to put in the family, as an association having rights, to define what is meant by "family". How would you define "family", Mr. Martin? How could it go to court to protect its rights in the name of the family?

Would you incorporate it, and if so, would you do it under the Companies Act or under the Societies Act?

It is a *non sequitur* to talk about giving juridical rights to the family. The family has its rights, and it has the right to protect its existence, because it is made up of a group of individuals. Society recognizes the principle of the family group.

In the bill of rights you have given protection to everyone who makes up that family group. Thus you have given the opportunity to protect the position of the family. And if you are going to use Mr. Martin's argument, you are giving

the family the right of protection as a family which it does not have. Then how can you speak of a family and not proceed further to mention specific associations, trade unions, schools, lodges and churches?

Mr. DORION: Every one of us surely agrees that the family has the right to full protection. But I repeat I do not know by what means it would be possible to apply that rule to federal statutes.

On the other side it is very dangerous, even if we have a provision by which it is declared that this bill would be applied only within the federal jurisdiction. It is dangerous because if we have no juridical existence—if the family has no juridical existence as such, then under the federal field it is quite different to our own, under the Civil Code.

Under the Civil Code you have a lot of articles which recognize implicitly the existence and the protection of the family. You have, for example, the legal order or succession, and you have the relations between the father, the mother and the children.

You have more than that. If a family has to change its name, there is no fdeeral jurisdiction under which it may do so. If the family wants to change its name it has to come within the provincial jurisdiction, and it is a matter for the legislature to act on.

In consequence, all we can say is that the relations between the members of the family are clearly within the field of civil rights. There is nothing at all except civil rights when we have to decide as to the interests of members of a family. The father may claim for the loss of his child; the child may claim, or the wife may claim from her husband for allowance, and so on; and in consequence when we have something to do in connection with the family, we always have to take recourse to the Civil Code, because it is a matter of civil rights clearly.

Mr. FULTON: It is the same in the other provinces, except that they do not use the Civil Code.

Mr. DORION: Yes. In other words while they may have reference to the Civil Code, I do not see how it would be possible to have reference to federal legislation. That is the main reason for my objection. That is why I prefer the suggestion of the Minister of Justice to put something in, in very general terms, to the effect that in Canada we recognize that the group, the family, is the soul of society.

The CHAIRMAN: Are you ready for the question: The question is as follows: moved by Mr. Martin, seconded by Mr. Deschatelets that clause 2 be amended by inserting the following paragraph to be designated as paragraph (c), after the present paragraph (b):

> The right of the family to protection by society and the state as the natural and fundamental group unit,

and that the remaining paragraphs be re-lettered accordingly.

All those in favour of the motion will please signify?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: Those contrary?

The CLERK OF THE COMMITTEE: Seven.

The CHAIRMAN: I declare the motion lost. Now, are there any further amendments in connection with clause 2?

Mr. BATTEN: Mr. Chairman—

Mr. FULTON: How many more paragraphs are there in the universal declaration of rights? If you will tell us, then we might know how many more amendments we are going to have.

Mr. MARTIN (*Essex East*): It does not cover them all.

The CHAIRMAN: We are making progress.

Mr. MARTIN (*Essex East*): We are making great progress.

Mr. BATTEN: The last time the minister took out a comma for me. I am not going to present any particular arguments for this amendment at this particular time. But I do believe that one of the rights that Canadians have within the federal field is the right of equal access to public service.

Mr. FULTON: That is another extract from the universal declaration of rights.

Mr. BATTEN: Is that in there too?

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): It is not the less valuable for that.

Mr. FULTON: Oh no.

Mr. BATTEN: I appreciate the discussion, but in order to shorten it, I move, seconded by Mr. Deschatelets that clause 2 be amended as follows: that the following paragraph be designated as paragraph (c), to be added after the present paragraph (b):

> The right of the individual of equal access to public service, and that the remaining paragraphs be relettered accordingly.

Mr. FULTON: Of course this is a right which everybody in Canada enjoys in the federal field now. It is a right which is, in my view, embraced particularly in the new clause 2 already, which says:

> It is hereby recognized and declared that in Canada there exists and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely...

And then you have in addition to the definition of the rights in paragraph (a), the right contained in paragraph (b), namely, the right of the individual to equality before the law and the protection of the law.

Then you have the additional protection that the individual may not be deprived of any of his rights including the right to equality before the law, except by due process of law. So that this again is one of those rights which, as I see it, are generally embraced within the declaration of fundamental rights and freedoms that we have already made; and this is just another bill of particulars and not proper to be included in a bill of rights, not necessary with respect to the present bill of rights, and not necessary in Canada at the present time.

Mr. MARTIN (*Essex East*): The minister said it is not necessary and it is covered. Of course, that is his opinion. However, the wording that Mr. Batten has presented is pretty careful wording. It does not say "to the public service", it says "to public service" which would, of course, include "the public service".

Will anyone deny that there is not equal access to "the public service" at the present time? I am not going to go into details on that argument unless I am encouraged so to do. I think that everyone around this table will recognize what I mean when I make that statement. The amendment has more comprehensive scope than what might have been implied in my last observation.

At the present time in Canada, as far as public service is concerned, using that phrase in its widest connotation, including public life, serving in parliament, in the legislature, in municipal councils and so on, I am not aware that there exists at the moment any barring. There may be, I do not know.

In Canadian history we have some examples of the denial of equal access to public service. We all remember the case of Mr. Hart, in one of our provinces.

Mr. FULTON: Why talk about provinces; this is federal.

Mr. MARTIN (*Essex East*): I know, but that just shows what can happen in a restricted sphere can also happen in a more general sphere. We all remember that William Lyon Mackenzie, in spite of being elected three times, was denied the right to take his seat on grounds that provided a great controversy at that time. We do know that in one of the commonwealth countries equal access to public service is denied on the grounds of colour. We are not dealing for present generations in Canada now, in our present legislation: we are dealing for all time to come, we hope. We cannot now guarantee what situations will ensue in the future, and it seems to me, that while this particular right is one that is inherent in our free society, an affirmation of this kind is applicable here as well as it is in other countries. By making this kind of statement we will meet the very kind of argument that the Minister of Justice addressed to me on Friday last. There is no equal access to public service in the Soviet Union. In the Soviet Union no one can get a job without the approval of the party in power; no one can hold an office without the approval of the party in power, and no one can be a member of their so-called parliament without being a member of the body in power. That is not our way of doing things. It seems to me that this is a great opportunity of asserting one of the basic differences in our ideology as well as providing a guarantee, by asserting the right of the individual, of equal access to public service.

Mr. FULTON: Mr. Chairman, the Civil Service Act now covers the broad general field of public service. It gives the right of equal access to Canadians, and the bill of rights now says that all Canadians enjoy their rights without discrimination, including the right not to be deprived of any right or privilege without due process of law. The Civil Service Act then cannot be set aside. It entitles Canadians to be treated equally in applications for admission to public service; and no Canadian can be denied that now, as a result of our bill of rights, by the arbitrary decision of an executive or administration, or even by the civil service commission itself. So that the protection sought in this further bill of particulars is covered now as a result of the bill of rights.

I think it would be interesting to ask, and I rather think the committee is entitled to know, how many of these proposals, everyone of which so far—and I think I am correct in saying this—has been drawn from one or more article of the universal declaration of human rights, we will be faced with; because I think it would be helpful to the committee to know the totality of the number of particulars that the Liberal party want to insert in a bill of rights. It would help the committee, I would think, in deciding whether there is or is not any one particular important matter—perhaps in some general application or interest—that it might be proper to agree should be written into the bill of rights. It seems to me not quite the sort of treatment to which the committee is entitled—to go on producing them one by one.

How many have we had now,—seven? I believe it is something like that. One would never know, having accepted one, if he was going to be asked to accept eight more. If you do accept one, then you destroy the framework of the bill of rights, which is a general bill of rights, because you are admitting a particular into it. This may be acceptable on one occasion—I do not think a case has been made yet—but you could not do that, because you would then be confronted with the claim that, having accepted one or two particulars, you must accept all the others, and thus destroy the whole concept and framework of this bill of rights. I think certainly the minister would be helped in dealing with this general problem, on the basis as I have now outlined it, if we could know just how many of these particulars, drawn from the universal declaration, we are to be asked to write into the bill of rights.

Mr. MARTIN (*Essex East*): Mr. Chairman, we have a number of amendments, some of which are based on the declaration of human rights, some that represent our own convictions apart from that declaration, others that have been referred to as in the proposed draft of the bill of rights offered last February by the Ontario bar association, and referred as an appendix in a submission made on behalf of that body by Mr. McInnes, the vice president of the Canadian bar association. None of these amendments, which we feel keenly about, is inconsistent with another. If we were able to persuade the minister to accept any of our amendments, and it turned out later that they seemed to contradict or cause a difficulty, it would not be difficult to go back to them.

Mr. FULTON: How many such amendments do you have, Mr. Martin?

Mr. MARTIN (*Essex East*): There are some that we have not finally decided on ourselves yet. We want to have a meeting today, if we get a free minute.

Mr. FULTON: How many have you decided on?

Mr. MARTIN (*Essex East*): We have decided on about eight.

Mr. FULTON: There is just one more then?

Mr. MARTIN (*Essex East*): No, eight more, and we have some that we have not decided on; but I assure you that they are valuable.

Mr. FULTON: Would it be agreeable to you to indicate to the committee in general, now, what fields they cover, and what extra or specific rights you do wish to include in the bill of rights, so we can assess the position in light of some general knowledge, at any rate, of the particular subject you want to cover?

Mr. MARTIN (*Essex East*): Some of them are legal rights; some of them are economic rights, but some of them have a social touch.

Mr. FULTON: And some of them have the fine touch of Paul Martin.

Mr. MARTIN (*Essex East*): Well, I assure you this is a collective effort.

Mr. BROWNE (*Vancouver-Kingsway*): But very vague.

Mr. MARTIN (*Essex East*): We are a party, and once we have made a decision it becomes a collective judgment.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): We hope that, as a collective judgment, it would have at least a more persuasive effect on the minister than would otherwise be the case.

Mr. FULTON: You do not care to particularize more than you have?

Mr. MARTIN (*Essex East*): No, because we still have certain decisions to make.

Mr. FULTON: Our knowledge is not very much advanced by what you have said so far, except as to the approximate number.

Mr. MARTIN (*Essex East*): I do not want to go any further than I have the right to go at the moment.

The CHAIRMAN: Gentlemen, are you ready for the question?

Some Hon. MEMBERS: Yes.

The CHAIRMAN: The question is: moved by Mr. Martin, seconded by Mr. Deschatelets—

Mr. MARTIN (*Essex East*): No—Mr. Batten.

The CHAIRMAN: Pardon me. Moved by Mr. Batten; seconded by Mr. Deschatelets; that clause 2 be amended as follows:

That the following paragraph to be designated paragraph (c), be added after the present paragraph (b):

> the right of the individual of equal access to public service;

and that the remaining paragraphs be lettered accordingly.

All those in favour, please signify.

The CLERK OF THE COMMITTEE: Four, sir.

The CHAIRMAN: Opposed?

The CLERK OF THE COMMITTEE: Six, sir.

The CHAIRMAN: I declare the motion lost.

Mr. MARTIN (*Essex East*): We are making progress; the majority is decreasing.

The CHAIRMAN: We are still on clause 2, gentlemen.

Mr. DESCHATELETS: Mr. Chairman, I would like to move an amendment to clause 2. May I say right at the outset that my amendment is based on the universal declaration of human rights, and I will read here a few lines of this clause of the universal declaration of human rights:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Mr. Chairman, may I say that in the post-war period the constitutions of the fourth French republic, the Italian republic and the German federal republic have been amended so as to incorporate some new rights, such as the right to work, to a living wage, to rest and leisure, to all levels of education, and to equal opportunities for advancement, regardless of race, religion or national origin.

Having this in mind, I thought that we should put into this bill a right which would protect the individual to social security in order that he may achieve a free development of his personality. It is with this in mind that I move—seconded by Mr. Martin—that clause 2 be amended as follows:

After paragraph (b), in inserting the following clause:

> the right of the individual to social security and his entitlement to realize the economic, social and cultural activities indispensable for his dignity and the free development of his personality.

Mr. FULTON: Mr. Chairman, I do not want to be speaking too much in this committee, and I will, therefore, make my comments very short. I hope I will not be accused of being arbitrary, as a result. You will appreciate, however, I am sure, that we have given a great deal of thought to this matter, because all of these are not, by any means, new suggestions. Therefore, I hope I can speak briefly, but in a kindly fashion, without being accused of being arbitrary.

The current amendment, of course, is one dealing with economic freedoms in the attempt to make this an economic bill of rights, instead of a fundamental freedoms bill of rights. The arguments pro and con have been discussed too extensively for me to rehearse them to you. Our decision—for reasons which we still believe to be valid, and I believe this committee would accept as valid—was that it should be confined to human rights and fundamental freedoms in the general sense of the words, so I am not able to recommend the acceptance of the amendment.

Mr. Chairman, may I point out, in addition, the interesting fact that this is No. 11 in a series of amendments to clause 2 moved by the opposition. All of them, it has been suggested, should go in after clause (b), so that with the addition of the 11 amendments moved by the opposition, we would now be down to paragraph (m). When you add the other four which are in there already, it would bring you up to paragraph (q) as the total number of paragraphs in clause 2.

We are told there are eight more. That would bring us up to (z). I hope you have not any more than eight, otherwise we would have to go back (aa) and (bb). I pity the poor school children who have to memorize the bill of rights, with the opposition members trying to chop at it, cut it out, and add to it. However, that is an incidental argument, because I do not believe this is appropriate in the bill of rights.

Mr. MARTIN (*Essex East*): Mr. Chairman, I need not take too much time in commenting on the rather gratuitous advice that we have received from the Minister of Justice.

Mr. FULTON: The Minister of Justice is not allowed to charge for his opinions.

Mr. MARTIN (*Essex East*): I had hoped that we could expect a change in his attitude, in this friendly atmosphere. However, I can simply tell him that maybe his view on this matter is arguable and, while we are discussing human rights and fundamental freedoms, you must recognize, of course, that all members of the committee, possibly not having all the talents that might repose elsewhere in the committee, are nevertheless, by virtue of their membership on this committee, entitled to put forward views which they believe are of some value.

The minister said that if we were to proceed under this particular procedure, we might result in having a whole series of paragraphs that would take us down to (m), and I believe he said that, with the other amendments that we propose, it would take us to (z), or possibly (aa).

Mr. BROWNE (*Vancouver-Kingsway*): He did.

Mr. MARTIN (*Essex East*): That may be so. But if that is the case, we ought to be very happy with the fact that we live in a country where we feel—at least, some of us—that there are rights so large in their enumeration as to warrant even that kind of consideration.

We regard this, not as a light matter, but as a matter of very considerable importance; no less important to us than it was to some 65 nations who subscribed to the right which we believe, through this amendment, should be incorporated in the bill.

I simply have one observation to make. At one time in this country social benefits were given only to those who were citizens—or, at that time, under the law of nationality that prevailed in the commonwealth, were only given to those who were British subjects.

I believe, wisely, in the last decade or so, we have changed this qualification for participation in social welfare benefits; we have changed the base from citizenship to one of residence. I believe that is a very important change. Now, everyone does not subscribe to that. Indeed, we had an argument the other night in the House of Commons about social benefits being given to those who thought enough of the country to become its citizens. If we believe in that view, this is one way of affirming our belief. For this and other obvious reasons implicit in the amendment I have pleasure in seconding the motion which was moved by Mr. Deschatelets.

Mr. STEWART: Question.

The CHAIRMAN: Gentlemen, the motion has been moved by Mr. Deschatelets, seconded by Mr. Martin, that clause 2 be amended as follows: that the following paragraph be designated paragraph (c), to be added after the present paragraph (b):

> ...the right of the individual to social security and his entitlement to realize the economic, social and cultural activities indispensable for his dignity and the free development of his personality;

and that the remaining paragraphs be relettered accordingly.

All in favour, please signify? Four. Opposed? Seven.

I declare the motion lost.

Mr. BADANAI: Mr. Chairman, I have an amendment to move under clause 2. This is an amendment which I think would tie our bill of rights to the economic, cultural and social opportunities for every man, woman and child.

I move, seconded by Mr. Batten, that clause 2 be amended—that the following paragraph be designated as (c), to be added after the present paragraph (b):

> —the right of the individual to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment,

and that all the remaining paragraphs be relettered accordingly.

Now, in presenting this amendment, I will not take too much time. I realize that we are in a rushing state of condition, but I should like to point out that the right which is envisioned by this amendment has been generally recognized in Canada during most of this century, and it is one that should be entrenched in a modern bill of rights, and deeply rooted in the political traditions of the west. If I may be permitted to read a paragraph from the declaration of Professor Scott, when he appeared before the committee, on July 12, I will do so. It is at page 29:

> But I think the experience in the application of things like the Fair Employment Practices Act, where discrimination in employment, for instance, has been excluded by statute, has taught us that you can make greater progress by investigating complaints, talking to employers, and finding out why there is discrimination, and see what is the reason, let us say, why an employer does not wish to employ a certain type or class of person, whether there is any justification for it, and so on. In other words, it is more or less a social work approach to the essential problem, rather than a criminal law enforcement approach.

Therefore, Mr. Chairman, I submit that an amendment outlining the right of the individual to the right of protection against unemployment might well be one of the most important segments of this bill.

Mr. FULTON: This is the first part of article 23 of the universal declaration of human rights—not the less interesting and forceful because of that, but it is interesting to us to note it is another thing taken from the declaration.

I should say something here which is applicable to this whole field of paragraphs relating to economic and social objectives, and it is this: that the fallacy of taking these things from the universal declaration lies not so much merely in the fact they are in the declaration—that does not make them, from any point of view, undesirable at all; it is not that they do not fit in with our bill of rights—but the basic fallacy is that most of these amendments are taken from that document which contains general principles to which the signatory nations subscribed. Some are capable of expression by way of a

statement of fundamental rights and freedoms, and those, I submit to you, we have—not separately and individually, but by the totality of our bill we have embraced in it those which are capable of expression by way of a statement of fundamental rights and freedoms. However, many other articles of the universal declaration are not so much declarations of basic rights and fundamental freedoms as they are statements of agreed objectives that the nations subscribing to this document agreed it would be desirable to reach —but statements of objectives that can only be reached by specific legislation or other measures taken in the particular countries. This is particularly true in this field of economic and social statements of objectives. We all think it is desirable to have these objectives, and it would be desirable to have these conditions prevailing in Canada and all the countries who are signatories to this document. But, they are not statements of basic rights and freedoms, and can only be reached by specific legislation or other measures taken in the particular countries. This applies to this whole present group of amendments which are being offered.

Mr. AIKEN: Mr. Chairman, just so my position might be clear on these several amendments that have been made, and which I voted against without any comment, I should say something that I said last night. I feel we are engaged now in deciding whether we are going to have a general bill of rights which will cover everything in the best way we can, or whether we are going to try to particularize—that is, name individual rights and freedoms in a special way, rather than including them in a general way.

Mr. FULTON: And, in a special area.

Mr. AIKEN: And in a special field; that is why I feel unless we have an amendment which covers the whole broad field in a general way, that to vote on these individual items would merely confuse the issue.

Mr. FULTON: You mean to accept them?

Mr. AIKEN: To vote for them, yes.

Mr. DESCHATELETS: It is my impression, Mr. Chairman, with due respect to my hon. friend who has already spoken, that some members of this committee seem to take a little too lightly some of the amendments we have put forward—and I would say, in particular, this amendment which has been moved by Mr. Badanai. Now, any Canadian citizen who will see, for the first time, the bill of rights, which bill has received and would receive so much publicity, and with good reason, surely, will feel very sad and very suprised if he does not find in that bill of rights some protection, as I note in this amendment, based on employment? Surely, in 1960 we should, in a bill of rights, give to the citizens of this country full protection, as much as we can, against such an aspect of unemployment?

