SESSION 1935

HOUSE OF COMMONS

SPECIAL COMMITTEE

ON

BRITISH NORTH AMERICA ACT

PROCEEDINGS AND EVIDENCE AND REPORT

OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1935

Price, 25 cents

SESSION 1935

HOUSE OF COMMONS

SPECIAL COMMITTEE

ON

BRITISH NORTH AMERICA ACT

PROCEEDINGS AND EVIDENCE
AND REPORT

OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1935

SESSION 1935

HOUSE OF COMMONS

SPECIAL COMMITTEE

ON

BRITISH NORTH AMERICA ACT

PROCEEDINGS AND EVIDENCE

AND REPORT

OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1935

MEMBERS OF THE COMMITTEE

Hon. Mr. Guthrie, D. J. Cowan, W. G. Ernst, O. Gagnon, Hon. Mr. Lapointe, Hon. Mr. Ian Mackenzie, Hon. Mr. Ralston, J. S. Woodsworth, Henri Bourassa, J. S. Stewart, Hon. Mr. Veniot and F. W. Turnbull (Chairman).

A. A. FRASER,
(Clerk).

LIST OF PERSONS ADDRESSING COMMITTEE

W. S. Edwards, K.C.,—Deputy Minister of Justice.

Dr. O. D. Skelton,—Under-Secretary of State for External Affairs.

M. Ollivier, K.C.,—Joint Law Clerk, House of Commons.

Dr. W. P. M. Kennedy,—Professor of Law, University of Toronto.

Dr. F. R. Scott,—Professor of Law, McGill University.

Dr. N. McL. Rogers,—Professor of Political Science, Queens University.

Dr. Arthur Beauchesne, K.C., C.M.G., LL.D.,—Clerk of the House of Commons.

SUBMISSIONS OF THE PROVINCIAL GOVERNMENTS

Collected at page 139

(No submission received from Government of New Brunswick at date of printing.)

ORDERS OF REFERENCE

HOUSE OF COMMONS,
MONDAY, January 28, 1935.

Resolved,—That, in the opinion of this House, a special committee should be set up to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities and legitimate provincial claims to autonomy, the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope.

Attest.

ARTHUR BEAUCHESNE,
Clerk of the House.

TUESDAY, February 12, 1935.

Ordered,—That a Select Committee consisting of Messrs. Cowan, Guthrie, Turnbull, Ernst, Gagnon, Lapointe, Mackenzie (*Vancouver Centre*), Ralston, and Woodsworth, be appointed in accordance with the Resolution passed by this House on the 28th of January, 1935, to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities and legitimate provincial claims to autonomy, the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in their scope;

And that the said Committee shall have power to report from time to time and to send for persons, papers and records.

Attest.

ARTHUR BEAUCHESNE,
Clerk of the House.

MONDAY, February 18, 1935.

Ordered,—That the said Committee be empowered to print its day to day proceedings and evidence, 500 copies in English and 250 copies in French, and that Standing Order 64 be suspended in relation thereto.

Attest.

ARTHUR BEAUCHESNE,
Clerk of the House.

TUESDAY, February 19, 1935.

Ordered,—That the names of Messrs. Bourassa, Stewart (*Lethbridge*), and Veniot be added to the said Committee.

Attest.

ARTHUR BEAUCHESNE,
Clerk of the House.

MINUTES OF PROCEEDINGS

MONDAY, February 18, 1935.

The meeting came to order at 11 a.m.

Members present: Messrs. Woodsworth, Guthrie, Cowan, Turnbull, and Gagnon.

Mr. Turnbull was elected Chairman.

Mr. Turnbull took the Chair and read the Order of Reference.

Discussion took place as to the advisability of having the number of members of the committee increased, when it was decided to leave the matter of determining numbers and personnel with the government.

Discussion followed as to procedure to be adopted in the conduct of the business of the committee, when it was decided to call as witness, Mr. Edwards, Deputy Minister of the Department of Justice, for the next meeting; the subject of procedure to be given further consideration.

Mr. Gagnon moved that leave be asked of the House to print the day to day proceedings and evidence, 500 copies in English and 250 copies in French.

Carried.

The meeting adjourned till Tuesday, February 26th at 11 a.m.

A. A. FRASER,
Clerk of Committee.

HOUSE OF COMMONS,
TUESDAY, February 26, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull, presiding.

Members present: Messrs. Cowan, Turnbull, Gagnon, Mackenzie, Woodsworth, Bourassa, Stewart, and Veniot.

Upon request the Chairman read the Order of Reference.

W. S. Edwards, K.C., Deputy Minister, Department of Justice, was called and addressed the committee on the subject matter of the Order of Reference. The witness agreed to submit a memorandum showing the trend of judicial decisions respecting constitutional questions.

The witness retired to reappear at a subsequent meeting.

The meeting adjourned at the call of the Chair.

A. A. FRASER,
Committee Clerk.

HOUSE OF COMMONS,
TUESDAY, March 5, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present: Messrs. Cowan, Ernst, Turnbull, Gagnon, Lapointe, Mackenzie, Woodsworth, Bourassa and Stewart.

W. S. Edwards, K.C., Deputy Minister, Department of Justice, was recalled and filed a "Memorandum of Extracts from Decisions indicating Trend of Judicial Opinion regarding Jurisdiction of Dominion over Matters which are essentially National in their Scope." (Memorandum appears appended to the Minutes of Evidence hereto.)

Witness made a statement in explanation of the Memorandum filed.

Witness retired.

Dr. O. D. Skelton, Under-Secretary of State for External Affairs was called and addressed the meeting.

Witness retired.

Discussion followed regarding further witnesses and evidence when the Chairman was authorized to name and convene a subcommittee on witnesses and evidence.

The meeting adjourned at the call of the Chair.

A. A. FRASER,
Committee Clerk.

HOUSE OF COMMONS,
THURSDAY, March 21, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present: Messrs. Gagnon, Woodsworth, Ernst, Lapointe, Cowan, Ralston, Stewart, and Turnbull.

The chairman informed the committee that, pursuant to authority in him vested at the preceding meeting, he had appointed Messrs. Gagnon, Woodsworth, Ernst, Mackenzie, and Cowan a sub-committee to consider and report on witnesses and evidence.

Mr. Gagnon for the sub-committee reported a recommendation that the attorneys general of the several provinces be asked to submit their views, by writing or delegate; also that Professor Scott of McGill University and Professor Kennedy of Toronto University be called.

The sub-committee report was adopted.

Mr. M. Ollivier, K.C., joint law clerk of the House of Commons, appeared and presented a brief dealing with the subject matter of reference.

The meeting adjourned until Tuesday, March 26, at 10.30 a.m.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS,
TUESDAY, March 26, 1935.

The meeting came to order at 10.30 a.m., Mr. Turnbull presiding.

Members present: Messrs, Cowan, Turnbull, Ernst, Gagnon, Lapointe, Mackenzie, Woodsworth, Bourassa, Stewart and Veniot.

Dr. W. P. M. Kennedy, professor of Law of the University of Toronto, was called and addressed the meeting.

Witness retired.

Dr. F. R. Scott, professor of Civil Law, University of McGill was called and addressed the meeting.

Witness retired.

Mr. Gagnon for the subcommittee on witnesses reported a recommendation that Professor N. McL. Rogers of Queens University be called for the next meeting.

The report was adopted.

The meeting adjourned till Tuesday, April 2nd at 11 a.m.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS
TUESDAY, APRIL 2, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull in the Chair.

Members present: Messrs. Cowan, Turnbull, Lapointe, Mackenzie, Ralston, Woodsworth, Bourassa, Stewart and Veniot.

Mr. Veniot directed attention to some necessary corrections to his reported remarks at the previous meeting.

The Chairman read a copy of a telegram sent to the attorneys general of the several provinces and the reply received from the attorney general of British Columbia.

Discussion followed.

Professor N. McL. Rogers of Queens University was called and addressed the meeting.

Witness retired.

The committee resolved to invite Mr. L. S. St. Laurent, K.C., of Quebec to appear at the next meeting.