This is not new. I said a few minutes ago that in the post-war period many countries—and I have cited the Fourth French Republic, the Italian Republic and the German Federal Republic—went so far as to add new rights to their existing bills of rights—such rights as the right to work, to earn a living wage, and so forth.

This amendment does not go as far as that, but it goes far enough to reaffirm to the Canadian citizen that the state recognizes that he is to be protected against unemployment and the other items which are enumerated in this amendment.

I am much in favour of this amendment, and I cannot understand very well the reason why members of this committee should not support it to the full extent.

Mr. RAPP: Mr. Chairman, regarding the statement that some members are not serious about the whole thing, I do not think this is factual. Just because

every two minutes there is an amendment moved here, it does not mean somebody is very serious about it. I do not think it is right to accuse some hon. members of this committee of not being serious about the whole thing.

Mr. DESCHATELETS: On the question of privilege, may I say to Mr. Rapp I did not say that members of this committee were not serious. I just said that they are taking, maybe, some of our amendments too lightly. I did not go so far as to say that it is not so, and I would hope my friend would not think for a minute that I would say a member of this committee, even my friends opposite, are not serious.

Mr. BROWNE (*Vancouver-Kingsway*): I wonder if I may say, in addition to other objections that have been raised to this clause, that it would be a very dangerous clause. In fact, I think it would or could work the very opposite to what a bill of rights should work. The words "right to work" certainly would not be very popular with any trade union movement in this country; and I would be surprised if Mr. Martin would be supporting any amendment of this nature. The "right to work", in the United States, was said to be a right to work outside the trade union movement, and it was very strongly opposed by the trade unions in that country.

Also, while we naturally do not want to see anyone unemployed, it seems to me that if the state was obligated to provide employment they would also have the power to direct a man to employment and into what field he should work, what part of the country he should work in, and so on. If that is not the very antithesis of a bill of rights, I do not know what you consider it.

Mr. STEWART: It would be a definite infringement.

Mr. FULTON: They are both very strong points and were very much in the mind of the government when they decided to reject this article in the universal declaration.

In order that the government's position may be clear, on the record of this committee, at least, as to why we oppose this type of amendment—and I think this reasoning would also be the reasoning in the mind of the members of the committee who oppose it—those reasons are contained in the introductory portion of the universal declaration of rights itself. That introductory portion reads:

> The General Assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance—

That is what I said a moment ago, that these are statements of objectives, the realization of which will require specific measures. The preamble contains specific and progressive measures. We have a progressive measure on the statute book the Unemployment Insurance Act, which we have extended in a progressive fashion twice since 1957 so that the coverage of unemployment insurance will be available to a larger group of people and for longer periods than it was before. That is why it is not appropriate to write this sort of thing into a bill of rights.

Mr. STEWART: Question.

The CHAIRMAN: The question is, moved by Mr. Badanai, seconded by Mr. Batten:

> That clause 2 be amended as follows: that the following paragraph to be designated paragraph (c) be added after the present paragraph (b):

> The right of the individual to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment."

And that the remaining paragraphs be re-lettered accordingly.

Motion negatived.

Mr. MARTIN (*Essex East*): Mr. Chairman, I would like to move, seconded by Mr. Deschatelets:

> That clause 2 be amended as follows: that the following paragraph, to be designated paragraph (c) be added after the present paragraph (b):
>
> The right of the individual to just and favourable remuneration, ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by the means of social protection.

This amendment represents the action taken by a number of countries, particularly in Europe. It represents the action taken by a number of countries in Latin America. It is a matter that is now, I understand, being discussed in Switzerland. It is a matter which, I believe, in this period of 1960, represents the collective common acceptance, in this particular generation and century, of a right that cannot be ignored.

The minister seems to regard these not only as objectionable, on the ground that they are particularizations, but on the ground that they have no place in a bill of rights—

Mr. FULTON: In this kind of bill of rights.

Mr. MARTIN (*Essex East*): In this kind of bill of rights.

That argument, if it had been adduced in the nineteenth century, would have had great cogency at a time when laissez-faire was the dominant theme in current political philosophies and political programs by all political parties. That was the view.

However, in the latter part of the nineteenth century there developed a growing recognition that it was not enough only for a man to have certain freedoms in terms of the general aspects hitherto understood, but that economic freedom and economic rights in the kind of industrial societies that were being developed, were regarded as essential in order to project legislative attention and programs of social betterment and rehabilitation.

I need say no more than that this represents the thinking, I think, of the vast majority of people of this country. It is not a view that must be regarded as the pre-emptive right of the socialist; it is a view that is more commonly accepted than is recognized. I hope on this account it will be accepted.

Mr. FULTON: I might inform the committee that this is another subparagraph of article 23, the first paragraph of which was given in the last amendment. I would have thought this might have formed a part of the previous amendment. Having identified it, I can only say again that it might well form part of a charter of economic and social rights when and if the parliament of Canada comes to write such a charter, but it forms no part of a bill on basic human rights and fundamental freedoms. Incidentally, I am supported in that argument by the authority of Professor Cohen.

Mr. MARTIN (*Essex East*): That may be one man's view. However, you do not deal with the situation, particularly in the German Republic, Italy and the fourth French Republic.

Mr. FULTON: I did not question the inclusion of this in their bill, charter, or whatever it is they may have drafted.

An Hon. MEMBER: Question.

The CHAIRMAN: The question is: moved by Mr. Martin, seconded by Mr. Deschatelets that clause 2 be amended as follows:

> that the following paragraph, to be designated paragraph (c), be added after the present paragraph (b):
>
> > The right of the individual to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection,
>
> and that the remaining paragraphs be relettered accordingly.

All those in favour of the motion please signify.
All those opposed?
I declare the motion lost.
Are you ready for the question on clause 2 as amended.

Mr. MARTIN (*Essex East*): No.

Mr. BATTEN: Mr. Chairman, there has been some discussion in this committee about these amendments being taken lightly; but I am sure they are not made lightly by this group and I am equally sure they are not taken lightly by the members of the other group. I do not think there is any one here on this committee who is not in favour of a bill of rights for Canada. I know that I myself would certainly like to see a bill of rights for this country. Any criticisms that are being made of this present bill are only an attempt to improve the bill which we have.

All across this country we will have many people who will discuss the bill of rights. They are not going to discuss it in the terms in which the minister discusses it. They will discuss it in terms which apply more readily to their daily lives. While the minister may feel that these amendments are particularizing, as he calls it, I think that in discussing these amendments we at least are getting some better idea of the minister's opinion as to what a bill of rights for Canada ought to be. Those of the committee who are lawyers will have one way of looking at this; those of us who are laymen will have quite another way. In the difference of opinion which may arise between those who are lawyers and those who are not, I think the discussions in respect of these amendments which are being made are very important.

Mr. CHAIRMAN: I have another amendment which I would like to make. I make it for a number of reasons. We live in a country where the standard of living gradually is getting higher. As it gets higher I think the greater is the danger to those who find themselves unemployed either because there is no work to be had or because they are disabled, or for some other reason. I would, therefore, move, seconded by Mr. Deschatelets that clause 2 be amended as follows:

> that the following paragraph, to be designated paragraph (c), be added after the present paragraph (b):
>
> > The right of the individual to a standard of living adequate for the health and well-being of himself and his family and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.
>
> and that the remaining paragraphs be relettered accordingly.

Mr. FULTON: Mr. Chairman, for purposes of identification, this reproduces most of article 25(1) of the universal declaration. I wonder why you did not include what they have in there if you think this amendment should go into

our bill of rights. They include the right to food, clothing, housing, medical care and necessary social services. There are rather conspicuous omissions in your amendment. In one part it also goes on to say that motherhood and childhood are entitled to special care and assistance and that children born out of wedlock should enjoy the same social protection. I say that merely for identification. The other arguments I used previously also apply here. I might also point out that much of what is covered under the proposed amendment at the present time is in the field of provincial responsibility.

An Hon. MEMBER: Question.

The CHAIRMAN: Are you ready for the question?

The question is: moved by Mr. Batten, seconded by Mr. Deschatelets that clause 2 be amended as follows:

> that the following paragraph, to be designated paragraph (c), be added after the present paragraph (b).
>
> > The right of the individual to a standard of living adequate for the health and well-being of himself and his family and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.
>
> and that the remaining paragraphs be relettered accordingly.

All in favour please signify?

Those contrary?

I declare the motion lost.

Mr. MARTIN (*Essex East*): I am sure the minister will recall that great men like Erskine and those other great precursors of our concept of political liberty, found great satisfaction in the recognition, even in their time, of many of the things they advocated, and this little band of Liberal-minded men in this committee at this table will, I am sure, in their time find that these various rights which they have fought to champion and put forward today ultimately will be recognized—some of them may still be about to see the adoption of some of these things and see them recognized as part of the concept of human rights and fundamental freedoms.

Having delivered myself of that, perhaps the minister and the chairman will be glad to know that the next amendment has nothing to do with the article referred to.

Mr. FULTON: I appreciate Mr. Martin's comments, and may I say that those Conservative-minded members of this committee and of the House of Commons are delighted to find that recognition is now being given to a principle they have long stood for, that there should be incorporated in the statutes of Canada a bill of rights protecting the basic human rights and fundamental freedoms, bearing in mind that this principle was vigorously opposed for 25 years while the Liberal party was in power.

Mr. MARTIN (*Essex East*): I cannot let a blanket political observation go unnoticed.

Mr. WINKLER: Progressively conservative!

Mr. MARTIN (*Essex East*): The minister's statement is so historically inaccurate that it does not deserve comment. But the fact is that we as Canadians during the period which the hon. member referred to, not only gave an era of freedom in this country, but also recognition to the advance of economic freedom as well. I cannot say anything more.

I would like to go on to clause 3.

The CHAIRMAN: May I put the question on clause 2? Shall clause 2 as amended carry?

Clause 2 agreed to.

On clause 3—construction of law.

Mr. MARTIN (*Essex East*): The minister stated earlier that he would hope that the bill could be so arranged, now that the majority of this committee have voted against all these amendments, except as to a few matters of form, that he would anticipate the possibility of having a bill of rights made up of a preamble and possibly one clause, in place of where it is now or elsewhere, two, and that this would be in such a form that it could be placed on the wall.

I think, as I said before, subject to these amendments which have not been accepted—oh, the labour estimates are now coming up in the house.

Mr. FULTON: This might be a good time to adjourn, just as we are coming to clause 3.

The CHAIRMAN: Is it agreed that we adjourn now in deference to Mr. Martin?

May I impress on the committee—the labour estimates are coming up in the house, and may I express the hope that in view of this adjournment, we shall have the co-operation of Mr. Martin tomorrow and that we shall be able to conclude?

Mr. MARTIN (*Essex East*): What was that?

The CHAIRMAN: I was suggesting that we might have your co-operation tomorrow and conclude our deliberations on this bill.

Mr. MARTIN (*Essex East*): We will give you the kind of support that we always give.

Mr. RAPP: Oh, no, no, don't do that!

Mr. MARTIN (*Essex East*): Shall we meet tomorrow at 9.30?

The CHAIRMAN: Yes.

HOUSE OF COMMONS

Third Session—Twenty-fourth Parliament

1960

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SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 12

INCLUDING FINAL REPORT TO THE HOUSE

FRIDAY, JULY 29, 1960

Bill C-79: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

WITNESS:

The Honourable E. D. Fulton, Minister of Justice.

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

23596-0—1

SPECIAL COMMITTEE

ON

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Chairman: Norman L. Spencer, Esq.

Vice-Chairman: Noël Dorion, Esq.

and Messrs.

Aiken,	Deschatelets,	Weichel,
Argue,	Jung,	Winkler.
Badanai,	Martin (*Essex East*),	
Batten,	Rapp,	
Browne (*Vancouver-Kingsway*),	Stefanson,	
	Stewart,	

J. E. O'Connor,
Clerk of the Committee.

CORRIGENDA—APPENDIX

REPORT TO THE HOUSE

The Special Committee on Human Rights and Fundamental Freedoms has the honour to present the following as its

First Report

Your Committee has considered Bill C-79, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms and has agreed to report it with the following amendments:

Clause 1

The present Clause 1 is deleted.

Clause 2

Clause 2 is re-numbered as Clause 1; and lines 5, 6 and 7 on page 1 of the Bill are deleted and the following substituted therefor: "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,".

Paragraph (*b*), lines 12, 13 and 14 on page 1 of the Bill, is deleted and the following substituted therefor: "(*b*) the right of the individual to equality before the law and the protection of the law;".

Clause 3

Clause 3 is re-numbered as Clause 2; and lines 19, 20 and 21 on page 1 of the Bill and lines 1 to 10 inclusive on page 2 are deleted and the following substituted therefor: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to".

In paragraph (*b*), lines 13 and 14 on page 2 of the Bill, the words "torture, or cruel, inhuman or degrading" are deleted and the following words are substituted therefor: "cruel and unusual".

Paragraph (*f*), lines 30 to 32 inclusive on page 2, is deleted and the following is substituted therefor: "(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.".

Clause 4

Clause 4 is re-numbered as Clause 3 and the following words are inserted immediately after the word "in" in line 37 on page 2: "or presented to"; and the following words are added immediately after the word "Part" in line 40: "and he shall report any such inconsistency to the House of Commons at the first convenient opportunity".

The following is inserted as new Clause 4: "4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.".

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Clause 5

The numeral "(1)" is inserted immediately after "5".

The following subsection is added to Clause 5: "(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.".

Preamble

The following is inserted as the Preamble to the Bill:

"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 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 the provisions of its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada;

THEREFORE . . . . ".

* * * *

A reprint of the Bill, as amended, has been ordered.

A copy of the Committee's Minutes of Proceedings and Evidence is appended.

Respectfully submitted,

N. L. SPENCER,
Chairman.

MINUTES OF PROCEEDINGS

FRIDAY, July 29, 1960.
(23)

The Special Committee on Human Rights and Fundamental Freedoms met at 9.35 a.m. this day. The Chairman, Mr. N. L. Spencer, presided.

Members present: Messrs. Aiken, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Jung, Martin (*Essex East*), Rapp, Spencer, Stefanson, Stewart and Winkler.—13

In attendance: The Honourable E. D. Fulton, Minister of Justice, assisted by the following *from the Department of Justice*: Mr. E. A. Driedger, Deputy Minister; Mr. D. H. W. Henry, Director, Advisory Section; and Mr. H. A. McIntosh, Legislation Section.

Following the observation of quorum by the Chairman, Mr. Fulton explained certain remarks he made to the Committee at its last meeting.

The Committee proceeded with the further consideration of Clause 3 of the Bill.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That all the words preceding paragraph (*a*) be deleted and the following substituted therefor:

'The Interpretation Act is amended by adding thereto under the heading of "Rules of Construction" immediately before section 9 thereof, the following section as Section 8(A):

8(A) 1. Every act of the Parliament of Canada and every order, rule and regulation thereunder in force at the commencement of this section, and all laws in Canada that are subject to be repealed, abolished or altered by the Parliament of Canada in force at the commencement of this section, are hereby amended by repealing or revoking them to the extent that any provision thereof would abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.

2. No act of the Parliament of Canada, passed hereafter, shall, unless it is otherwise expressly stated in it be interpreted to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.

3. No act, order, rule or regulation or law mentioned in Subsection 1, and, unless it is expressly otherwise stated therein, no act hereafter passed, shall be construed or have effect to' "

The motion was allowed to stand.

Moved by Mr. Browne, (*Vancouver-Kingsway*), seconded by Mr. Rapp, "That paragraph (*b*) be deleted and the following substituted therefor;

'(*b*) Impose or authorize the imposition of cruel and unusual treatment or punishment' "

The motion was resolved unanimously in the affirmative.

Moved by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), "That the word "hearing" appearing in paragraph (*e*) on line 27 be deleted and the words "examination of his case" be substituted therefor."

The motion was withdrawn by Mr. Deschatelets.

Moved by Mr. Stewart, seconded by Mr. Browne (*Vancouver-Kingsway*), "That paragraph (*f*) be deleted and that the following be substituted therefor:

> '(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.' "

The motion was resolved unanimously in the affirmative.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That the following paragraph to be designated as paragraph (*g*) be added to Clause 3:

> 'deprive a person of the right to defend himself in person or to retain and instruct counsel of his own choosing without delay.' "

The motion was resolved in the negative, YEAS: 4; NAYS: 8.

Moved by Mr. Badanai, second by Mr. Batten, "That paragraph (*f*) be further amended by adding immediately following the word "tribunal", the words, "or of the right to reasonable bail without just cause."

The motion was resolved unanimously in the affirmative.

Moved by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), "That the following paragraph to be designated as paragraph (*g*) be added to Clause 3:

> 'deprive a person of the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.' "

The motion was allowed to stand.

At 11.00 a.m. the Committee adjourned to meet again at 1.00 p.m. this day.

AFTERNOON SITTING

(24)

The Committee reconvened at 1.30 p.m.

Members present: Messrs. Badanai, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Jung, Spencer, Stefanson, Stewart and Winkler.—9

Following brief discusion concerning the scheduling of future meetings the Committee adjourned to meet again at 2.30 p.m. this day.

At 3.08 p.m. the Committee reconvened.

Members present: Messrs. Aiken, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Rapp, Stefanson, Stewart and Winkler.—10

On the motion of Mr. Browne (*Vancouver-Kingsway*), seconded by Mr. Badanai,

Resolved—That the Committee meet at 6.00 p.m. this day and remain in session until it completes its deliberations on this Bill.

At 3.15 p.m. the Committee adjourned.

The Committee met at 6.15 p.m. this day, the Chairman, Mr. N. L. Spencer, presiding.

Members present: Messrs. Aiken, Badanai, Batten, Browne (*Vancouver-Kingsway*), Deschatelets, Dorion, Martin (*Essex East*), Rapp, Spencer, Stefanson and Stewart.—11

In attendance: The Honourable E. D. Fulton, Minister of Justice, assisted by the following *from the Department of Justice:* Mr. E. A. Driedger, Deputy Minister; Mr. D. H. W. Henry, Director, Advisory Section; and Mr. H. A. McIntosh, Legislation Section.

The following motion proposed at this morning's sitting of the Committee by Mr. Deschatelets, seconded by Mr. Martin (*Essex East*), was put to the Committee: "That the following to be designated as paragraph (*g*) be added:

'deprive a person of the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.' "

The motion was resolved in the negative, YEAS: 4; NAYS: 6.

Moved by Mr. Batten, seconded by Mr. Deschatelets, "That the following paragraph to be designated as paragraph (*g*) be added immediately following paragraph (*f*):

'deprive a person of the right not to be compelled to be a witness in any criminal case against himself.' "

Following discussion the motion was withdrawn.

The following motion, moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, which was allowed to stand at this morning's sitting of the Committee, was put to the Committee:

'The Interpretation Act is amended by adding thereto under the heading of "Rules of Construction" immediately before section 9 thereof, the following section as Section 8(A)

8(A) 1. Every act of the Parliament of Canada and every order, rule and regulation thereunder in force at the commencement of this section, and all laws in Canada that are subject to be repealed, abolished or altered by the Parliament of Canada in force at the commencement of this section, are hereby amended by repealing or revoking them to the extent that any provision thereof would abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bills of Rights.

2. No act of the Parliament of Canada, passed hereafter, shall, unless it is otherwise expressly stated in it be interpreted to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian Bill of Rights.

3. No act, order, rule or regulation or law mentioned in Subsection 1, and, unless it is expressly otherwise stated therein, no act hereafter passed, shall be construed or have effect to'

The motion was resolved in the negative, YEAS: 4; NAYS: 6.