The meeting adjourned at the call of the Chair.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS,

TUESDAY, April 16, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present:—Messrs. Cowan, Turnbull, Ernst, Gagnon, Lapointe, Mackenzie, Bourassa, Veniot.

The Chairman informed the committee that replies from several provincial attorneys-general had been received and read the same into the record.

The Chairman also informed the committee that Mr. Louis St-Laurent, K.C., of Quebec, had been invited to address the committee this day, but was unable to be present.

Dr. Arthur Beauchesne, K.C., C.M.G., LL.D., Clerk of the House of Commons, appeared and addressed the meeting.

The meeting adjourned at the call of the Chair.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS,

THURSDAY, June 6, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present: Messrs. Cowan, Turnbull, Ernst, Gagnon, Lapointe, Mackenzie, Woodsworth, Bourassa, Stewart, Veniot.

The chairman read communications from the Governments of Alberta, Manitoba and Ontario submitting their views on the subject matter of reference to this committee; also a telegram from the Attorney-General of New Brunswick, that the views of his Government would be submitted as soon as possible.

These communications to be printed in the Minutes of Evidence hereto.

The chairman informed the meeting that he had received a copy of a report of a committee of the Regina Bar Association, appointed to consider the question of amending the British North America Act.

The committee decided that the paragraph of the report respecting, "Procedure for Amendment," be printed in the Minutes of Evidence.

Mr. Ernst moved that the House be asked to authorize the printing of the Minutes of Proceedings and Evidence and Reports in blue book form, 2,000 copies in English and 750 copies in French and as an Appendix to the Journals.

Carried.

A resolution moved by Mr. Lapointe was adopted requesting the chairman to prepare a draft report to be submitted to the committee at the next meeting.

The meeting adjourned at the call of the Chair.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS,
TUESDAY, June 11, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present: Messrs. Turnbull, Gagnon, Lapointe, Mackenzie, Ralston, Woodsworth, Stewart, Veniot.

The chairman presented a draft report which was taken under consideration and referred back to the chairman for re-drafting, a new draft to be presented at the next meeting.

The meeting adjourned till Thursday, June 13th, at 11 a.m.

A. A. FRASER,
Clerk of the Committee.

HOUSE OF COMMONS,
THURSDAY, June 13, 1935.

The meeting came to order at 11 a.m., Mr. Turnbull presiding.

Members present: Messrs. Gagnon, Lapointe, Mackenzie, Woodsworth, Cowan and Turnbull.

The chairman submitted a draft report.

After consideration of the draft report, the same not being acceptable in all its terms, was referred to a subcommittee consisting of Messrs. Gagnon, Lapointe, Woodsworth, Cowan and the Chairman, for revision.

The meeting adjourned till Tuesday, June 18th at 11 a.m.

A. A. FRASER,
Clerk of Committee.

HOUSE OF COMMONS,
TUESDAY, June 18, 1935.

The meeting was called for 11 a.m. this day but no quorum being present it convened at 2.30 p.m., Mr. Turnbull in the Chair.

Members present: Messrs. Cowan, Ernst, Gagnon, Mackenzie, Lapointe, Ralston, Stewart and Turnbull.

Mr. Turnbull for the subcommittee appointed at the previous meeting submitted its draft report.

After consideration of the draft, the same with certain amendments was adopted unanimously and ordered presented to the House.

The meeting adjourned sine die.

A. A. FRASER,
Clerk of the Committee.

REPORT

HOUSE OF COMMONS,
June 19, 1935.

SECOND REPORT

The Special Committee of the House of Commons, appointed to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities and legitimate provincial claims to autonomy, the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope, begs leave to present the following as its second and final report.

Your Committee has held ten sessions and has heard the opinions of a number of witnesses.

Under the instructions of the Committee, telegrams were sent to the respective Attorneys General of the nine provinces in the following terms:—

> " The Special Committee of the House of Commons on the British North America Act desires to have the views of your Government with respect to methods of securing amendments to said Act. The Resolution referred to the Committee follows. ' Resolved, that in the opinion of this House a Special Committee should be set up to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities and legitimate provincial claims to autonomy, the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope.' While the Committee does not object to the personal attendance of a representative of your Government it was thought less costly to ask for a written submission. Copies of proceedings have been sent you, please intimate when we may expect to receive your submission."