Moved by Mr. Stewart, seconded by Mr. Stefanson, "That all the words appearing in Clause 3 prior to paragraph (*a*) be deleted and the following substituted therefor:

'2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding

the Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to' "

Clause 3, as amended, was unanimously adopted.

Moved by Mr. Aiken, seconded by Mr. Stefanson, "That Clause 4 be amended by substituting a comma following the word "Part" in line 40 and adding thereafter the following:

'and he shall report any such inconsistency to the House of Commons at the first convenient opportunity'."

The motion was resolved unanimously in the affirmative.

Moved by Mr. Badanai, seconded by Mr. Batten, "That Clause 4 be amended by adding thereto the following:

'(*a*) The Minister of Justice shall report any inconsistency to an appropriate standing committee of the House of Commons on Human Rights and Fundamental Freedoms.

'(*b*) All petitions to the House of Commons which purport to be based on the Canadian Bill of Rights shall be referred to an appropriate standing committee of the House of Commons on Human Rights and Fundamental Freedoms. The committee shall have power to report these petitions from time to time to the House, together with its opinions and observations thereon.' "

The motion was resolved in the negative, YEAS: 4; NAYS: 6.

Clause 4, as amended, was adopted.

By unanimous consent, the Committee reverted to consideration of Clause 2.

The following motion, moved by Mr. Batten, seconded by Mr. Deschatelets on Thursday, July 28th and subsequently withdrawn with the reservation that the right to again present it to the Committee be maintained, was put to the Committee: "That following Clause 2(*b*) there should be inserted as paragraph (c) the words

'the right of the individual to freedom of movement and residence within the borders of Canada'

and that the remaining paragraphs be re-lettered accordingly.

The motion was resolved in the negative; YEAS: 4; NAYS: 6.

Clause 2, as amended, was adopted.

Moved by Mr. Stewart, seconded by Mr. Browne (*Vancouver-Kingsway*), "That the numeral (1) be inserted immediately after the clause number and that the following subsection be added as subsection 2:

'(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.' "

The motion was resolved unanimously in the affirmative.

Clause 5, as amended, was adopted.

Moved by Mr. Martin (*Essex East*), seconded by Mr. Deschatelets, "That subsection (5) of Section 6 appearing in Clause 6 of the Bill, be deleted and that the following section be added and designated as Section 6A:

'6A (1) Subject to subsections 2, 3, 4, 5, 6, and 7, any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement, or infringement of any right or freedom recognized by the Canadian Bill of Rights.

(2) No naturalized Canadian citizen may be deprived of his citizenship and no naturalized British subject may be deprived of his status as a British subject under this Act.

(3) No Canadian citizen may be deported from Canada under this Act.

(4) No Canadian citizen or British subject may be detained under this Act beyond a period of sixty days, unless the cause for his detention has been reviewed by an appropriate impartial tribunal which has reported to the Minister or authorities authorizing the detention.

(5) Any order or regulation under this Act conferring authority to order the detention of any person shall, forthwith after it is made, be laid before Parliament, or if Parliament is not then sitting, within the first fifteen days next thereafter that Parliament is sitting.

(6) Where an order or regulation has been laid before Parliament pursuant to subsection (5), a Notice of Motion in either House, signed by ten members thereof, and made in accordance with the rules of that House within ten days of the day the order or regulation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the Motion in the House was made.

(7) If either House of Parliament resolve pursuant to a Motion made under subsection (6) that the Order or Regulation be revoked, it shall cease to have effect, without prejudice, to the previous operation of the order or regulation, or anything duly done thereunder.' "

The Chairman having ruled the motion out of order on the grounds that it sought to introduce matters beyond the scope of the Bill, Mr. Martin (*Essex East*) appealed the ruling.

The Chairman's ruling was sustained on the following division: YEAS: 6; NAYS: 4.

Clause 6 was adopted.

The Committee reverted to the consideration of Clause 1.

Moved by Mr. Aiken, seconded by Mr. Rapp, "That Clause 1 be deleted and Clauses 2, 3 and 4 be re-numbered as Clauses 1, 2 and 3 respectively, and that the following be inserted as Clause 4:

'4. The provisions of this Part shall be known as the *Canadian Bill of Rights.*' "

The motion was resolved unanimously in the affirmative.

The Committee proceeded to the consideration of a draft Preamble to the Bill.

Moved by Mr. Browne (*Vancouver-Kingsway*), seconded by Mr. Rapp, "That the Committee's deliberations be now conducted *in camera.*"

The motion was resolved unanimously in the affirmative.

Following discussion and amendment of the draft Preamble, the Committee again went into open session.

Moved by Mr. Dorion, seconded by Mr. Badanai, "That the following be adopted as the Preamble to Bill C-79:

'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 the provisions of its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada,

NOW THEREFORE...' "

The motion was resolved unanimously in the affirmative.

By unanimous consent, the Committee reconsidered the re-numbered Clause 3.

Moved by Mr. Stewart, seconded by Mr. Stefanson, "That the following words be inserted immediately after the word "in" appearing in line 37 page 2 of the Bill:

'or presented to' "

The motion was resolved unanimously in the affirmative.

Clause 3, as amended, was adopted.

The Preamble, the Title and the Bill were adopted, as amended, and the Chairman ordered to report the Bill to the House.

On motion of Mr. Batten seconded by Mr. Rapp,

Resolved,—That the Bill be reprinted, as amended.

At 9.30 p.m. the Committee adjourned.

J. E. O'Connor,
Clerk of the Committee.

EVIDENCE

FRIDAY, July 29, 1960.
9.30 a.m.

The CHAIRMAN: Order, gentlemen.

Hon. E. D. FULTON (*Minister of Justice*): Mr. Chairman, on a question of privilege—I hope this will not take long: I was reading over the transcript yesterday, and there is one passage of my remarks that bothers me. I do not want to change it, but I want to express it subject to one modification.

Mr. Rapp has asked me whether a naturalized Canadian going abroad was in the same position as a natural born Canadian, and it was in that context that I was discussing the matter. I said:

> That is absolutely correct, Mr. Rapp, subject to this addition, or subject to this modification of what you have said: a naturalized Canadian is entitled to the protection of the Canadian laws everywhere, in so far as that protection can be given to him, to the full extent and to the same extent as a natural born Canadian, because a naturalized Canadian is a Canadian citizen, and Canadian citizens are entitled to the protection of Canadian laws everywhere; and the only limitation thereon is the ability of Canada to extend the protection of those laws.

There are two modifications I think I should make. The first is that a naturalized Canadian has all the rights of a Canadian citizen; but I think he is not a Canadian citizen unless he actually applies to become one. He is entitled to become a Canadian citizen, but he has to make formal application.

Secondly, unless we read what I said regarding Canadian citizens being entitled to the protection of Canadian laws everywhere in the context of what we were discussing, it might be taken that that was somewhat too broad a statement. I think that in the context of his rights as a Canadian citizen, as we are considering them, my statement probably does not go too far. But I would not want it to be taken as meaning, for instance—to take the case Mr. Martin referred to—that if somebody went to France and made a contract there, he would be entitled to have that contract interpreted in accordance with the laws of Canada, necessarily. That would have to be decided in accordance with the principles of conflict of laws, and so on.

I think my statement was correct in the context that we were discussing; but I would not want it to be taken as a complete generalization.

Mr. MARTIN (*Essex East*): If that is the only question of procedure about which the minister is worrying, I do not have any apprehension. But I think there are others that concern us much more.

Mr. FULTON: If that is my most serious trouble, Mr. Martin, I am not in much trouble.

The CHAIRMAN: I think we will move on to clause 3, gentlemen.

Mr. MARTIN (*Essex East*): Mr. Chairman, as I indicated yesterday, I have an amendment for the consideration of the minister and the committee now, or it can be considered later. I would have no objection to the latter course. Just as the minister was good enough to give us an opportunity of considering his proposed amendments, he might want, in consultation with his law officers, to think this one over.

Mr. Chairman, I move, seconded by Mr. Deschatelets, that clause 3 be amended as follows:

> That lines 1 to 10 be deleted and the following substituted therefor:
>
> The Interpretation Act is amended by adding thereto, under the heading of "Rules of Construction" immediately before section 9 thereof, the following section as section 8 (A):
>
> '8 (A) 1. Every act of the parliament of Canada and every order, rule and regulation thereunder in force at the commencement of this section, and all laws in Canada that are subject to be repealed, abolished or altered by the parliament of Canada in force at the commencement of this section, are hereby amended by repealing or revoking them to the extent that any provision thereof would abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the rights of freedoms declared to exist in Canada by the Canadian bill of rights.
>
> 2. No act of the parliament of Canada, passed hereafter, shall, unless it is otherwise expressly stated in it, be interpreted to abrogate, abridge, or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms declared to exist in Canada by the Canadian bill of rights.
>
> 3. No act, order, rule or regulation or law mentioned in subsection 1, and, unless it is expressly otherwise stated therein, no act hereafter passed, shall be construed or have effect to'

And then (*a*), (*b*) et cetera. I believe that there was justification for this kind of proposal before yesterday's discussion, or the discussion since the minister has come into the committee these last two days.

Mr. FULTON: Mr. Martin, I have been here more than the last two days.

Mr. MARTIN (*Essex East*): I know; but since you have come into the committee. I am not suggesting you have only been here the last two days. But you did make the point in the last two days.

Mr. FULTON: That is right.

Mr. MARTIN (*Essex East*): You did make the point that you would like to see the bill of rights, in so far as public attention was concerned, in sort of an abbreviated form.

Mr. FULTON: That is correct.

Mr. MARTIN (*Essex East*): This particular amendment will fit in with that. I would have gone further this morning; but I looked up the rules of the house and the committee. My intention, really—and I see no reason not to be frank with the minister and the committee—is that in the house I will be inclined to go even further in this amendment; but we have no authority, as I understand it, under our rules, to divide this bill now. Any attempt to divide this bill is outside our powers. But in the committee of the whole, at some point it would be possible to do that.

In other words, what is in clause 3 is all very important, and I am not opposed to it—or any of this—but I think the place to have that is in the Interpretation Act. However, that is an argument that we can discuss in the proper place.

I do not think there is anything further that I have to add. I have no objection, if the minister so desires, to letting it lie so that he may consider it, as he did with the other one. That is perfectly satisfactory, as far as we are concerned.

Mr. FULTON: Mr. Chairman, I think that might be the preferable course. We may be able to return to it this morning; but I would like to have the opportunity of a brief word with my officers. There are one or two things in

the form of the amendment that I should like to bring to Mr. Martin's attention, to make sure that I understand exactly what he intends his amendment to accomplish.

Mr. Martin, you start by saying, "Clause 3 be amended as follows: That lines 1 to 10 be deleted and the following substituted therefor".

I think if one were to take that literally, it means lines 1 to 10 on page 2 of the present bill. I take it that you mean, really, all the words in the clause before line 10 on page 2?

Mr. MARTIN (*Essex East*): Yes. Mr. Aiken had mentioned that.

Mr. FULTON: That is what you intend?

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: It is clear that your intention is to have the effect of an amendment to the Interpretation Act. I think, Mr. Chairman, that I would want to consider this before giving my reaction to it. May I suggest, therefore, that inasmuch as this amendment deals with the introductory part of clause 3, which is the part affected by the amendment which I suggested to the committee yesterday, amendment be allowed to stand for further discussion also until we have disposed of Mr. Martin's amendment.

Mr. MARTIN (*Essex East*): Yes; and we could deal now with (*a*), (*b*), (*c*), and so on, and save a great deal of time.

Mr. FULTON: Yes.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, I have an amendment to propose to clause 3. It is that paragraph (*b*), which now reads:—

Mr. MARTIN (*Essex East*): Well, is that the right thing to do now?

Mr. FULTON: I would have thought that perhaps the chairman, or the committee, could formally agree to stand the introductory part of clause 3, and then proceed with—

Mr. MARTIN (*Essex East*): (*a*) and (*b*)?

Mr. FULTON: Yes.

Mr. BROWNE (*Vancouver-Kingsway*): But in considering clause 2, Mr. Chairman, we did not go at it paragraph by paragraph.

Mr. MARTIN (*Essex East*): I was just trying to save time.

Mr. BROWNE (*Vancouver-Kingsway*): That was my understanding of what we did before.

Mr. MARTIN (*Essex East*): Perhaps we should listen to what you have to say.

Mr. BROWNE (*Vancouver-Kingsway*): That is very decent of you, Mr. Martin.

The CHAIRMAN: I think we will just stand over the first part of clause 3; that is, down to and including line 10 on page 2, and deal with the lettered paragraphs first.

Mr. BROWNE (*Vancouver-Kingsway*): May I proceed then, Mr. Chairman, with a suggestion I had made.

The CHAIRMAN: Proceed.

Mr. BROWNE (*Vancouver-Kingsway*): There was considerable discussion in connection with paragraph (*b*), which reads as follows:

> Impose or authorize the imposition of torture, or cruel, inhuman or degrading treatment or punishment.

I do not think I need to say too much about it, because it has received a good deal of discussion. I think all the witnesses agree that while this was not likely to lead to any change in our procedure, it would be open to the courts

to rule that capital punishment, for instance, could be construed as cruel, inhuman or degrading treatment or punishment. In examining the other bills of rights—the American bill of rights and the English bill of rights—both have used the words "cruel and unusual" and, in the light of the interpretation that has been given to those words, which I think could be taken to ensure that our present Criminal Code would not have to be changed because of the bill, I felt strongly that the words should be changed to "cruel and unusual". Therefore, I would move, seconded by Mr. Rapp, that paragraph (*b*) of clause 3 be deleted, and the following substituted therefor:

> impose or authorize the imposition of cruel and unusual treatment or punishment.

The CHAIRMAN: Is there any further discussion, gentlemen?

Mr. MARTIN (*Essex East*): Well, Mr. Badanai has something to say, I believe.

Mr. BATTEN: Mr. Chairman, would you mind reading the amendment again?

The CHAIRMAN: The amendment is to delete paragraph (*b*), and substitute these words which do, of course, include part of the words in paragraph (*b*):

> impose or authorize the imposition of cruel and unusual treatment or punishment.

In substance, it removes the word "torture", and removes the words "inhuman or degrading", and substitutes "unusual treatment"—or, rather, substitutes the word "unusual".

Mr. MARTIN (*Essex East*): The word "cruel" continues?

The CHAIRMAN: Yes.

Mr. MARTIN (*Essex East*): Would you mind reading it again?

The CHAIRMAN:

> impose or authorize the imposition—

and these are the words:

> —of cruel and unusual treatment or punishment.

Mr. MARTIN (*Essex East*): Then, it will read:

> impose or authorize the imposition of cruel—

The CHAIRMAN: "cruel and"—

Mr. MARTIN (*Essex East*): "cruel and unusual punishment".

The CHAIRMAN: "treatment or punishment".

Mr. MARTIN (*Essex East*): Well, that certainly is an improvement.

The CHAIRMAN: Thank you. Are you ready for the question?

Mr. MARTIN (*Essex East*): Just a minute.

Have you given consideration, Mr. Fulton, to just saying:

> impose or authorize the imposition of torture.

Although I think this is a great improvement, I am afraid that people like Mr. McGee will still argue that "cruel" would have reference to capital punishment, and I do not think they would have that argument if we just said "torture".

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, may I point out it has to be "cruel and unusual" and that, in my opinion, is the saving part of that. While it might be said that capital punishment could be cruel, it is not unusual, and I believe it has been accepted in the English bill of rights, which says "cruel and unusual"—and capital punishment has been accepted there. It says "cruel and unusual" in the American bill of rights, and the same type of punishments we mete out are held to be valid in the United States. So, I think there is a great deal of interpretation of the law which leads us to believe that the present punishment would be accepted under the words "cruel and unusual" and, therefore, it seems to me it ensures that any change in capital punishment would be left in the hands of parliament, where it should be.

Mr. FULTON: I think Mr. Browne has summarized the views I have formed as a result of the consideration we have given it, Mr. Martin.

The CHAIRMAN: Mr. Dorion.

Mr. DORION: Mr. Chairman, in answer to Mr. Martin, if we leave it to the courts to conclude that these expressions are of such a nature that they can be interpreted as against capital punishment, I do not believe it logical or legally possible, because this is exactly a reproduction of the words in the bill of rights of 1689, and this does not deprive the application of capital punishment.

Mr. MARTIN (*Essex East*): You like this change.

Mr. DORION: Yes.

Mr. MARTIN (*Essex East*): Well, you have had more experience.

Mr. AIKEN: Mr. Chairman, while I am in agreement with the change, I do not think we should go any further in reducing the wording of the section with a view, perhaps, to capital punishment. What occurs to me is that if this bill had been passed 100 years ago, drawing and quartering would not then have been considered unusual punishment. Today, hanging is not considered an unusual punishment. I think that the imposition of the word "cruel" there would certainly protect us, but I think we should go no further in cutting back the import of the words. I think, as long as the word "cruel" is included, there is sufficient protection. I would not want to reduce it any further, with a view to not abolishing capital punishment, because the time may come in the near future, or in the distant future, when capital punishment might no longer be considered a proper punishment in Canada—and at that time it would then become an "unusual" punishment.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, that would be up to parliament. It is up to parliament and not the courts to make that decision. That is my feeling, and we want to protect it at the present time. If parliament should decide capital punishment should be abolished, the bill can be amended, but I do not believe it should be up to the courts to make that decision.

Mr. AIKEN: I have no objection as long as "cruel" is left in, but I do not think "unusual" is giving any special protection at all.

Mr. MARTIN (*Essex East*): "and unusual".

The CHAIRMAN: The question, gentlemen.

It has been moved by Mr. Browne (*Vancouver-Kingsway*) and seconded by Mr. Rapp that paragraph (b) of clause 3 be deleted, and the following substituted therefor:

> (b) Impose or authorize the imposition of cruel and unusual treatment punishment.

Motion agreed to.

The CHAIRMAN: Carried unanimously.

Mr. DESCHATELETS: Mr. Chairman, on clause 3 paragraph (*e*), I would like to—

Mr. MARTIN (*Essex East*): This is on paragraph (*e*)?

Mr. DESCHATALETS: I have an amendment on paragraph (*e*),—

The CHAIRMAN: We are paragraph (*c*) now.

Mr. DESCHATELETS: —but we have not reached that yet.

Mr. FULTON: Paragraph (*a*), I presume, is carried.

The CHAIRMAN: There have been no amendments offered to paragraph (*a*), and that will be carried by our final passage of the whole clause.

Mr. MARTIN (*Essex East*): We have agreed on paragraph (*a*), I think.

The CHAIRMAN: Is paragraph (*c*) satisfactory?

Mr. MARTIN (*Essex East*): Mr. Badanai has something to say.

Mr. BADANAI: On paragraph (*c*), I want to move an amendment. I had one prepared yesterday, to the effect that a person charged with a criminal offence has the right to be presumed innocent until proved guilty.

Mr. MARTIN (*Essex East*): That is later, Mr. Badanai.

Mr. FULTON: I have submitted for consideration of the committee, an amendment to paragraph (*f*).

Mr. MARTIN (*Essex East*): In fairness to Mr. Badanai, he had an amendment prepared and he just wants to go on record.

Mr. BADANAI: The minister's statement yesterday afternoon was very welcome indeed and, therefore, I would not move the amendment.

The CHAIRMAN: I would suggest we let paragraph (*c*) stand until we get to paragraph (*f*).

Mr. FULTON: Mr. Chairman, with respect, if Mr. Badanai merely wants to go on record as to what he had in mind—

Mr. MARTIN (*Essex East*): That is all. Go on record, Mr. Badanai.

Mr. BADANAI: I was saying that this amendment I had prepared was to the effect that an accused had the right to be presumed innocent until proved guilty according to law.

The minister made a statement yesterday afternoon which was very welcome indeed and, therefore it is unnecessary for me to move that amendment.

However, I have one which would compliment that proposed amendment, which would read as follows:

> That clause 3 be amended with a paragraph to be designated as (*g*), to be added after the present paragraph (*f*):
>
> Deprive a person, of the rights to reasonable bail without just cause.

Mr. MARTIN (*Essex East*): Mr. Badanai, Mr. Fulton suggested you put on record the amendment you had in mind with regard to the presumption of innocence. That has not been put on record.

The CHAIRMAN: Not in precise wording.

Mr. BADANAI:

> That paragraph (*g*) be added after the present paragraph (*f*):
>
> "Deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law."

Mr. MARTIN (*Essex East*): That is the amendment Mr. Badanai had in mind, and which was met by the minister's statement yesterday.

The CHAIRMAN: That is in (*f*) though.

Mr. FULTON: I appreciate that, Mr. Badanai, and we will have a look at it. If it suggests any modifications of ours, we will try to work them in before we come to paragraph (*f*).

The CHAIRMAN: Is there any further discussion on paragraph (c)?

Mr. BATTEN: Will we be coming back to paragraph (c)?

The CHAIRMAN: In this sense, Mr. Batten, that the whole clause will be put before the committee for adoption. If there are any amendments to paragraph (c) which you think should be made, now is the proper time to do so.

Mr. BATTEN: What would be the meaning of the word "promptly"? Suppose a police officer went to a home to arrest a man, does that mean that the man to be arrested has to be informed that he is being arrested at the home or after he has been taken back to the station?

The CHAIRMAN: I think I should have made it clear, gentlemen, that even though you have not an amendment to make to a particular clause or paragraph, you are certainly entitled to ask questions of the minister as we come along to the consideration of a particular clause.

Mr. FULTON: Mr. Batten, a man can only be arrested if there is a warrant for his arrest. He must be informed there is a warrant at the time that he is arrested.

It is usual—although I would not care to say that at the moment, I could point to a specific provision requiring it—but it is usual that where there is an arrest the man is informed at once of the charge upon the basis of which the warrant is issued. He is then taken to the place where he is to be detained, and he has, by the Criminal Code, the right to be brought before a magistrate and officially arraigned within 24 hours from the time of the physical arrest; and at that time is formally charged. So that even if there were some imperfect understanding on his part of what was in the warrant at the time of his arrest, he is entitled to know it in full, within 24 hours, by reason of the fact that he must be brought before a magistrate and formally charged within 24 hours. At all times he has the right to refuse to answer any questions that may be put to him, or to refuse to answer them without counsel being present; that is, to refuse at all times up until the time that he appears in court before the magistrate. Then of course he has the right to counsel.

I should make this further modification: a man may be arrested without warrant, under special circumstances outlined in the code, mainly dealing with circumstances where he is found in the course of actually committing a crime, or some such circumstance, where obviously it would be foolish to impose the requirement of rushing away, getting a warrant and going back to arrest him, because the crime would have been committed in the meantime.

Mr. AIKEN: Those are also cases where the private individual may effect an arrest?

Mr. FULTON: That is correct.

Mr. BROWNE (*Vancouver-Kingsway*): What is brought to my mind under this clause is that it seems to me there were a couple of cases that came to the attention of the public last year, where people had been in jail, charged with an offence, and they had been remanded continuously for some five or six months. They had stayed there without being brought to trial. I realize these people had counsel, and the remanding was being done with the consent of counsel; but the judge was quite critical of counsel in the case, I believe. Is there any protection for a person finding himself in that position?

Mr. FULTON: He can always personally apply for a writ of habeas corpus; but if he takes the advice of his counsel then, presumably, he is not suffering any prejudice by the postponement you refer to.

Mr. BROWNE (*Vancouver-Kingsway*): They are usually people without means and probably, without knowledge of these things. It seems to me the attorney general of the province should take some action in that regard.

Mr. FULTON: Which cases are you referring to—those where there was delay in Toronto; and I think it had something to do with the empanelling of a grand jury?

Mr. BROWNE (*Vancouver-Kingsway*): No, in Vancouver, where counsel simply said he was busy, and the men were only on a minor charge of some sort, and I doubt whether the penalty would have been as great as the time spent in jail. They got remanded from week to week, and this went on for about six months.

Mr. FULTON: My advisers say it was ninety days, but I am not minimizing it on that account. I would think the attorney general would certainly have some concern when those facts were brought to his attention. This is one of those problems which it is difficult to be categorical about. The magistrate, presumably, had knowledge of the circumstances before him, and also came to the conclusion it would be more desirable to remand rather than to insist on going ahead when the accuseds' counsel could not be present.

Whether that was, on the basis of afterthought, a right or wrong decision, I do not think it would be proper for me to say; but I do not think it could be argued that the man did not have the full opportunity for asserting the rights that he had, had he wished to do so, since he was advised by counsel. I think that really all I can say in addition is that the procedure is there. There are cases, I suppose, where accused persons are poorly or improperly advised by those whose professional advice they obtain; but the procedure is there to protect them.

The CHAIRMAN: Are there any further questions, gentlemen?

May we move along to subclause (*d*).

Mr. MARTIN (*Essex East*): I am not going to raise anything. I still worry about the phrase "constitutional safeguards". I know the intention, but I do not know what "constitutional safeguards" really are.

Mr. BROWNE (*Vancouver-Kingsway*): There is one question I might ask. In reading this clause is it intended that if he is denied counsel that it could not proceed, or if he is denied protection against self crimination; or does it mean all three things listed here?

Mr. FULTON: Do you mean that before the protection of this bill would arise he has to be denied all three?

Mr. BROWNE (*Vancouver-Kingsway*): Yes.

Mr. FULTON: Oh, no. He is entitled to the benefit of this subsection if he is denied any one of those three. If we had said "and" instead of "or", I think it would have been all three.

The CHAIRMAN: Is it made clear about a witness?

Mr. FULTON: I think previous discussion made that clear.

Mr. MARTIN (*Essex East*): We discussed that. I expressed some disagreement with the clause, but we have had our discussion and I have nothing further to say on it.

The CHAIRMAN: Subclause (*e*).

Mr. DESCHATELETS: I would like to submit for the consideration of the committee that the word "hearing" in line 27 seems to be a very strong word in the context of this clause. If we refer to subclause (*f*) there is no doubt that the term "hearing" falls in very well with the independent and impartial

tribunal; but in clause (*e*) I do not see why we should keep the word "hearing", because if we do so we will be obliged to set up in each case a kind of tribunal to hear any complaints that might arise—that might be brought up. I think we might amend or change this word.

I would move, seconded by Mr. Martin, that the word "hearing" be deleted from line 27 and the words "examination of his case" be substituted. May I say that with this change we could dispose of any case by way of letter after examination.

Would you permit me to add a few words. It seems to me in respect of the word "hearing" in clause (*e*), that if it stays as it is we would be exposed to this: in each case the complainant would come and we would have to hear him personally, and maybe his witnesses. This may open the door to quite a broad field.

Mr. FULTON: Mr. Deschatelets, we have been concerned ourselves about this point. I think your fears could be answered along these lines. This is a paragraph designed to deal with a case where you have an administrative board or tribunal which is dealing with the question of the determination of the rights and obligations of an individual. Putting it in that context I am sure you will agree this is a pretty important matter—the determination of the rights and obligations of an individual. We felt that it was proper and indeed essential to provide in a bill of rights that such an individual is entitled to a fair hearing. That means he is entitled to know the allegations against him and have an opportunity to answer them.

The cases have established that that is what is implied in a fair hearing —to know the allegation against him and have an opportunity to answer; but the cases also establish that provided he does know the allegation and has an opportunity to answer, "opportunity to answer" does not mean that he must be given the right to appear in person and to give his account orally. It may be satisfied by a written statement of his case on his behalf. It is for the board itself to determine whether or not he appears personally. This does not obligate them to hear him personally, but does obligate them to see that he knows the case against him and has an opportunity to put in an answer to the allegations.

Mr. DESCHATELETS: If you leave in this word here, which means in French "audition", surely it binds us to the presence of the complainant. I have no objection to that, but I do not think that is the intent of the bill.

Mr. FULTON: No. It is not intended that he should have the right to appear personally. That is at the discretion of the board. May I contrast the outline I have given with your words "examination of his case". If we confined it to that I think the board might say: "we have examined his case, looked at the evidence carefully, we have been fair minded, and have decided the evidence establishes the allegations". There would be no obligation on the board to give the individual the opportunity to reply, if you confine it to "examination of the case".

Mr. MARTIN (*Essex East*): The point you have made now has been going through my mind. I was going to ask Mr. Deschatelets what would he think if we said here "and/or examination of the case". You might want a hearing or just want an examination.

Mr. FULTON: This is one of those cases where perhaps the minister looks a little stubborn. But I can only ask you to believe that it is not stubbornness. It is the fact that these questions have occurred to us, and have recurred to us in the course of the discussion in the committee, and we have tried to see if we can come up with a better wording to meet your points. But every time

we do, every word that occurs to us, such as examination, procedure, or proceedings seems to us to take away what is implied in the words "fair hearing in accordance with the principles of fundamental justice".

That is what it seemed to us we should write into a bill of rights, and we have not been able to convince ourselves that anything other than that would be adequate.

Mr. DESCHATELETS: With the permission of the committee I would like to withdraw my amendment. I have no objection at all that fair hearing be given in all cases. In fact, I would be pleased. But it is my impression that people would believe that they would have to be here, and that was the reason for my amendment, because I know that is not the intention behind the purpose of the clause. In any event, I am withdrawing my amendment.

Mr. MARTIN (*Essex East*): It shows you how those who are not in on this are not burdened by the difficulties of concessions; not that I am suggesting that the minister is stubborn, because I know he is not. But something like that always exists with those in authority.

Mr. FULTON: It is our responsibility to ensure that we do not do anything beyond what we should do. And, of course, discussions of this sort are helpful.

Mr. MARTIN (*Essex East*): That is right.

Mr. FULTON: About the only alternative which we could come up with would be substitute for the word "hearing" the words "the opportunity of presenting his case".

Mr. MARTIN (*Essex East*): You would have the word "hearing" taken out?

Mr. FULTON: Yes, and as a possible alternative substitute therefor the words "opportunity of presenting his case". What you would have given to him is the opportunity.

Mr. MARTIN (*Essex East*): I do not know. It might be desirable that he should have a hearing; but on the other hand it might be desirable that he should not have a hearing, but just have the opportunity of presenting his case, which is quite different.

Why could you not accept "hearing or an opportunity of presenting his case"? This is in the interests, I believe, of the crown and of the individual—"hearing or opportunity".

Mr. FULTON: In our view "hearing" includes opportunity of presenting his case; in fact, it includes it and it might go a little beyond it.

Mr. BATTEN: But it is not true the other way around.

Mr. FULTON: No; the "opportunity of presenting his case", I think is less embracing than "hearing". Why not leave "hearing" and let us have another look at it, because no doubt this discussion will arise again in the house.

Mr. AIKEN: May I comment by saying that a chain is only as strong as its weakest link. In this case where we have the word "or" inserted to protect the public, it is a good deal less, because those in charge could use the weaker portion of the clause, if they so desired, to prevent a proper hearing.

I think that "hearing" is a strong word, but it creates much stronger rights.

Mr. MARTIN (*Essex East*): I think that is a good point.

Mr. FULTON: If you are content to carry the clause in its present form, we could have another look at it between now and the time it comes up in the house.

The CHAIRMAN: Is it agreed that Mr. Deschatelets' motion be withdrawn?

Agreed.

Now we are on subclause (*f*).

Mr. STEWART: Subclause (*f*): was there not an amendment moved by the minister in respect to subclause (*f*)?

The CHAIRMAN: No, it has not been moved.

Mr. STEWART: Well, I so move.

The CHAIRMAN: Have you a seconder? It has been moved by Mr. Stewart and seconded by Mr. Browne that subclause (*f*) be deleted and that the following be substituted therefore:

> Deprive a person charged with a criminal offence of the right to be presumed innocent—

Mr. MARTIN (*Essex East*): What was that again, please?

The CHAIRMAN: I shall repeat:

> Deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Mr. MARTIN (*Essex East*): Yes, that embodies the same principle which Mr. Badanai had in mind when he said "a person charged with a criminal offence should be presumed innocent until proved guilty according to law."

The CHAIRMAN: Is there any discussion, gentlemen?

Mr. JUNG: I wonder if I might ask the minister if he knows of any federal statute in which there are infractions of a federal statute which would not be proceeded with by way of a prosecution under a criminal charge? We are talking about criminal charges. Will this cover other infractions?

Mr. FULTON: "Criminal" covers all penal provisions. It does not mean only those charges arising under the Criminal Code; it is wherever you have punishment applied or made applicable for the breach of that statute. Then all these proceedings would be included under this word.

Mr. DORION: Mr. Minister, I would like to have your comment on the following case: you know the presumption that exists in the case of theft or receiving. Do you believe that within this context that presumption would be applicable or not?

Mr. FULTON: Really, I think what is implied there, is a question of the onus of proof, and a matter of the onus of proof rather than the presumption of innocence. The onus of proof shifts from time to time in accordance with the jurisprudence established in that regard. I think they are closely related fields, but I do not think that the point you have raised relates directly to the question of presumption of innocence in the broad sense in which we are seeking to preserve it here.

Mr. DORION: Yes, but with that presumption the accused is obliged to give an explanation, and that presumption is sufficient for the judge to convict an accused if the accused does not give any reasonable explanation, but has been found in recent possession of certain effects.

Mr. FULTON: But the crown still has to prove certain things. You cannot put a man in the dock and say; here he is and he is guilty until he proves his innocence, even under that statute or provision you are referring to. The crown still has to prove the facts on which it relies in establishing the guilt of an accused, and the accused is still presumed innocent unless and until the crown proves those facts. This matter of the inference the court is entitled to draw from those facts may be covered by a certain statutory provision, and this is what you are saying the matter of presumption in respect of recent possession is; but the crown has to prove recent possession, or whatever other

fact it is from which the court is entitled to draw inferences. The crown has to prove the facts, and the accused is presumed innocent until the crown has proved certain facts.

Mr. MARTIN (*Essex East*): But in any event, if the bill has the effect which the minister says it has, that it overrides the existing law, then your situation is taken care of; but if this bill does not override the existing law then I think you are on sound ground, because the mere fact that a man has recent possession is in itself a presumption of guilt, and the onus is on him to deny it. I think it all depends on the effect of the bill of rights with regard to existing law.

Mr. AIKEN: Mr. Chairman, I suppose there is no further discussion regarding this.

The CHAIRMAN: Are you ready for the question, gentlemen? It was moved by Mr. Stewart, seconded by Mr. Browne, that subclause (*f*) be deleted and the following substituted therefor:

> deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by a competent and impartial tribunal.

All those in favour? Contrary if any?

It is carried unanimously.

Mr. MARTIN (*Essex East*): I would like to move an amendment. I would move, seconded by Mr. Deschatelets, that clause 3 be amended as follows; that a paragraph designated (*g*) be added after paragraph (*f*) so as to read:

> deprive a person of the right to defend himself in person or to retain and instruct counsel of his own choosing without delay, or to have provided for him legal assistance when interests of justice so require, and if he has not sufficient means to pay for it.

Mr. FULTON: Mr. Chairman, this again is one of those provisions where the objectives are, in a general sense, desirable—certainly emotionally,—but it creates problems which, to a parliament dealing with federal jurisdiction, are well night insoluble. Firstly, let me point out that much of what is included in here is covered in subclause (*c*); the right to retain and instruct counsel without delay. The difficulty arises when you come to insert a provision which says that you shall not deprive a person of the right to have provided for him legal assistance when the interests of justice so require, and if he has not sufficient means to pay for it.

This problem is one of very broad implications. There is the question of the obligation that might be said to rest on the various law societies; the obligation that might be said to rest on the legal profession to see that a person does not suffer for want of means, or want of the ability to pay counsel. This is not, it seems to me, an obligation which we can say the government should assume, because such a statement would be to say, in effect, that the legal profession is relieved of any such obligation. I believe that the legal profession would resent—perhaps that is too strong a word—they would be very much concerned over the statement that they had no obligation, and that they were relieved of the obligation of discharging one part of their professional undertaking—that is, to see that justice is done in the courts of which they are servants.

Also, you are dealing here with the field of criminal law, in addition to other fields. Now I know that in many of the arguments I have made before, objecting to amendments on the grounds of interference with provincial authority I have been reminded that this statute is confined to federal jurisdiction. So it is, but we must remember that although the Criminal

Code is, to a large extent, in our federal jurisdiction—certainly the right to make criminal law and to amend criminal law is exclusively reserved to parliament—yet, the constitutional convention is that the obligation to enforce the criminal law is that of the provinces. The attorney general mentioned in the code is the provincial attorney general. Now, what situation do you get into if you carry this amendment? Would you not get into the situation that the provincial attorney general is, under his responsibility to administer criminal law in the province, instructing and retaining counsel for that purpose, and would you not then have thrown upon the dominion government the obligation of instructing and retaining counsel to oppose the provincial attorney general with respect to his obligation to enforce the Criminal Code? This, I think, would be a most undesirable, if not an unconstitutional intrusion by the federal government.

This, I am convinced, is an area where the obligation to see that persons are properly defended before the criminal courts is an obligation of the provincial attorneys general, or an obligation within the field of provincial governments. For us to assume that obligation would be to step outside our constitutional authority, and definitely to intrude into provincial fields.

Mr. MARTIN (*Essex East*): I do not need to spend much time on this; I think it speaks for itself. We have clearly indicated that nothing in this bill of rights can affect provincial powers. At least, that is what is proposed. As we are only dealing with those matters that have to do with the federal government, it seems to me that the argument of the minister, while interesting, has no point.

Mr. DORION: Mr. Chairman, the minister has told us that it would be an infringement of the rights and the obligations of the attorneys general; it is a question of the administration of justice. It is a very good idea; but I believe that if we accept that text, it will lead to confusion, even if we have a provision to the effect that this bill of rights will affect only the federal parliament jurisdiction.

Mr. FULTON: This would be a statement that that earlier provision was not applicable.

Mr. DORION: May I add this: in different cities in Ontario and Quebec the legal profession is very concerned with that idea, that we have to have a system whereby every person who has to answer to a criminal charge should be defended without fee, if necessary.

In Quebec City, for example, we have legal assistance, and I have never seen a lawyer refuse to defend a person who is accused of a criminal charge.

On the other side, I remember a circumstance where, with regard to a person accused of murder, it was impossible for him to go before the court because he had to wait for the transcription. But it is a question which depends exclusively on the attorney general, and I believe that the situation is better now than it was previously.

Mr. MARTIN (*Essex East*): I simply want to say at once, as a member of the profession, that I fully agree with Mr. Dorion; no self-respecting lawyer would allow consideration of pecuniary return to stand in the way of his assisting in the administration of justice. I certainly do not know of any lawyer, and I am sure there is none, who would. But that is not really the point. The point of this amendment is that there are not, in all the cities of Canada, legal aid societies; and in any event, in those communities where there are, this would not preclude the participation of counsel's or solicitors' advice by these legal aid organizations. This is simply supplementary to it.

However, as apparently there is no chance of this amendment being carried in its present form, and as perhaps half a loaf is better than no loaf at all, would the minister accept the amendment if it were simply to say:

> Deprive a person of the right to defend himself in person or to retain and instruct counsel of his own choosing without delay.

Mr. FULTON: I appreciate the concession, Mr. Martin, but I think that is covered by the earlier comment I made—that the right to retain and instruct counsel without delay is already covered in paragraph (*c*).