The following answers were received:—

Prince Edward Island.—"Your wire March twenty-seventh Government of Prince Edward Island is of opinion that Dominion Government should formulate its plan and policy for the purposes intended and that this should be submitted to the Provincial Governments and afterwards discussed at a conference of representatives of the Provinces and the Dominion. Signed by H. F. MacPhee, Attorney-General."

New Brunswick.—"Will wire views as soon as available. Delay unavoidable. Signed by W. H. Harrison, Attorney-General." (New Brunswick views not yet received.)

Nova Scotia.—"Our legislature now in session and most difficult to attend to matter of this kind now in way you suggest. We feel matter should be approached by conference between representatives of Provinces and Dominion, where each would have the views of the other and ample time to discuss the matter. Signed by J. H. MacQuarrie, Attorney-General."

Quebec.—"Your telegram received. Surely the committee cannot expect that the views of the province of Quebec will be discussed by a change of telegrams or letters. In a matter of such importance I suggest that a conference of the Dominion and the provinces should be held. Signed by L. A. Taschereau, Attorney-General."

Ontario.—"Province of Ontario does not desire to make any representation before your committee *re* British North America Act amendment, as no good purpose will be served by attempting to advise Dominion Government at this time. Signed by A. W. Roebuck, Attorney-General."

Manitoba.—"With further reference to your telegram of the 27th March to the Attorney-General and to his reply of the 5th instant, the government have now had an opportunity of giving consideration to the suggestion that it should make a written submission regarding the subject matter that is before your committee.

"The government of Manitoba is of the opinion that the subject matter referred to in the resolution is one of such importance that no written submission, setting out our views in reference to it, should be made without a conference with the other provinces and the Dominion Government. We would be willing to attend such a conference at any time, with a view to arriving at a definite method of procedure for making amendments to the British North America Act. Signed by John Bracken."

Saskatchewan.—"Referring to your telegram of the 27th day of March wherein you request the government of the province to make representations either orally or by written memoranda as to the methods of procedure which this province would suggest in connection with amendments to the Canadian constitution, I would say that I have been following with intense interest the proceedings of your committee. The question of what, if any, provision is to be made for amendment of the Canadian constitution from time to time is a question which ultimately must be decided by conferences between the governments of the provinces and the government of Canada with the possibility of a previous preliminary inter-provincial conference. In view of this fact it would appear to be unwise for the provinces to be giving their views before a committee of the House of Commons. With due deference, might I be permitted to suggest that the proper procedure is for your committee to pursue its present inquiry and to make a report to the House of Commons, which I presume will either be accepted or amended or merely received without binding the government to accept the proposals of the committee and with this report available the provinces could then give consideration as to what attitude they desired to take and perhaps discuss the matter amongst themselves and thereafter join with the Federal government in a general conference. The report of your committee would serve as a basis of discussion around which would take place the ultimate solution of this problem. We realize that the question is one of great national importance and should be decided in the welfare of Canada free of all political considerations, and we are certainly prepared to do our share towards the facilitating of a solution, but we feel that we must look after the interests of the province and think that the procedure I have outlined would be the proper course for us to adopt at this time. Signed by T. C. Davis, Attorney-General."

Alberta—"*Re* amendment British North America Act. Alberta Government appreciates desire of committee to have views of all provinces before it on this very vital question but considers approach to question should be through interchange of views at inter-provincial conference. Signed by Mr. Lymburn."

British Columbia—"Reference your wire twenty-seventh to Attorney-General requesting written submission from the government of this province to your committee it is the opinion of the government that amendment of the constitution is too important a matter to be dealt

with in manner suggested. It is not thought that satisfactory conclusions can be reached either federally or provincially until a conference of the provinces and the dominion is held when full discussion may be had and matters properly debated. Other than stating that the right should be secured to amend our constiution in Canada this province respectfully declines to make submission to your committee, neither will it feel bound by any report which may be made by your committee. Signed by T. D. Pattullo."