Mr. MARTIN (*Essex East*): But it does not say anything about the right to defend himself in person.

Mr. FULTON: I was going to go on to say I think much of the intent of the whole amendment is covered by the words in (*f*), as now amended:

> Deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing.

I would think any court which found an accused before it, who said: I do not want to defend myself in person, and do not have counsel—I think any reviewing court would say that if you insist on going ahead with the trial without making arrangements for counsel, it is not a fair hearing. Similarly, if the accused said: I want to defend myself in person, and he was refused the right to defend himself in person, then, also, the reviewing court would say that is not a fair hearing. So, frankly, while I appreciate your desire to be conciliatory in this respect, I go back to my earlier reply—that your objectives are covered in the bill as drawn.

Mr. MARTIN (*Essex East*): Well, I do not agree on that. I do not think this section does cover the point of the right of a citizen to defend himself. You say it does, and I say it does not. I suggest we dispose of the matter now by vote.

Mr. BROWNE (*Vancouver-Kingsway*): I wonder if I might ask one thing before we proceed with that.

I was a bit confused on paragraph (*d*), when we were discussing that. As I understand it, that would give the right to anyone who is called as a witness in a case, the right to counsel, and presumably, if he said: I cannot afford to have counsel, it would be an obligation on somebody's part to provide him with counsel. As I understand the clause now—after looking at it further—it seems to me that is a similar principle to what is being proposed here. If a witness in a case requires counsel, it would seem to me that somebody who is accused would require one a lot more than a witness would.

Mr. MARTIN (*Essex East*): That may be, but he may not want counsel, and may want to defend himself. There are many cases where this is done, and sometimes with great success.

I suggest we vote on the amendment.

Mr. STEWART: That is not the point.

Mr. FULTON: The position of a witness is protected in paragraph (*d*), and the position of an accused is protected in paragraphs (*c*) and (*f*), because paragraph (*c*) says he has the right to retain and instruct counsel, without delay, and (*f*) says he shall have the right to a fair and public hearing. And, if he says: I want to defend myself in person, and the court says: you shall not, a reviewing court would say it is not a fair hearing. If he says he does not want to defend himself in person, and they proceed without counsel, the reviewing court will say it is not a fair hearing.

The CHAIRMAN: It has been moved by Mr. Martin and seconded by Mr. Deschatelets that clause 3 be amended as follows:

That a paragraph, to be designated (*g*) be added after the present paragraph (*f*): deprive a person of the right to defend himself in person or to retain and instruct counsel of his own choosing without delay—

Mr. MARTIN (*Essex East*): Period.

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I am trying to make a concession.

The CHAIRMAN: All those in favour? Four. Opposed? Eight. I declare the motion lost.

Motion negatived.

Mr. BADANAI: I have here an amendment on clause 3. I move, seconded by Mr. Batten:

That clause 3 be amended as follows:

That a paragraph designated—be—

Mr. FULTON: Designated "(*b*)" or "(*g*)"?

Mr. BADANAI:

That a paragraph designated—be added after the present paragraph (*f*)—

Mr. FULTON: That is "(*g*)" then?

Mr. BADANAI:

Deprive a person without just cause of the right to a reasonable bail without just cause.

Mr. FULTON: You have "without just cause" in twice. We have discussed this before—

Mr. BADANAI: May I say this?

Mr. FULTON: I beg your pardon, Mr. Badanai.

Mr. BADANAI: I want to point out that the American bill of rights, under the eighth amendment of the United States constitution, provides that excessive bail shall not be required. I think this is a good point.

Mr. FULTON: Mr. Chairman, this has been discussed before, and I have expressed the opinion this is covered in paragraph (*a*) and the generality of our provisions.

Paragraph (*a*) says:

Authorize or effect the arbitrary detention, imprisonment or exile of any person;

I think that refusing reasonable bail without just cause would be held to be arbitrary detention. Nevertheless, I recognize this is wording which is contained in the old bill of rights, and that it has been referred to by a number of witnesses. It is obviously a matter which gives concern, that somehow or other we have omitted it. While I think it is repetitious, I appreciate the depth of feeling on it, and I cannot see it would do any harm to particularize to this small additional extent.

Mr. MARTIN (*Essex East*): Agreed.

Mr. FULTON: May we have a moment to fix up the drafting of the amendment and suggest any alteration, if necessary, to your own wording?

Mr. MARTIN (*Essex East*): Yes.

Mr. FULTON: Then you could re-move it.

Mr. AIKEN: "Remove" it?

Mr. FULTON: Mr. Badanai, would you be prepared to reword your amendment so that it would be an amendment to paragraph (*f*) instead of the addition of paragraph (*g*)? I take it you want to apply it to criminal charges. That is why I suggest this. (*f*) then would read: deprive a person of the right to a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause.

Mr. BADANAI: Agreed.

Mr. FULTON: It seems to me it should come in in the paragraph dealing with criminal charges.

Some Hon. MEMBERS: Agreed.

Mr. DESCHATELETS: Mr. Chairman, would you permit me—

The CHAIRMAN: Just a moment please, until I put this question?

Mr. Badanai, are you agreeable to the amendment of your motion as follows: that subclause (*f*) as amended be further amended by adding after the word "tribunal" the words, "or of the right to reasonable bail without just cause"?

Mr. BADANAI: I so agree.

The CHAIRMAN: Is it agreeable to the seconder?

Agreed.

The CHAIRMAN: Are you ready for the question? May I dispense with reading it again?

Agreed.

The CHAIRMAN: All in favour?

Contrary?

Motion agreed to.

Mr. DESCHATELETS: Mr. Chairman, I would like to suggest for the consideration of the committee the addition of a new subclause to clause 3. This has to do with the very important question of an interpreter. As we all know there is an inquiry going on not very far from this building. I would like, Mr. Chairman, to read just a few lines from the *Ottawa Journal* of Monday, July 25 to establish my case in favour of the amendment I have in mind. I think the reading of these few lines will give a much stronger impact than any speech I could make. I quote:

> Mrs. Laroche, appointed treasurer nine years ago, although she has no formal training in accountancy, asked for an interpreter on taking the stand today in the Eastview town hall.
>
> But her request was denied by C. W. Yates, Department of Municipal Affairs, who is sitting jointly as a tribunal with F. G. Blake, head auditor of the department.
>
> "But I insist I have an interpreter", said Mrs. Laroche, who said that she spoke better in French.
>
> "You can't insist on that" replied Mr. Yates. "We are conducting this hearing in English and your English seems adequate. We will be the judge whether an interpreter is needed."

Though I may not touch here on any constitutional aspect that might arise out of this statement of what happened at that inquiry, I do feel that we should not adopt a bill of rights without outlining and spelling out very clearly that the free assistance of an interpreter should be given to any Canadian citizen of whatever origin he is, in any court, tribunal, inquiry or anywhere in any part of Canada.

I therefore move, seconded by Mr. Martin, that a further amendment be added after paragraph (*f*) of clause 3, and I quote:

> Deprive a person of the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Mr. FULTON: Mr. Deschatelets, we all appreciate and we all share concern about the conduct that is reported in the particular case to which you have referred. I have no hesitation in saying that to refuse to grant a person the services of an interpreter, if he is unable to understand the language being used in the procedures of the court, is not a fair hearing; I would say it was a grossly unfair hearing, and I make that statement of fact or principle without saying that it is applicable to the case that you have cited, because I do not know the facts of that case.

But I do make the statement of principle that to refuse to allow a person the services of an interpreter, if he does not understand the language being used in the proceedings in court, constitutes an unfair hearing.

I think however that this situation is covered by our bill of rights as drafted; and if you will look at paragraphs (*e*) and (*f*) now before you, you will see that where the hearing is, as in the case of paragraph (*e*), before a board or tribunal for the determination of his rights and obligations, he is entitled to a fair hearing, and if it be, as in the case of (*f*), a criminal charge, he is entitled to a fair and public hearing by an independent and impartial tribunal, in accordance with the principles I have indicated to you. I think that it is covered by paragraphs (*e*) and (*f*).

It is my view that any reviewing court upon being told, and having it established that in the lower court or board a man who could not understand the language used was not given the right to an interpreter, would say that this was not a fair hearing, and the proceedings below would be quashed. That is my view of the way courts would apply this. If we find that should not be the case, we would, without hesitation, move a further amendment to strengthen the bill of rights, but in my view it would be clearly covered. I think, therefore, I must object to your amendment, not because it embodies an objective with which I disagree—I do agree with it—but because it has got into the realm of writing procedural particulars to be used by the courts. I do not think a bill of rights should write procedure or particulars, but should confine itself to principles.

Mr. MARTIN (*Essex East*): I am sure Mr. Yates, of the Ontario municipal board, would say, with respect to the implication of his action the other day in this Eastview hearing—his denial of this witness' right to an interpreter—was not a violation of the principles involved in subclauses (*e*) and (*f*). This situation can arise and we do know that there are moods of magistrates and judges, and so on. This is not the first time this has arisen, not only with regard to a person whose enthnic background is the same as Mrs. Laroche's, but also with regard to other ethnic groups in Canada. We do know the impatience of some judges in respect of people who cannot fully speak English. This amendment, proposed by Mr. Deschatelets, I think is a necessary one. I myself know of a particular judge who on one occasion denied the right of a man, who was a Czech, who could hardly understand the English language, the opportunity, just as was done in this case, of having an interpreter, and we were able to get a new trial on the basis of his action. This particular drafted amendment is similar to the one in the declaration of human rights, and I think that the minister ought to recognize the value of this amendment so that this would be appreciated by, I am sure, the courts, and by the bar, and many groups of people in our country, French, and of various ethnic groups which we have, as well as the French and English, the two basic constituents of our country.

Mr. FULTON: I know that all ethnic groups will appreciate that we have written into the bill of rights their right to a fair hearing. The case that you have cited, Mr. Martin, proves that the remedy is there, and that remedy will be reinforced by the bill of rights. You said you were able to obtain a new trial because the person was denied an interpreter. The courts above must have held that this was not a fair hearing. That principle will be applicable and will be part of the jurisprudence. Our bill of rights gives support to that principle, and the courts will be able to rely additionally on the bill of rights, and say that an individual is not being given a fair hearing, but the bill of rights say he shall have a fair hearing. We have anticipated you in this respect, and by that provision in the bill of rights we have moved to ensure that no one who cannot understand the language being used in court shall be denied the right to an interpreter.

Mr. MARTIN (*Essex East*): I cannot agree that you have anticipated this. I think by saying "providing a fair hearing", you have obviously gone a long way, but I say that judges have existed and will exist who show intolerance to any language other than their own, and will say that a man who has difficulty with either English or French—in this case French—is not being denied a hearing because he insists on an interpreter. I cannot see why the minister will not accept this amendment.

The CHAIRMAN: The question is: moved by Mr. Deschatelets, seconded by Mr. Martin that clause 3 be amended as follows: that a paragraph designated (*g*) be added after paragraph (*f*) reading:

> Deprive a person of the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Mr. FULTON: May we have this stand over?

Mr. STEWART: Let it stand over.

The CHAIRMAN: Is it agreeable then to have the question stand over?

Mr. FULTON: It is the moment for adjournment, and I do not think our decision should be taken in haste.

Mr. MARTIN (*Essex East*): Do you want to let it stand?

Mr. FULTON: Yes.

Mr. MARTIN (*Essex East*): I think that is a good idea.

Mr. STEWART: When are we meeting again, Mr. Chairman?

The CHAIRMAN: At 1 o'clock in this room. Is that agreed?

Agreed to.

AFTERNOON SESSION

FRIDAY, July 29, 1960.
1.00 p.m.

The CHAIRMAN: Order, gentlemen: I see a quorum. The minister is apparently tied up at the moment, so I would suggest that we adjourn the meeting until 2.30 this afternoon. Is that agreed?

Agreed.

Mr. STEWART: In this room?

The CHAIRMAN: Yes.

—Upon resuming

The CHAIRMAN: Order, gentlemen. It is my understanding—and if I am not correctly expressing it, I would like to be corrected—that we will adjourn now until 6:00 o'clock, and then continue with the deliberations of this committee until 8:00 o'clock. If we are not concluded by 8:00 o'clock, we will continue until we have concluded.

Mr. BADANAI: Mr. Chairman, we have one or two amendments here that I would like to—

The CHAIRMAN: I did not wish to interrupt, Mr. Badanai; but I would like to have that understanding agreed to by everyone.

Mr. FULTON: Mr. Chairman, perhaps we could go off the record for a moment.

—(*discussion off the record*)

The CHAIRMAN: Gentlemen, we go on the record again. On the record now is simply the statement that I made. Do you want to make a statement, Mr. Browne?

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, for the sake of clarity of the record, I would like to state that the committee should now decide to commence sitting at 6 o'clock, and should sit continuously until it has finished its deliberations on the bill.

Mr. STEWART: Why not make that a motion, and I will second it.

Mr. FULTON: Perhaps, Mr. Chairman, we could have Mr. Deschatelets second it.

Mr. DESCHATELETS: Before I came down, Mr. Chairman, Mr. Martin asked me to suggest that the committee adjourn until 6 o'clock. We think we will be able to finish tonight. I did not talk with Mr. Martin about what would happen if at 8 o'clock we had not finished; but personally I think that we should sit after 8 o'clock.

Mr. FULTON: If necessary.

Mr. DESCHATELETS: If necessary.

Mr. BATTEN: I am willing to go along with that suggestion, Mr. Chairman. All I am going to say, quite frankly—with all deference to anybody who deserves deference—is that I am not prepared to go along with this arrangement unless we are going to meet and get on with the job. If we are going to meet, let us get the job done.

Mr. FULTON: You mean, we will meet with that objective at 8 o'clock?

Mr. BATTEN: I am willing to meet at any time; but let us get on with the job.

The CHAIRMAN: You would prefer to go on now, personally?

Mr. BATTEN: Yes. If we are going to adjourn until 6 o'clock for Mr. Martin, that is fine; but let us meet and get this job done.

Mr. FULTON: That is the understanding.

Mr. BADANAI: No more postponements.

Mr. BROWNE (*Vancouver-Kingsway*): Mr. Chairman, I feel I should put a motion on this matter in the wording that I used before; that the committee sit at 6 o'clock, and sit continuously until it completes its deliberations on this bill.

Mr. BADANAI: I second that.

The CHAIRMAN: You have heard the motion, gentlemen? All in favour? Contrary? Carried unanimously.

—Upon resuming—

The CHAIRMAN: Order, gentlemen.

I think, when we adjourned, we had a motion under consideration.

Mr. MARTIN (*Essex East*): Yes, and the minister will tell us whether or not he accepts Mr. Deschatelets' amendment.

Mr. FULTON: Concerning interpreters? No, Mr. Chairman; I am sorry. We considered this further, and I must repeat the opinion I gave before. This is getting into the question of procedures of the courts, whereas our bill should legislate as it does in general principles by providing the right to a fair hearing in both administrative tribunals and criminal courts. By providing this we already have reinforced and given to the individual the right to ensure that he will not be deprived of an interpreter where he is unable to understand the language in which the proceedings are carried on. So, we cannot accept the amendment.

Mr. MARTIN (*Essex East*): The question, Mr. Chairman.

The CHAIRMAN: It has been moved by Mr. Deschatelets, seconded by Mr. Martin, that clause 3 be amended as follows:

> That paragraph designated (*g*) be added after the present paragraph (*f*):
>
> deprive a person of the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

All those in favour, please signify. Four. Those opposed? Six.

Mr. MARTIN (*Essex East*): Was that six?

The CHAIRMAN: Yes. I declare the motion lost.

Mr. BATTEN: Mr. Chairman, I move, seconded by Mr. Deschatelets, that clause 3 be amended as follows:

> That the paragraph designated (*g*) be added after the present paragraph (*f*):
>
> deprive a person of the right not to be compelled to be a witness in any criminal case against himself.

Mr. FULTON: Mr. Chairman, this is fully covered in paragraph (*d*), which says that the law shall not be construed so as to authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards.

Mr. MARTIN (*Essex East*): Does not the minister think the section does not really bear on that interpretation?

> . . . authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel,

Mr. FULTON: And, if he is denied protection against self-crimination.

Mr. MARTIN (*Essex East*): To compel a person to give evidence, provided he is not denied counsel, provided he is protected against self-crimination or other constitutional safeguards—but that is not what the amendment calls for. The amendment states that he shall not be compelled to be a witness in any criminal case against himself.

Mr. FULTON: Well, I fail to be able to distinguish between that and self-crimination. We intended to make paragraph (*d*) as all-embracing as we possibly could—and I think we have; and we have covered what you have in mind in your amendment.

Mr. MARTIN (*Essex East*): What do you think, Mr. Dorion?

Mr. DORION: I regret that I did not follow the wording of your amendment sufficiently.

Mr. DESCHATELETS: Paragraph (*d*) gives protection against self-crimination; it does not state how this protection could be given, while the amendment is—

Mr. STEWART: He is not compellable now.

Mr. DESCHATELETS: No one could be compelled to be a witness in any case against himself.

Mr. FULTON: Would that not be self-crimination?

Mr. STEWART: Yes. He is not compellable now.

Mr. FULTON: And, we have written that into the bill of rights.

The CHAIRMAN: Are you ready for the question?

Mr. MARTIN (*Essex East*): I am waiting for Mr. Dorion.

Mr. DORION: I am sorry, but I did not have the time necessary to reflect on this particular point, and I do not like to give my first impression. However to deprive a person of the right not to be compelled to be a witness in any criminal case against himself—would the meaning of it be in his own case, or in any case?

Mr. MARTIN (*Essex East*): In any case.

Mr. DORION: Against himself?

Mr. MARTIN (*Essex East*): Yes.

Mr. DORION: Not to be a witness against himself in any case? That is self-crimination, because it can be construed as in any case where a man may criminate himself in giving his own testimony; for example, when you have many accomplices who are charged individually, the crown has the privilege to hear all the other accomplices if they have not been accused in the same procedure with the accused himself. But when they are together—what is the word?

Mr. STEWART: When they are jointly charged.

Mr. DORION: Yes—they have the privilege, by the Criminal Code.

Mr. STEWART: And, they are entitled, even if charged separately, to the protection under section 5 of the Canada Evidence Act.

Mr. DORION: Yes.

Mr. MARTIN (*Essex East*): What do you think about this?

Mr. STEWART: I think it is sufficiently covered in the bill.

Mr. DESCHATELETS: Well, Mr. Chairman, at first sight, I might say that protection against self-crimination might mean that I might be called as a witness in a case, and my testimoney might involve me in another prosecution, or I might be involved in the main case because of my testimony. This does not mean that the judge might give me the benefit to testify with the protection of the court. That is what I think it means here. But, in the amendment it goes much further than that. It states very clearly that I cannot be compelled to be a witness in any criminal case against myself.

Mr. FULTON: But, Mr. Deschatelets, do you not think if you were forced into the box against your will in a criminal case in which you were charged you would be put into the box for the purpose of self-crimination and, therefore, our wording would cover both cases—the case of a witness who felt if he gave evidence he would criminate himself, or the case of an accused who was forced into the box and was reluctant to go because he would criminate himself.

Mr. DESCHATELETS: Under paragraph (*d*) a judge may tell me: you are compelled to testify; you are going to testify, but we are going to give you the protection of the court, and anything that you will say will not be used against you in that case.

The CHAIRMAN: He is charged, himself?

Mr. FULTON: I do not want to use too strong language, but I think your argument is not apt, because for what other purpose would he be put in the box, if he were the accused in that case?

Mr. MARTIN (*Essex East*): I have some difficulty with this myself in relation to paragraph (*d*), I must admit. But this was suggested by someone who discussed it with Mr. Batten and some of us, someone who has had some great criminal experience.

What about this situation—and this may be the same point Mr. Deschatelets had in mind. There is no doubt that paragraph (*d*) provides that a person cannot be compelled to give evidence: (*a*) where he is denied counsel, (*b*) where he will perpetrate self crimination, or, (*c*) where there is any violation of any constitutional safeguards, whatever that may mean.

Now, he may not be the person charged; he may be a witness. But the evidence that he will give, while it might not be used for any one of these three purposes, it might be used in this way, that he might say something to the court which the court would regard as corroboration in another case, where he might personally be involved.

Mr. FULTON: I must say I cannot imagine any such case as you refer to.

Mr. MARTIN (*Essex East*): Let us put it this way: "A" is a witness in a case involving a charge against a man who was charged with bank robbery, let us say. "A" says, in that case, something that in a charge against him on a subsequent case, where corroboration would be essential, and it might not be part of the case against him—

Mr. FULTON: In the earlier case, he could not be compelled to give evidence if he was deprived of the protection against self crimination.

Mr. MARTIN (*Essex East*): I say that he will get that; he will get these three that he comes within now—one of the three or all of them.

Mr. FULTON: But the evidence he gave in the first case, merely as a witness, if he were given protection against self crimination, could not be used against him in any way in a subsequent case in which he appeared in the role of the accused.

Mr. BROWNE (*Vancouver-Kingsway*): In any event, your amendment would not affect that because it deals with a case against himself, but you are dealing now with a man in another case.

Mr. FULTON: I think Mr. Browne is quite right. Your amendment only covers a case where he is compelled to give evidence in a case against himself.

Mr. DESCHATELETS: Paragraph (*d*) concerned a witness—

Mr. FULTON: Not only a witness.

Mr. DESCHATELETS: —because it says "to compel"—

Mr. FULTON: —"to compel a person to give evidence"—not only a witness, but an accused.

Mr. STEWART: That would apply to a tribunal or commission making the investigation.

Mr. FULTON: It covers, in my view, a court, tribunal or commission. No such court, tribunal or commission can compel a person to give evidence without protection against self crimination. That, therefore, would cover the case of a person, whether that person was a witness or an accused.

Mr. DORION: Mr. Chairman, I do not know exactly in what sort of cases this formula would be applicable—deprive a person of the right not to be compelled to be a witness in any criminal case against himself.

The principle is that nobody who is accused—and it would be very interesting to see the historical origin of that principle—nobody who is accused, who is under a criminal charge, can be compelled to appear before a court

and give testimony. There is, maybe, an exception to this. He is any person who appears before a coroner's court, but at that moment there is no accused, and he is only a witness, and if he asks the privilege of section 5 of the Canada Evidence Act he is absolutely—

Mr. FULTON: —protected.

Mr. DORION: —in order, and nobody can use his testimony against himself, but he has to ask for that privilege. Maybe on this particular point it would be possible to change, maybe, section 5 of the Criminal Code, because I have in mind—

Mr. STEWART: Of the Evidence Act?

Mr. DORION: —something very precise, where a man who was a witness was accused of murder after, and he had given to the policeman, police agent, a very incriminating statement. He was detained at that moment. I think it was a very strong prosecutor, and I believe it was my duty to inform him and advise him, by the police agent, to ask for the protection of the court, because he had no counsel at that time. He was only a witness originally, but, subsequently, he was accused of the same murder, and if he had had no protection from the court it would have been possible for the crown prosecutor to use his own testimony against him.

But I do not believe that this meets what I am saying there, and this is the reason why I do not know that it is useful to have the paragraph in the bill of rights.

Mr. BATTEN: Mr. Chairman, on looking at the motion which I have made, and on comparing it with the statement that the minister has made in regard to paragraph (*d*), I wonder would you hold this over for a while?

Mr. STEWART: Why; have you any reason for it?

Mr. AIKEN: I suppose we could hold it over until we have finished considering clause 3?

Mr. STEWART: Yes, but I just wondered why.

Mr. DORION: It is the privilege of the accused not to be a witness. This is the reason why I do not see how this would be an improvement of the actual status of the accused.

Mr. FULTON: Precisely. My point is that that is a privilege which is now incorporated in the Criminal Code, I believe.

Mr. DORION: That is right.

Mr. FULTON: And is further reinforced by our bill of rights; so no parliament could amend the Criminal Code to take that away, unless by express intention they over-rode the bill of rights.

Mr. STEWART: It is in the Canada Evidence Act?

Mr. FULTON: The right of an accused person in a criminal charge, that he cannot be forced into the witness box, I think is in the Criminal Code.

Mr. DORION: It is section 4.

Mr. FULTON: It is somewhere—

Mr. BATTEN: With the permission of Mr. Deschatelets, who seconded this motion, and of the committee, I withdraw this amendment.

The CHAIRMAN: Is that agreeable, gentlemen?

Agreed to.

Mr. MARTIN (*Essex East*): With the right, of course, to introduce it at some later stage outside of this committee?

Mr. AIKEN: Oh yes.

Mr. FULTON: I would like to make a correction if I may. Sometimes one says things too quickly. I think the protection of an accused against being forced into the box is in the Canada Evidence Act. I believe I said it is in the Criminal Code.

Mr. MARTIN (*Essex East*): It is in both.

The CHAIRMAN: Is there any further discussion on clause 3?

Mr. AIKEN: Mr. Chairman, we left over the main amendment on subclause 3. Perhaps we might consider that now.

Mr. FULTON: Do you mean that we go back to the introductory words of clause 3?

The CHAIRMAN: I believe there are no further additions contemplated under clause 3. We can go back to the introductory words.

Mr. FULTON: In that case then, yesterday the committee considered the amendment I suggested, the amendment which has not yet been moved, and there is the amendment moved by Mr. Martin this morning. In respect of the amendment of this morning it has the effect—

Mr. MARTIN (*Essex East*): This is my amendment?

Mr. FULTON: Yes—it has the effect, as I read it, of taking clause 3 right out of the bill of rights and making it a part of the Interpretation Act. This means it would not be a part of the bill of rights. We want this bill not to be over-ridden except by express declaration. Therefore, in my view that provision itself should be included in the Canadian bill of rights.

Mr. MARTIN (*Essex East*): Question.

The CHAIRMAN: The question is: moved by Mr. Martin, seconded by Mr. Deschatelets that all the words preceding paragraph (*a*) be deleted and the following substituted therefor—

Mr. MARTIN (*Essex East*): It is long.

The CHAIRMAN: Yes.

Mr. AIKEN: We heard it this morning.

The CHAIRMAN: Shall we dispense.

Agreed.

The CHAIRMAN: All in favour of the motion please signify?

Those opposed?

Motion negatived.

Mr. MARTIN (*Essex East*): By what vote?

The CHAIRMAN: Four in favour and six opposed.

Mr. FULTON: May I then read to the committee the amendment we had suggested to clause 3: that all the words of the clause preceding paragraph (*a*) be deleted and the following substituted therefor:

> Every law of Canada shall, unless it is expressly declared by an act of the parliament of Canada that it shall operate notwithstanding the bill of rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

Mr. STEWART: I so move.

Mr. STEFANSON: I second the motion.

The CHAIRMAN: Is there any discussion, gentlemen?

Mr. MARTIN (*Essex East*): If we do vote for that, that is always reserving the right elsewhere to seek to put forward the other amendment or any other amendment we think is necessary.

The CHAIRMAN: Moved by Mr. Stewart, seconded by Mr. Stefanson that all the words preceding paragraph (*a*) be deleted and the following substituted —shall I dispense?

Agreed.

The CHAIRMAN: All in favour?

Contrary?

Motion agreed to.

Mr. BATTEN: This morning when we were speaking about subclause (*c*) there was some question as to whether sections (i), (ii) and (iii) applied collectively or individually. Did we agree to put the word "or" after the word "detention" in the seventeenth line?

Mr. FULTON: It is a universal rule of drafting and is recognized by the courts that where you have subparagraphs numbered consecutively, and the word "or" appears between the penultimate and ultimate subparagraphs, then all subparagraphs are in the alternative.

The CHAIRMAN: The question now is on clause 3 as amended.

Clause 3 as amended agreed to.

On clause 4.

Duties of Minister of Justice.

Mr. FULTON: On clause 4 I have an amendment to offer to the committee dealing with the point raised that the obligation of the Minister of Justice is rather nebulous here in the sense that he has an obligation to ascertain, but no express obligation arising thereafter, and that it would be desirable to compel the minister, or make it clear by the act that the minister has an obligation at least to report to parliament in any case where in his opinion there is an infraction in any of the documents or statutes he has examined.

Mr. MARTIN (*Essex East*): Only the bill.

Mr. FULTON: Any documents which have been presented to parliament.

Mr. MARTIN (*Essex East*): But not a draft before the clerk.

Mr. FULTON: No; in respect of regulations, it is only after the regulations are passed that they would be tabled. I assume any objectionable feature would be removed before tabling, and therefore this is not applicable to draft documents.

My suggestion is that clause 4 be amended by substituting a comma for the period in line 40 and add the following words thereafter: "and he shall report any such inconsistency to the House of Commons at the first convenient opportunity".

Mr. AIKEN: I would so move.

Mr. STEFANSON: I second the motion.

The CHAIRMAN: Is there any discussion?

Mr. MARTIN (*Essex East*): I thank the minister for this further clarification. I think it is a considerable improvement and meets the argument that some of us put forward; but I wonder if we could not even strengthen it further. Instead of saying "at the first convenient opportunity" could you not say within so many days, or something like that.

Mr. FULTON: I thought that would be covered by the regulations. I am not quite sure how this will work in practice. There are a large number

of private bills, all of which we will have to look at under the section. I would rather not start by excepting certain classes of statutes or regulations. I think it should be all-embracing. I am not sure at the moment how long it might take for this examination to be completed. Would you not be content to have it left for the regulations under this act; they will be tabled in the house.

Mr. MARTIN (*Essex East*): Would you be content to say "and shall report any such inconsistency to the House of Commons during the first session of parliament after prorogation", or something of that sort.

Mr. FULTON: That would make it possible for a statute to be enacted before the minister reports on it. I would think parliament would desire the minister's report to be received before the enactment of the statute.

Mr. MARTIN (*Essex East*): I was really thinking of the regulations.

Mr. FULTON: I feel we would like time to develop a little experience. We will have to make regulations covering the procedure. Those regulations will be tabled, and if the period in the regulations is felt to be too long or if the experience proved that we are not reporting to parliament when parliament would like us to report, or by the time parliament would like us to report, then in that event the regulation itself could be brought up for debate.

Mr. DESCHATELETS: Do you not think it should be covered by regulation?

Mr. FULTON: Yes, I think it should be covered by regulation, Mr. Deschatelets. I think we might work out a standard form for reporting to parliament, probably in writing.

On the other hand it might be found more desirable to do it by oral report at the time of the motion for second reading, or something like that. But I think probably a standard form of reporting to parliament would be preferable.

Mr. MARTIN (*Essex East*): I find that I spoke too hurriedly. May I have leave to withdraw what I said? I find that Mr. Badanai has an amendment to this clause, which is not exactly in those terms, and which incorporates another idea. I think his amendment is an improvement.

Mr. AIKEN: Perhaps we might consider them both.

Mr. MARTIN (*Essex East*): Yes, it could hardly be made a sub-amendment, because it incorporates other ideas.

Mr. FULTON: Well, in order not to foreclose on Mr. Badanai, perhaps he might read his suggestion to us, although he cannot move it at the moment. In any event, it would be before the committee for consideration.

Mr. BADANAI: I move, seconded by Mr. Baten—this is the form of the amendment—

The CHAIRMAN: No, Mr. Badanai. It has been suggested that it would be out of order for you to move it at this stage; however, you can give us the substance of it.

Mr. BADANAI: The substance of my suggestion is as follows: that clause 4 be amended by adding thereto:

(*a*) The Minister of Justice shall report any inconsistency to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms.

(*b*) All petitions to the House of Commons which purport to be based on the Canadian bill of rights shall be referred to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms. The committee shall have power to report these petitions from time to time to the house, together with its opinions and observations thereon.

That is the substance of my amendment.

Mr. FULTON: May I comment on this to the effect that your proposed amendment seems to me to deal with those things which are only within the competence of the House of Commons itself to deal with, by its rules, or by amending its rules. And if you mean to provide that the Minister of Justice is to be under an obligation to report to an appropriate standing committee of the House of Commons on the bill of rights, you are imposing on him on obligation to do something which at the moment he is incapable of doing because there is not such a standing committee on the bill of rights.

Therefore it seems to me that we would have to wait until such time as the House of Commons itself decided whether or not to set up such a committee.

Mr. BADANAI: That is the very point which I raise. The amendment suggested the appoinment of a committee, and if I may just add this: that in the submission made by the Seventh Day Adventists at page 74—

Mr. MARTIN (*Essex East*): Mr. Michael.

Mr. BADANAI: There is a statement by the delegation as follows:

> With respect to bill C-79, "An act for the recognition and protection of human rights and fundamental freedoms" which it is felt would greatly strengthen the effectiveness of this bill —

And then he goes on to enumerate several of the ideas, among which is No. 6:

> 6. A standing parliamentary committee be established to give continuing examination with reference to the operation of this proposed act in the light of changing circumstances, and—

Now, even the Prime Minister, if I may quote him when speaking in 1945, in *Hansard* at page 2460 among other things said—and by the way, he was speaking on the national emergency bill—

> In the United Kingdom it has been found necessary to set up a committee in this regard, and I should like to see a similar committee appointed by this house.
>
> Such a committee would report to the house from time to time on all orders in council passed where there is a matter of principle in issue and where the question of delegated power arises. Where legislative power is conferred, the committee would make the necessary criticisms of orders passed by civil servants under the powers granted by legislation enacted by parliament.
>
> Members of the house would be given an opportunity to serve. There should be no difficulty about the government having a majority in the committee. Its members would be charged with nothing any breaches of parliamentary privileges and democratic rights; in fact, in orders in council it would be a watchdog in the preservation of our democratic rights.

I think the Prime Minister there envisaged the setting up of a committee which would strengthen a bill of rights if we had one. And, as you are aware, I have already indicated that in New Zealand they have a petitions committee dealing with grievances of individual citizens. And there are many examples of a petition with only one signature, being made in respect of the Succession Duties Act; and there are many seeking adjustments in social welfare benefits, licensing requirements, and other things. In fact, a member of parliament might recommend to a constituent who is aggrieved by the effect of a statutory law or regulation that recourse should be had by way of petition.

Briefly, Mr. Chairman, that is the point which I think should be considered by the minister.

Mr. FULTON: Well, it is a point, Mr. Badanai, of importance; but again I say to you that your amendment could only be accepted if the House of Commons had set up a standing committee on human rights and fundamental freedoms, but it has not set up such a committee. Therefore your amendment would impose—it would have the effect of imposing on the minister an obligation which he could not discharge.

Now I think that it might well be that such a recommendation, such a proposal as contained in your amendment, might be referred to the rules committee—that is the committee of which the speaker is chairman, and which considers the rules of the house. And if the House of Commons were to set up a committee and were to make a recommendation that the government should immediately refer to it—to that committee, along the lines of your amendment, and that the committee be burdened with the responsibility of sub paragraph (*b*) of your amendment, then the whole thing would be possible. But at the present time this cannot be done, because the government does not have the right or the power by statute to affect the rules and procedures of the House of Commons.

Mr. MARTIN (*Essex East*): I wonder if the minister would not consider this in support of Mr. Badanai's amendment: it is true there is no such appropriate committee—there is not now an appropriate standing committee of the House of Commons on human rights and fundamental freedoms; but the procedural point which the minister has just made, I would submit, is that if the committee accepted this amendment, and it went—I would submit that if they did set up such a committee and accepted this amendment, and it went to the House of Commons, then the House of Commons would not be precluded from seeking to answer the objection raised by the Minister of Justice.

The House of Commons is master of its own situation, subject always to the rules, and subject to the right of the House of Commons to provide exceptional applications; and the House of Commons could very well accept this recommendation from the committee, and, having done so, then the House of Commons will, I think, be obligated at the earliest opportunity, or at the next session to set up such a committee. I think there is no difficulty about that. The House of Commons would, by the acceptance of this amendment, perhaps have so decided. On the merits of the proposal, Mr. Badanai has quoted the Prime Minister's view of 1945, and he bases his argument in part on that as well as on the desirability of the proposal by itself. I do not think there is really any such difficulty. The Minister of Justice shall report any inconsistencies to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms. Granted, there is no such standing committee now, but the House of Commons could, by this very act, be deemed to have taken a step to setting one up.

Mr. FULTON: But it simply has not.

Mr. MARTIN (*Essex East*): Yes, but by so deciding, it could be considered to.

Mr. FULTON: Well, there would have to be a resolution. A mere passage of a statute would not have the effect of creating such a committee in the House of Commons.

Mr. MARTIN (*Essex East*): Surely if the House of Commons wishes to resort to this procedure it could. I know there is a procedure now of setting up a standing committee, but if the House of Commons unanimously decided

to throw aside that particular procedure for this particular purpose, there would be no objection to it.

Mr. FULTON: I think there still is, Mr. Martin. Either you are purporting to set up a standing committee by a statute, which, as I see it, is undesirable and certainly an inappropriate method of proceeding. Secondly, if you look at subclause (*b*), you will see that you are writing rules of the House of Commons here. It says:

> All petitions to the House of Commons which purport to be based on the Canadian bill of rights shall be referred to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms. The committee shall have power to report these petitions from time to time to the house, together with its opinions and observations thereon.

You are writing rules of the House of Commons.

Mr. MARTIN (*Essex East*): That is all right.

Mr. FULTON: It is not all right in my view. I could just imagine what we would be accused of if we had introduced a statute of this type. I can hear the clamour that would be set up.

Mr. MARTIN (*Essex East*): I do not think there would be any clamour. The House of Commons is always master of its own rules.

Mr. FULTON: Precisely, and it would object very much to the government introducing by statute, something which was enacting rules of the House of Commons. There is a procedure in the House of Commons for enacting or varying its rules.

Mr. MARTIN (*Essex East*): That is admitted, but the House of Commons will decide; and I am arguing in this particular case that it is prepared to resort to this particular vehicle for the purpose; namely, by way of special resolution.

Mr. FULTON: My view is that the most that this committee could do is not to insert into a statute what amounts to writing rules of the House of Commons, but to make a recommendation to the House of Commons as to the views of this committee; and the House of Commons could consider what is appropriate to do with regard to its rules.

Mr. AIKEN: May I speak in connection with the motion I moved and also comment on Mr. Badanai's suggestion?

I feel that the amendment that I have moved—

> —that the minister shall report any such inconsistencies to the House of Commons at the first opportunity—

—covers all the points that have been raised. In the first place, the minister is authorized to recommend to the governor general in council regulations, so that the method of dealing with any complaints could be set up by regulation as a means of reporting. Secondly, the House of Commons is the body to which the report is to be made, and if the number of reports, or the nature of the reporting seems to demand it, there is no reason why the House of Commons could not set up a committee, or deal with it by whatever means the House of Commons decided upon. Right now we do not know the nature or volume of the reports that the minister might be making, and I think by putting this in a statute leaves it open to the House of Commons to appoint any group to receive these complaints without amending this statute.

Mr. MARTIN (*Essex East*): I do not think that is an answer to the point. This is an important point I make. We do not know whether there will be any

reports or not, but they shall report any inconsistency to a standing committee. I would suggest we let Mr. Badanai move his motion and deal with it then.

Mr. STEWART: There is a motion now.