In no case did the authorities of these provinces signify any desire to present their views to your committee, either in writing or orally.

The committee recognizes that there is a divergence of opinion with respect to the question of whether or not the British North America Act is a statutory recognition of a compact among the four original provinces of the Dominion and as to the necessity or otherwise of provincial concurrence in amendments. Without expressing any opinion upon that question, the Committee feels that in the present case and at the present time it is advisable in the interest of harmony and unity that there should be consultation with the provinces with respect to the adoption of a definite mode of amendment or the enactment of amending legislation which might seriously alter the legislative jurisdiction of the provinces and the dominion.

Many interesting suggestions were made. Dr. Kennedy, Professor of Law at Toronto University, suggested that a Royal Commission should be appointed to study the workings of the Act, with a view to recommending a rearrangement of powers if thought necessary.

Dr. Ollivier, Joint Law Clerk of the House of Commons suggested that:

(*a*) Obsolete sections should be dropped;

(*b*) Certain sections should be subject to amendment without consultation of the provinces;

(*c*) Certain sections should be amended only with the concurrence of a majority of the provinces;

(*d*) Certain sections might be amended with the consent of one province only;

(*e*) Other sections should be amended only on consent of all the provinces.

Dr. Scott, Professor of Civil Law at McGill University, expressed the view that as the Dominion Parliament represented the population of the provinces, ordinary amendments should be made upon a majority vote of both Houses and amendments affecting minority rights should be approved in addition by all provincial legislatures, in order to become law.

Professor Rogers, Professor of Political Science at Queens University, suggested that a Dominion-Provincial Conference or a National Convention might appoint a committee to draft an amended constitution to be thereafter approved by the conference or convention and subsequently by the Dominion and provincial legislatures. He was of the opinion that the question of consulting the provinces was a matter of political expediency rather than one of legal right.

Dr. Beauchesne, K.C., C.M.G., LL.D., Clerk of the House of Commons, would have a new constitution drafted by a constituent assembly composed of delegates representing the various provinces and the Dominion, made up of all classes of people. The constitution so drafted would be thereafter adopted by the Dominion and the provinces, approved by the King, and the present act thereupon repealed.

The committee recognizes the urgent necessity for prompt consideration of amendments to the British North America Act with reference to a redistribution of legislative power and to clarify the field of taxation.

It is further of opinion that the conference hereafter proposed should carefully consider the adoption of a recognized yet flexible method of amendment.

In view of the fact that the several provinces did not feel it advisable to give the committee the benefit of their views with respect to the method of procedure to be followed in amending the constitution, the committee is of the opinion that before any decision upon the subject matter of the resolution is finally made, that the opinions of the provinces should be obtained otherwise if at all possible and for that reason recommends that a Dominion-Provincial Conference be held as early as possible in the present year to study the subject matter of the resolution. The proposed conference should have ample time in which to study every phase of the question.

In view of the above recommendation the committee expressly refrains from recommending any form of procedure for amendment so as to leave the proposed conference entirely free in its study of the question, except that the committee is definitely of the opinion that minority rights agreed upon and granted under the provisions of the British North America Act should not be interfered with.

A copy of the Minutes of Proceedings and Evidence is submitted herewith.

All of which is respectfully submitted.

F. W. TURNBULL,
Chairman.

MINUTES OF EVIDENCE

HOUSE OF COMMONS,
OTTAWA, February 26th, 1935.

The Special Committee appointed to enquire into and report on the best method by which the British North America Act may be amended, met this day, at 11 a.m., Mr. Turnbull presiding.

The CHAIRMAN: Gentlemen, we have a quorum. If you come to order, I think perhaps we may proceed. In the first place may I welcome the new members to the committee. The three of them are present to-day, so we have a unanimous attendance from the new members no matter what may have happened to the old. Mr. Edwards, Deputy Minister of Justice, and Mr. Plaxton of the Justice Department are here to give evidence this morning, and I now call Mr. Edwards to come forward.