Mr. FULTON: Mr. Chairman, one other point. This bill will have to go to the Senate and, quite apart from the propriety of the government seeking to write rules of the House of Commons by a statute that it submits, I think there are many members of the House of Commons who would raise a very real question as to whether a statute, which also goes to the Senate, should write rules of the House of Commons. I think your suggestion bristles with difficulties.

Mr. MARTIN (*Essex East*): I do not think that is a very serious one.

Mr. FULTON: It occurred to me that possibly the amendment I suggested should be altered to read; "the parliament at the first convenient opportunity", because this bill is going to the Senate, and the Senate might have views about our report being confined to the House of Commons.

Mr. MARTIN (*Essex East*): Yes, I think that is very important. I agree with that, but I do not agree with you when you say that Mr. Badanai's motion would be regarded as an infringement of the rules of the House of Commons because the Senate has to pass it.

The CHAIRMAN: Are you ready for the question, gentlemen?

Mr. MARTIN (*Essex East*): Question.

The CHAIRMAN: The question is; moved by Mr. Aiken, seconded by Mr. Stefanson, that clause 4 be amended by substituting a comma for the period in line 40 and adding the following words thereafter:

> and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Mr. MARTIN (*Essex East*): Question.

The CHAIRMAN: All those in favour please signify. Contrary?

Carried unanimously.

Mr. BADANAI: Now, Mr. Chairman, I move seconded by Mr. Batten, that clause 4 be amended by adding thereto:

> (*a*) The minister shall report any inconsistency to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms.
>
> (*b*) All petitions to the House of Commons which purport to be based on a Canadian bill of rights shall be referred to an appropriate standing committee of the House of Commons on human rights and fundamental freedoms, the committee shall have the power to report these petitions from time to time to the House of Commons together with its opinions and observations thereof.

Mr. STEWART: Where does that come in clause 4?

Mr. FULTON: It would be added thereto.

Mr. BADANAI: Question.

The CHAIRMAN: I have some doubt about its being in order, but I will put the question. Moved by Mr. Badanai: that—

An hon. MEMBER: Mr. Badanai has just read it.

Some hon. MEMBERS: Dispense.

The CHAIRMAN: Shall I dispense with the reading of it?

Agreed.

The CHAIRMAN: All those in favour, please signify.

The CLERK OF THE COMMITTEE: Four, sir.

The CHAIRMAN: Those opposed?

The CLERK OF THE COMMITTEE: Six, sir.

The CHAIRMAN: I declare the motion lost.

Mr. MARTIN (*Essex East*): Now we are on clause—

The CHAIRMAN: Five.

Mr. AIKEN: Mr. Chairman, have we carried clause 4 yet? We have carried the amendment.

Mr. STEWART: We had better carry clause 4.

The CHAIRMAN: Shall clause 4, as amended, carry?

Mr. MARTIN (*Essex East*): With the usual reservation.

Clause 4, as amended, agreed to.

The CHAIRMAN: Clause 5, gentlemen.

Mr. BATTEN: Mr. Chairman, before we pass on to part II of this bill, we have a little unfinished business. Yesterday, during the discussion on clause 2, I moved:

> That the following paragraph, to be designated paragraph (*c*), be added after the present paragraph (*b*):
>
> "The right of the individual to freedom of movement and residence within the borders of Canada"
>
> and that the remaining paragraphs be relettered accordingly.

Following the discussion on that, we agreed to stand that motion.

Mr. FULTON: That is right.

Mr. BATTEN: Before we leave part I of this bill, I would like to have that motion dealt with.

The CHAIRMAN: That was yesterday?

Mr. BATTEN: Yes, Mr. Chairman, that was yesterday.

Mr. STEWART: Clause 2, Mr. Chairman.

Mr. BATTEN: If I can help you, Mr. Chairman, that was the fifth amendment proposed yesterday.

Mr. BROWNE (*Vancouver-Kingsway*): That was kind of a troublesome one too, was it not?

The CHAIRMAN: I have just checked the minutes, Mr. Batten, and the minutes indicate that following the presentation of that motion, you withdrew it, with leave to present it again if you wished to.

Mr. BATTEN: Yes.

The CHAIRMAN: Do you want to present it again?

Mr. BATTEN: I would like to present it, Mr. Chairman, and if I could present it at this time, we would have part I finished.

Mr. FULTON: Except that clause 1 of part I is stood.

The CHAIRMAN: Yes, clause 1 is also stood.

Mr. FULTON: We might as well deal with this now, if you wish to reintroduce it. Why not dispose of it now?

Mr. MARTIN (*Essex East*): Question.

Mr. BADANAI: Question.

Mr. BATTEN: "The right of the individual to freedom of movement and residence within the borders of Canada".

The CHAIRMAN: The question is—moved by Mr. Batten, seconded by Mr. Deschatelets—that following clause 2(*b*) there should be inserted, as paragraph (*c*), the words:

> "The right of the individual to freedom of movement and residence within the borders of Canada" and that the remaining paragraphs be relettered accordingly.

Are you ready for the question, gentlemen? All those in favour?

The CLERK OF THE COMMITTEE: Four, sir.

The CHAIRMAN: Contrary?

The CLERK OF THE COMMITTEE: Six, sir.

The CHAIRMAN: I declare the motion lost. In case I did not do it, shall clause 2, as amended, carry?

Clause 2 as amended, agreed to.

Mr. MARTIN (*Essex East*): All that remains is clause 1, and the point there was as to its location.

Mr. FULTON: Yes. I have a suggestion on that; but it is usually called at the end, and I could put it forward then.

Mr. MARTIN (*Essex East*): All right.

Mr. FULTON: On clause 5 there should be a consequential amendment, which I would like to suggest to the committee. You will remember that we suggested the adding of what amounts, in effect, to an interpretation section, because of our shortening of the introductory words of clause 3.

That would then be contained in a second part of clause 5, so I would suggest that this be taken care of by somebody moving:

> That clause 5 be amended by inserting the figure "(1)" after "5", and by adding the following subsection (2), with a marginal note, "Law of Canada" defined.
>
> "(2) The expression "law of Canada" in part I means an act of the parliament of Canada enacted before or after the coming into force of this act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this act that is subject to be repealed, abolished or altered by the parliament of Canada".

Mr. MARTIN (*Essex East*): What is your interpretation of what that does?

Mr. FULTON: It does the same thing, Mr. Martin, as I see it, that the words in clause 3, as it was originally drafted, would have done.

Clause 3 said:

> All the acts of the parliament of Canada enacted before or after the commencement of this part, all orders, rules and regulations thereunder—

et cetera. And then:

> —shall, unless it is otherwise expressly stated in any act of the parliament of Canada hereafter enacted, be so construed and applied—

We have taken most of those words out and have qualified them to say what we mean by the "laws of Canada" which are subject to the provisions of this part. So now we say:

> The expression "law of Canada" in part I means an act of the parliament of Canada enacted before or after the coming into force of this act—

This makes it clear that the bill of rights overrides any inconsistent provision of any statute heretofore enacted, and it goes on to say that it means any order, rule or regulation thereunder—under any act of the parliament of Canada:

> —and any law in force in Canada or in any part of Canada at the commencement of this act that is subject to be repealed, abolished or altered by the parliament of Canada.

Mr. MARTIN (*Essex East*): Question.

Mr. STEWART: I so move, Mr. Chairman.

Mr. BROWNE (*Vancouver-Kingsway*): I second the motion.

Mr. DESCHATELETS: When you say "law", that means regulations well?

Mr. FULTON: Yes; this defines "law of Canada" as set out in part I, used in clause 3, as meaning:

> —an act of the parliament of Canada enacted before or after the coming into force of this act, any order, rule or regulation thereunder—

The CHAIRMAN: You have heard the question, gentlemen. Shall I dispense with reading it again?

Agreed.

The CHAIRMAN: All in favour, please signify? Contrary? Carried unanimously.

Mr. MARTIN (*Essex East*): With the usual reservation.

The CHAIRMAN: Clause 6.

Mr. MARTIN (*Essex East*): Just a minute, Mr. Chairman.

Mr. BATTEN: Mr. Chairman, I have an amendment to clause 5. I am not sure now that it is not covered by the amendment we have just passed. My amendment is to add to clause 5 the words:

> or that may in future exist in Canada.

Mr. FULTON: Mr. Batten, may I suggest to you that that is really inapplicable, because I think it is correct to say no statute—not even this bill—no act now in force could abrogate or abridge a right that comes into existence thereafter.

Mr. BATTEN: Well, I did not quite agree to that.

Mr. MARTIN (*Essex East*): What you mean to say is that we cannot pass an act that seeks to tie a future parliament.

Mr. FULTON: Yes, and in recognition of that we have put in the words; unless hereinafter otherwise expressly provided—or words to that effect—to make it clear that Parliament does have to expressly override the bill of rights to take away any right. This will preserve existing rights unless parliament expressly takes them away. Your amendment seeks to say that nothing in this bill shall be construed so as to abridge any right arising hereafter, and I do not see how any present statute, including the bill of rights, could possibly abridge any right which arises hereafter. So, I think your amendment is simply a statement of the present fact, but it does not seem to me to need statement.

Mr. BATTEN: Suppose that in 1970 a new right were recognized.

Mr. FULTON: How would it be recognized? Say, by inclusion in the bill of rights?

Mr. DESCHATELETS: Say, an amendment.

Mr. FULTON: If you amend the bill of rights to create that right, you then also give it statutory recognition. So, you have taken care of the situation then which you are seeking to take care of now by your amendment.

Mr. AIKEN: Mr. Chairman, I think I see Mr. Batten's point. The bill of rights is providing a minimum standard, and I think what he has in mind is maybe a progression of minimum standards by the enactment of some bill in the future which will give higher rights than presently exist, say under the bill of rights. I cannot see that we have to cover that by statute, because we are providing minimum rights. Certainly, we cannot go under them.

Mr. FULTON: But we could not, even if we wanted to, say that you shall not create any right hereafter because, as Mr. Martin says, you cannot bind a subsequent parliament. So, if a future right was a statutory creation, that speaks for itself. If it is a right which arises, as it were, by operation or interpretation of law, it is obviously recognized by law, and has not been prevented from being given recognition by this bill of rights or any other statute.

Mr. AIKEN: I see the point, but that is what I was saying. I think if any future right is created by an act of parliament which creates higher rights than the minimum standards set in the bill of rights, no one would be concerned.

Mr. FULTON: Quite so, and the bill of rights does not purport to create maximum rights.

Mr. BATTEN: If, as the minister says, in the future some other right was recognized, then that recognition would be given by an amendment to the bill of rights—

Mr. FULTON: Yes.

Mr. BATTEN: That would cover the situation I have in mind.

Mr. FULTON: If it was desired to give it a statutory bill of rights sanction, it could be done by an amendment to the bill of rights.

Mr. BATTEN: Once again the minister has convinced me, and I will withdraw the amendment.

Clause 5, as amended, agreed to.

On clause 6.

Mr. MARTIN (*Essex East*): Mr. Chairman, I move, seconded by Mr. Deschatelets, that subsection 5 of section 6 be deleted, and that there be added the following section, as section 6A. It will read:

(1) Subject to subsections 2, 3, 4, 5, 6 and 7, any act or thing done or authorized, or any order or regulation made under the authority of this act, shall be deemed not to be an abrogation, abridgement, or infringement of any right or freedom recognized by the Canadian bill of rights.

(2) No naturalized Canadian citizen may be deprived of his citizenship and no naturalized British subject may be deprived of his status as a British subject under this act.

(3) No Canadian citizen may be deported from Canada under this act.

(4) No Canadian citizen or British subject may be detained under this act beyond a period of sixty days, unless the cause for his detention has been reviewed by an appropriate impartial tribunal which has reported to the minister or authorities authorizing the detention.

(5) Any order or regulation under this act conferring authority to order the detention of any peson shall, forthwith after it is made, be laid before parliament, or if parliament is not then sitting, within the first fifteen days next thereafter that parliament is sitting.

(6) Where an order or regulation has been laid before parliament pursuant to subsection (5), a notice of motion in either house, signed by ten members thereof, and made in accordance with the rules of that house within ten days of the day the order or regulation be

revoked, shall be debated in that house at the first convenient opportunity within the four sitting days next after the day the motion in the house was made.

(7) If either house of parliament resolve pursuant to a motion made under subsection (6) that the order or regulation be revoked, it shall cease to have effect, without prejudice, to the previous operation of the order or regulation, or anything duly done thereunder.

It speaks for itself, I think. We have already had some discussion about the points involved in this amendment. These basically are the ideas that were expressed by the Leader of the Opposition in his speech in the debate on the bill of rights in the House of Commons, with one exception. The minister will note in subclause (4), if he will direct his attention to that, that when the Leader of the Opposition spoke he spoke of a review by a superior court judge, and not by the minister. We have since given some consideration to this. The act of detention in itself is a matter that does not come, *per se,* before a court. What is really involved here is a matter involving the security of the state at this point which is a matter for the consideration of the government and not the judiciary. That is why we have left "the court" out and substituted therefor the words "the minister". It is obviously a decision of the government and not of a court.

That is the only comment that was not made on this subsection of this proposed amendment; and that is why I do not, at this time, expand the reasons for putting it forward. That has already been done.

Mr. AIKEN: We have never been sticky in this committee about rules of procedure or order; but I just throw this out as a thought that occurred to me: I feel this amendment is going far beyond what is in clause 6, and the type of matters that are dealt within the original clause.

Clause 6 only covers a very limited action, and that is the declaration of a state of war or invasion. The amendment goes on to bring in questions of deportation, detention, and loss of citizenship.

I just raise it as a point. I think it ought to be considered whether we would have the authority to go beyond the provisions in this act, because we are getting into the War Measures Act; and I would be afraid, if we went into it too far, we would be into substantive amendments of the War Measures Act rather than the limited intrusion into the War Measures Act we have had in this clause.

Mr. MARTIN (*Essex East*): The point Mr. Aiken has just raised was casually mentioned by the chairman when a discussion ensued on this point, and he did express some doubt about whether or not it was open to the committee to make this amendment. However, there was no ruling that it was not, nor is there any thing to preclude that ruling being made now. However, I hope it would not be made.

The point is that the War Measures Act involves human rights and fundamental freedoms. We do not want to abridge the War Measures Act in a manner that would prejudice the security of the state; but as the government itself has already recognized by some modification that it has made, it has provided for a change in some particulars of the War Measures Act itself; and it would seem that at the time we are discussing the bill of rights and are about to enact it, we should seek to make the War Measures Act, consistently as is possible, bearing in mind the security of the state, to provide amendments that will put the War Measures Act forward in such a position that it will be consistent at this time, and not at some subsequent time, with the passage of the bill of rights itself.

Mr. AIKEN: Mr. Chairman, I am not objecting to discussing the matter at all, subject to the same reservations—

Mr. MARTIN (*Essex East*): That is right.

Mr. AIKEN: —in connection with the other amendment.

Mr. MARTIN (*Essex East*): That is right.

Mr. FULTON: Well, Mr. Chairman, it is short notice to discuss the proposed amendment in detail, and I shall not discuss it in detail; but there are two or three things about it that occur to me at once, by way of objection to specific provisions. Then, of course, there is a much greater objection that I have, and I would like to come to it at the end.

I shall not comment on 6A(1), (2), (3) or (4). I come to (5),

> Any order or regulation under this act—

—referring to the War Measures Act—

> —conferring authority to order the detention of any person shall, forthwith after it is made, be laid before Parliament,—

etcetera.

That proposed provision would, in the first instance at any rate, be covered now by the Regulations Act which requires the tabling of any order or regulation made under the statutes of Canada. In the first instance, they would be tabled and would be subject to review by the House of Commons, or by parliament.

With respect to (6) and (7), parliament would have its ordinary rights to debate these regulations, in any event. It is true they would not have the same right of immediate debate, the sort of priority of debate given by (6) and (7), but they have the ordinary right to debate a regulation so laid on the table, as required now under the Regulations Act.

(6) and (7) of this amendment follow the same process as we have worked out, to provide the opportunity for debate in the house of a proclamation bringing the War Measures Act into effect. I am glad to have that affirmation of agreement with our drafting. My main objection to the amendment, however, is that it embarks upon and takes us a very long way along the voyage of a revision of the War Measures Act. Not by way of a point of order but by way of argument of substance I say this is not the time or place to be revising the War Measures Act. There will be a time and a place. The Prime Minister has indicated his intention to provide the time and place to review the War Measures Act; but that time and place has not yet been appointed. I would be unable at this stage to make this substantial amendment to the War Measures Act. I do not think this committee would wish to make this substantial amendment to the War Measures Act before that study had been given to it which would indicate whether these amendments were appropriate, whether they went too far, or whether indeed they went for enough. I do not think we should amend the War Measures Act in bits, piece by piece, without studying the whole problem of emergency powers in war time—what ones go too far, what ones can be taken away, and what ones can be exercised by a general supervisory power given to parliament. I do not think this is the time we should start the revision here.

Mr. MARTIN (*Essex East*): I will just make one brief comment. The Leader of the Opposition referred in his speech—to these amendments. The matter of substituting the minister for a judge was discussed by him. I presumed that the minister—although I recognize that he has been busy; but he is ably supported by his departmental officials—would have given this matter consideration on its merits. However, that is all I have to say.

Mr. DESCHATELETS: Mr. Chairman, the minister said that this seems to constitute a revision of the War Measures Act and that maybe we are going

too far—far enough or too far. May I recall here that this bill, according to the Prime Minister, is a first step only. Now, let us say that the amendment we are presenting now is a first step in the revision of the War Measures Act.

Mr. MARTIN (*Essex East*): Question.

The CHAIRMAN: Mr. Martin, are you agreeable to withdrawing your motion?

Mr. MARTIN (*Essex East*): I would like to put it forward.

The CHAIRMAN: I believe it is out of order.

Mr. MARTIN (*Essex East*): Why?

The CHAIRMAN: I think on July 14, when we went into the matter of what was relevant and what was irrelevant, I quoted at that time citation 304 of Beauchesne's fourth edition, subsection 2 which stated:

> A committee is bound by, and is not at liberty to depart from, the order of reference. In the case of a select committee upon a bill, the bill committed to it is itself the order of reference to the committee, who must report it with or without amendment to the house.

Mr. MARTIN (*Essex East*): On a point of order—

The CHAIRMAN: May I also refer to citation 406 of Beauchesne at page 285:

> Amendments are out of order if they are

I will leave out the irrelevant portions of it.

> —beyond its scope.

I think the introduction of comprehensive amendments to the War Measures Act before this committee, when it only has this bill before it, is going beyond the scope of this bill. In my opinion the motion is out of order.

Mr. MARTIN (*Essex East*): I do not propose to argue very long, because I would simply point out that this act already does provide for changes to the War Measures Act, and what the government has done certainly a member of this committee can propose be done likewise in respect to section 6 of the War Measures Act. The government has provided modification by this bill, and I think it is clearly within the citation you mentioned because this is a matter which has been referred by the house.

I move that your ruling in this matter be appealed.

The CHAIRMAN: All right, gentlemen, I shall put the question: shall my ruling be sustained?

Mr. MARTIN (*Essex East*): No, I appeal your ruling.

The CHAIRMAN: You appealed against my ruling, and I asked whether my ruling shall be sustained.

Mr. MARTIN (*Essex East*): No. You should ask whether my motion shall be accepted or not. I did not say it should be sustained, I said I appealed your ruling.

Mr. FULTON: Is not the form of appeals from a chairman's ruling to put the question "all those in favour of sustaining the chairman's ruling?" and then "those opposed to it?"

Mr. MARTIN (*Essex East*): Time is running out, and we have to leave at 8:00 o'clock. I know Mr. Dorion has something to say.

The CHAIRMAN: I shall put the question: all those who favour that my ruling be sustained will please signify?

The CLERK OF THE COMMITTEE: Six.

The CHAIRMAN: Contrary?

The CLERK OF THE COMMITTEE: Four.

The CHAIRMAN: I declare the ruling to be sustained.

Mr. MARTIN (*Essex East*): If we have no other amendments at this stage—

Mr. FULTON: There is the question of the preamble.

The CHAIRMAN: Shall clause 6 carry?

Carried.

Mr. MARTIN (*Essex East*): With the usual reservations.

Mr. FULTON: There is the question of clause 1. Perhaps we should dispose of it. I thought this could be taken care of, if the committee desired, by the following amendment:

> That clause 1 be deleted and that the following be added as clause 4:
>
> 4. The provisions of this part shall be known as the Canadian bill of rights.
>
> (2) Renumber clauses 2, 3 and 4 as clauses 1, 2 and 3 respectively.

Mr. MARTIN (*Essex East*): It is agreeable, as far as I am concerned.

The CHAIRMAN: It is moved by Mr. Aiken, seconded by Mr. Rapp. All in favour? Contrary? I declare the motion carried unanimously.

Now we come to the preamble.

Mr. FULTON: We have worked on all the drafts submitted, and we have come up with this one which, while I recognize it does not contain everything that has been submitted, I think I can say conscientiously appears to incorporate them either in principle, by reference, or by implication, avoiding on the one hand those things which might be offensive to some of our people, and, on the other hand, trying to conform to words or ideas which are precious to others of our people, and which should be incorporated in a manner which would not be offensive to others. So we have come up with this suggestion which I would like to read to you. It is as follows:

> The parliament of Canada recognizing that the Canadian nation is founded upon principles that acknowledged the dignity and worth of the human person and the position of the family within a society of free men and free institutions,
>
> Recognizing also that men and institutions remain truly free only when freedom itself is anchored upon the dual foundations of respect for moral and spiritual values and the rule of law,
>
> And being desirous therefore of enshrining these principles and the basic rights and freedoms derived from them—

It might be better to say "derived therefrom".

> in a bill of rights which shall reflect the respect of the parliament itself for the provisions of its own constitutional authority and shall ensure the protection of the basic rights and freedoms of all individuals in Canada,
>
> NOW THEREFORE....

Perhaps I might make these few additional comments: we make reference here to the dignity and worth of the human person, and the position of the family within a society of free men and free institutions, recognizing, I think, it not explicitly then certainly implicitly the position of the family as the basic unit of society.

We also recognize these principles of freedom embraced in the second paragraph, and that they are anchored upon the dual foundations of respect for moral and spiritual values and the rule of law, thus recognizing the concept of our Christian beliefs without being offensive to any other group or

groups of individuals; and finally we recognize that the basic physical foundation is the rule law. That, certainly, I do not think anyone would deny, because it is absolutely essential if any right or freedom is to have any meaning at all, because it is freedom under the rule of law.

And then, carrying that idea forward, the third paragraph says that parliament itself acts within the framework of moral and spiritual values, and parliament itself acts in conformity with the rule of law. And those ideas are carried forward because parliament is desirous of enshrining these principles and the basic rights and freedoms derived from them in a bill of rights which shall reflect the respect of parliament for religious values and for the provisions of its constitutional authority.

The CHAIRMAN: Before I ask for discussion, I think it should be moved, before it goes to the committee.

Mr. MARTIN (*Essex East*): May we have a discussion first, because there will be a considerable discussion on this, and perhaps afterwards we could move it.

The CHAIRMAN: I have no objection, if that is agreeable to the committee.

Mr. MARTIN (*Essex East*): I know that Mr. Dorion and I will have to go at 8:00 o'clock, and if the committee wishes to sit—I hope it will not sit—but I understood from the Minister of Justice that it would not be sitting.

Mr. FULTON: I spoke to Mr. Deschatelets, and Mr. Deschatelets reported to me that you did not have any objection to our sitting after 8:00 o'clock; but I might have misunderstood him.

Mr. MARTIN (*Essex East*): There was a definite misunderstanding because I have to be in the house at 8:00 o'clock, and in fact, Mr. Deschatelets is speaking at 8:00 o'clock himself.

The CHAIRMAN: That matter has been disposed of by the committee. There was a resolution.

Mr. MARTIN (*Essex East*): We could meet tomorrow at 9:30, but I hoped the committee would recognize that, and I simply want to say that Mr. Badanai put forward a resolution, and Mr. Dorion put forward a proposed preamble, and I put forward one. An examination of these three revealed that they have the same basic constituents, but I feel there are a number of things that should be in a preamble that are not explicit enough in this one. One thing I do not believe is explicit at all.

I agree with the minister fully, as every member of this committee does, that we would not want to put anything in a Canadian bill of rights that would be offensive to any religious denomination in our country; to Christians, to Jews, to Moslems, or to any other religious body that recognizes the existence of God. We are a country made up for the most part of religious-minded people. The majority of our people are Christians, but we have a very important and respectful group of Jewish citizens, who subscribe to their faith, and we would not want I am sure, any of us, to incorporate here anything that would be offensive to them. But, it would seem to me, and I am open to correction, that in a bill of rights entertained and introduced by a country composed as we are of people who acknowledge the existence of God, we should not hesitate to confirm that fact in some way in this preamble. In the preamble which I put forward, reference to the diety is made twice; at the beginning and in the final paragraph.

An examination of other charters of human freedom, and particularly the peoples charter, discloses that reference is made to God.

One of the basic differences between our free society and communism—the Soviet Union—and totalitarian countries based upon dialectical materialism, is that religion itself, and the existence of God, are denied. To them, God does

not exist, and religion is regarded by this group as an opiate to hold down the progress of human beings. We make much of this fact in our ideological ideas. I believe we seriously ought to give recognition to this fact in this preamble. Recognition is given to the fact that the family is a basic, solid unit, of our society. There is a reference in the second paragraph to moral and spiritual values, which does not meet my objection as first stated when I mentioned the desirability of reference to God, because if one looks at the language used by some of the spokesmen for communism, one will find that they do not deny the existence of what they call moral principles. I cannot say that I recall any reference to spiritual values, or certainly to the rule of law, but they certainly do talk of moral principles; moral principles that have a genesis in man himself, and a genesis in things terrestrial, but this does not satisfy me.

Now, I make these observations because I know that a number of members of this committee feel as I do. This is not a party matter. I am sure none of us are going to discuss this aspect of the problem in that light. As a matter of fact, I do not think party considerations have prevailed here in a very singular way in our discussions, but I feel this is very important.

Our statesmen have no hesitation in public declarations to call upon God and God's guidance. We listened last night to one of the candidates for the presidency of the United States who referred to God in, I thought, appropriate terms. We do not hesitate to do it in this country. The Prime Minister does it, and properly so. Other Prime Ministers have done likewise. The word "God" appears somewhere in the Royal title. I feel that for these reasons and because we are a nation which recognizes the existence of the Supreme Being, we should not hesitate to say so.

I have talked to some of my Jewish friends, and subject to what Mr. Rapp might say, I find there could be no objection there. I have talked to some others before, of other religious groups, to get their views, and I find no objection there. Because this is in accordance with my own convictions, I would hope that we could acknowledge this as an essential ingredient before we can give final consideration as to which preamble we wish to accept.

Mr. DORION: Mr. Chairman first of all, I have to congratulate the minister for the wording of this preamble. I believe that everyone would be satisfied with an announcement of the principles which are in it.

Now, I agree to a certain extent with the views expressed by Mr. Martin. I believe that there would be no prejudice at all, and I feel it would not be offensive to any religious body if we referred to God in order to determine that He is the source of these freedoms and human rights enumerated in this bill. I would suggest that after the word "upon", we could have:

Fatherhood of God, brotherhood of man, and principles—

et cetera. In order to sustain my proposition, I would like to make a few observations. I hope that every member will excuse me if I refer to these quotations. It is only to show every member that, in doing so, it is not something new in British institutions or in Canadian institutions. You have, for example, the bill of rights of 1689, where we read, in article 12, paragraph 3:

> And whereas the said King James the Second having abdicated the government and the throne being thereby vacant, His Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from Popery and arbitrary power)

You have James II, who is called the Instrument of God. You have Magna Carta, 1215. The beginning of the preamble of this so important constitution, which is the basis of our constitutional law, contains these words:

John, by the grace of God, King of England—

You have the coronation of Edward II—

Mr. FULTON: Mr. Dorion, may I just shorten this by suggesting that there is no dispute on the fact that those historical documents do contain such references, and I am sure everyone of the committee would accept your point and bring it up to date by reminding ourselves. We recognize that the present royal style and title starts with the words "Elizabeth II, by the grace of God". So there is no disagreement with that point at all, I am sure, in the minds of any of the members of this committee.

I just make that suggestion, because I know you are under some limitation with respect to time, so that you might go ahead from there.

Mr. DORION: In other words, it is very easy to establish that God was mentioned in many statutes, and very important statutes. Very often the opinion was given that Christianity is a part of our common law. On this point I have many quotations, but I will dispense with quoting them.

I have just a few observations. You will excuse me, because I have prepared some notes. I would add just this: I believe that recalling the religious character of royal institutions would help to preserve our actual form of government—and this, I believe, is very important. Canadian citizens will be reminded to what extent we are indebted to the crown for the maintenance and preservation of our spiritual values which are a guarantee of our social order.

A bill of rights recognizing the authority of God would have a very high educational value and would be in the line of our religious traditions. I believe that this is a very important point.

I hope that every member of the committee will appreciate and agree with my point, and the point expressed by Mr. Martin. I am sure that in so doing we will have gained a very serious and very precious document, which would be in the hands of our children, and it will be a sort of act of the recognition that all these freedoms, all these rights, depend on a Supreme Being.

Mr. FULTON: Mr. Chairman, may I say something here? This, I am sure, is one of the most important questions to which this committee could direct its attention.

I will speak personally for a moment, and then I will go back to recognizing my position as a minister of the government. Speaking personally, I would want to see a reference to God in this preamble. I do not need to enlarge on that, and I am not going to do so. But as minister I have had to be aware of the fact that we are drafting a statute for all the people of Canada. I think that statement itself is a sufficient statement of the difficulties inherent in this situation.

I have my own personal inclination, as I have indicated; but I have felt that my first responsibility as minister was to submit to the committee a document in a form which, in so far as possible, within the realm of the fact that we do have freedom for controversy in Canada, would be inoffensive to any person, particularly on this deeply-held point of religious dogma.

I felt that was my first responsibility, and so, as I said, I have endeavoured to find a preamble which, while recognizing the principles, spiritual and moral, as well as practical, that are so dear—and the others that are so dear—to many of our people, could nevertheless contain them without giving specific offence. By bringing it forward in this form, I wanted to make it possible for the Committee to decide.

Now, Mr. Chairman, at this point I would ask permission to go off the record, and I would ask that the press here respect the fact that this is off the record, rather than going into camera.

Mr. MARTIN (*Essex East*): You mean, this portion?

Mr. FULTON: Yes, this portion.

(*discussion off the record*)

—following discussion off the record.—

The CHAIRMAN: Gentlemen, we are now on the record.

We are on the preamble. May I have a motion.

Moved by Mr. Dorion, seconded by Mr. Badanai, that the following be adopted as the preamble to the bill:

> The parliament of Canada, affirming that the Canadian nation is founded upon principles that aknowledge 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 the provisions of its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada,
>
> Now therefore

Mr. BROWNE (*Vancouver Kingsway*): Might I ask, in the second line of the second paragraph, after the word "founded", is it founded upon or founded on?

Mr. FULTON: "on" was the committee's decision in camera. I do not think much hangs on it because I will take it to an expert in English.

The CHAIRMAN: I had in mind the word "upon".

An Hon. MEMBER: Question.

The CHAIRMAN: All in favour?

Contrary?

Agreed to.

Mr. FULTON: Mr. Chairman, may I ask that the committee be kind enough to revert to clause 4 which now is renumbered clause 3 of the bill, and add after the words in line 37 "every bill introduced in", the words "or presented to".

We are distinguishing here between what comes from the Senate and what comes from the house. There are far more bills introduced in the house.

After the words "every bill introduced in", there should be added the words "or presented to".

This is intended to take care of the fact that bills coming from the senate are perhaps not properly described as being introduced in the house. If we were to be asked where was such a bill introduced, the strict answer would be that it was introduced in the senate. So I think the words "or presented to" would more appropriately cover bills coming from the Senate, in case there was any technical objection to the authority given to me in relation to bills introduced in the House of Commons.

I would appreciate it if you would move that we have leave to revert.

The CHAIRMAN: Gentlemen, may we have leave to revert to paragraph 3 of the bill as amended?

Agreed.

Mr. FULTON: The motion would be that there be inserted in line 37 thereof, after the words "introduced in", the words "or presented to".

The CHAIRMAN: It is moved by Mr. Stewart, seconded by Mr. Stefanson.

Mr. AIKEN: Do I understand the Minister of Justice is to have no responsibility for a bill introduced in the Senate until after it comes to the house?

Mr. FULTON: That is correct.

The CHAIRMAN: You have heard the question. All in favour will please signify? Contrary, if any? I declare the motion carried unanimously.

Mr. FULTON: I would have no responsibility in the House of Commons with respect to the bills introduced in the Senate until they reached us from the Senate side.

The Senate might decide to impose such a responsibility on the minister by amending the act.

But as a member of the House of Commons, and as a minister who reports to the House of Commons I do not think it quite proper to assume now, in introducing this bill, that I am given the right to scrutinize bills when they are introduced in the Senate.

The CHAIRMAN: All right, gentlemen.

Shall the preamble carry?

Carried.

Shall the title carry?

Carried.

Shall the bill as amended carry?

Carried.

Shall I report the bill as amended?

Agreed.

Now, gentlemen, I believe the bill should be reprinted, and I would like to have a motion accordingly.

Mr. BADANAI: I so move.

Mr. RAPP: I second it.

The CHAIRMAN: It has been moved by Mr. Badanai, seconded by Mr. Rapp that the bill be reprinted. All those in favour signify? Contrary? It is carried unanimously.

Mr. BADANAI: On behalf of our group here I wish to extend to you, sir, our appreciation for the manner in which you conducted the committee meetings. We have had several meetings that have been strenuous. We perhaps have disagreed at times, and at some times we have found that each member has cooperated. In so far as we are concerned, we are satisfied. We want to thank you for a job well done.

The CHAIRMAN: Thank you very much, Mr. Badanai, and I certainly would not like to see this committee adjourn without taking the opportunity of expressing to all of the members, and I might say especially to the members who are not supporters of the government, the fact that I am most grateful for the cooperation that I have received throughout the deliberations of this committee. I recognize in respect of our first two meetings that the waters were a little troubled, but I believe that our differences were resolved.

Mr. DESCHATELETS: We had a good boat.

The CHAIRMAN: I received the cooperation of every member of the committee, and that made my work very easy indeed. I thank you very much.

Mr. BATTEN: Does that mean we are all friends again?

Mr. AIKEN: I think we should express our thanks to the minister. He has been under a tremendous amount of pressure.

Mr. FULTON: Mr. Chairman, that gives me the opportunity not only of expressing my gratitude for your expression to me, but to do something that I had wanted to do, and that was to express to the committee my appreciation for their treatment of me, and for the opportunities which the committee gave us to have the fullest and frankest discussions in respect of the implications of this bill. That is something I have appreciated very deeply.

The CHAIRMAN: Before we adjourn, I would like to express, I hope on behalf of all the members, our appreciation to the Clerk of the Committee and to the officials who assisted so well in the work that we have had to do.

A motion to adjourn I believe would now be in order.

Mr. AIKEN: I move we adjourn.

CORRIGENDUM FOR EVIDENCE OF PROF. MAXWELL COHEN TO SPECIAL COMMITTEE ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS,

Proceedings No. 5, Thursday, July 21st, 1960.

Page 361,	Line	5,	850 should read *350*
	"	16,	"proposes" should read *"poses"*
	"	24,	"bill" should read *"bills"*
	"	48,	"marketing board" should read *"utility board"*
" 362,	"	3,	"policing" should read *"police"*
	"	38,	"this" should read *"these"*
" 364,	"	8,	"protocol" should read *"political"*
	"	22,	"Cook" should read *"Coke"*
	"	26,	"Cook" should read *"Coke"*
" 365,	"	1,	"We tend to that idea of exceptional events" should read *"Let me cite several well-remembered events."*
	"	28,	"Theorist" should read *"theorists"*
	"	29,	"and Baghot, and others at a later period" should read *"and others at a later period, such as Bagehot"*
	"	50,	"Camden was one, but" should read *"I don't know and"*
" 366,	"	26,	"the theory" should read *"a theory"*
	"	27,	"federal statute" should read *"federation"*
	"	28,	"federation itself" should read *"states themselves"*
	"	33, & 34,	"the validity of constitutional law" should read *"the constitutional validity of statute law"*
	"	36,	"solemn" should read *"serious"*
	"	37,	"under" should read *"in"*
	"	37,	"to find a statute which was" should read *"to hold that a statute could be"*
	"	42,	"met with final success over" should read *"achieved a success as compared with"*
" 367,	"	15,	"for those things which they could not extend. In due course the
	"	16, & 17,	jus civilia and the jus gentium were merged into one system, jus naturala" should read *"for those peoples to which the civil law did not extend. In due course the jus civile and the jus gentium were merged into one system. But above them was the jus naturale, ideal principles of law to which the positive law should conform."*
	"	18,	"Sir Thomas" should read *"St. Thomas Aquinas"*
	"	31,	"whole" should read *"Holy"*
	"	43,	"for a very long time" should read *"from time to time"*.
" 368,	"	16,	"revising" should read *"reviving"*
	"	25,	"natural justice" should read *"natural law"*
	"	30,	"naturalist tradition" should read *"anti-naturalist tradition"*.
	"	40,	"Independence and in" should read *"Independence and later in"*
	"	43,	"expressions" should read *"experience"*
	"	47,	"discussion" should read *"dialogue"*
" 369,	"	22,	"laws" should read *"line"*
	"	51, & 52,	"and that is perspective" should read *"and that is the third perspective."*
" 370,	"	31,	"we mean rights" should read *"we mean relative rights"*
	"	31,	"but" should read *"for"*
	"	34,	"no" should read *"not"*
	"	35,	"and" should read *"with"*
	"	38,	"always has been" should read *"always should have been"*
	"	40,	"our technique is" should read *"our technique in bills of rights is"*
" 371,	"	21,	"with this" should read *"of"*
	"	26,	"whether achieved" should read *"whether fully achieved"*
" 373,	"	23,	"that it is intra vires" should read *"assuming that it is intra vires"*

Page 379, Line 7, "delegating" should read "*delegated*"
" 15, "the moment" should read "*at that moment*"
" 19, "it is the right" should read "*it is merely the right*"
" 23, "adds nothing to discrimination" should read "*adds nothing to the problem of discrimination*"

" 381, " 21, to " 23, "and if you are prepared that Canada has not a charter, and has not implemented it, that is part of the law of Canada now, mutatis mutandis?" should read "*and if you are prepared to have Canadian law and policy influenced by an international charter why not accept the possibility of provincial law to be influenced by a federal policy-making statute which reflects the obligations under the U.N. Charter*"

" 382, " 15, "of a direct kind" should read "*of an indirect kind.*"

" 384, " 47, & " 48, "the problem of freedom of the press in this country?" should read "*the problem of freedom in this country?*"

" 385, " 22, "for the interpretation in the passing of future statutes and regulations" should read "*for the interpretation of passed and future statutes and regulations.*"

" 389, " 40, "a small book" should read "*a small unpublished book.*"

" 393, " 34, "you" should read "*he*"
" 34, "information" should read "*legislation*"
" 37, "languages" should read "*phrases*"

" 396, " 30, "clauses 2 and 5" should read "*section 2 (b)*"

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