Mr. BOURASSA: Are the proceedings to be reported?

The CHAIRMAN: Yes.

Mr. BOURASSA: It will not be necessary to take notes.

Mr. COWAN: We decided at the last meeting to have the evidence reported.

WILLIAM STUART EDWARDS, K.C., called.

By the Chairman:

Q. Have you a copy of the reference?—A. Yes.

Q. Are you prepared to proceed with your statement? The committee desires to get from you your views as to the subject matter of the reference, namely, the best method of amending the British North America Act in accordance with the terms of the resolution submitted to the committee. It might be possible for you to give a statement first, followed by whatever questions the members may ask.

Hon. Mr. VENIOT: Would it be too much trouble to read the reference to the new members of the committee?

The CHAIRMAN: The resolution reads as follows:—

> That in the opinion of this house, a special committee should be set up to study and report on the best method by which the British North America Act may be amended, so that while safeguarding the existing rights of racial and religious minorities, and legitimate provincial claims to autonomy, the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope.

That is the reference. I think probably the Clerk might furnish each member of the committee with a copy of the reference later.

Mr. BOURASSA: Yes.

The WITNESS: I expected, Mr. Chairman, that what the committee would want would be to ask me questions on matters on which they might desire my advice; but in view of your request that I make some general statement, I will do so, subject to the understanding that what I say is not put forward as being any dogmatic opinion of my own. I merely wish to make a few suggestions for the consideration of the committee upon the subject before it.

In the first place I observe that the resolution itself is in somewhat narrow terms. The duty of the committee is to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities, and legitimate provincial claims to autonomy, the Dominion government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope. It will be observed that the purpose is to enable this parliament to deal effectively with urgent economic problems which are essentially national in their scope. Well, in my view, problems of that kind are now within the competence of parliament under the B.N.A. Act as it stands. A good deal has been said about the failure of the Fathers of Confederation to anticipate the necessity which might arise for the amendment of the constitution. Personally I do not think that they failed to anticipate such necessity; but I think they deliberately framed the constitution so as to make it subject to expansion by its own terms as the needs and as the problems of the country develop. In some of the self-governing Dominions and in other countries where a federal system prevails, there are fixed provisions for the amendment of their constitution; but in most, if not all, of those countries, their constitutions are not similar to ours in this respect, that the residuary powers rest with the state, and not with the central authority as it does in Canada. Therefore I think that the Fathers of Confederation deliberately provided a scheme whereby all matters that are essentially national in their scope would be within the exclusive competence of parliament. They did that by vesting in the Dominion parliament the residuary power, and in giving to the provinces their legislative powers they were very careful to make it clear that the legislative jurisdiction of the province was not, in any case, to extend beyond matters and rights situate in the province itself, matters of purely provincial or local concern.

By Mr. Bourassa:

Q. Did they succeed in making it clear?—A. I should think so. If you look over the provisions of section 92 you will find that almost invariably that idea is emphasized in the conferring of power. No. 1 is:—

> The amendment from time to time, not withstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant Governor.

It is clearly limited to provincial matters. No. 2 is:—

> Direct taxation within the province in order to the raising of a revenue for provincial purposes.

The limitation is emphasized there again. No. 3:—

> The borrowing of money on the sole credit of the province.

Now, I need not go through all the enumerated heads of jurisdiction, but if you glance down to what is the main item of provincial jurisdiction, property and civil rights, you will find that while the expression "property and civil rights" is one of very, very particular designation, they were very, very careful to say it was property and civil rights in the province. Therefore if at any time in the development of Canada a matter ceases to be a matter of property and civil rights in the province, it clearly belongs to the Dominion under the residuary power for the good government of Canada, which is found in section 91. I suggest therefore that the committee might well consider allowing the matter of the amendment of the B.N.A. Act to proceed as it has proceeded in the past, and leave the effect of what has been done to the determination of the courts, thereby avoiding all the difficulties and differences which might arise if any effort were made to fix a precise method of amending the constitution so as to reopen that balance of power which was so carefully provided at the time, and which has worked, in my judgment, very satisfactorily up to the present time.

The committee will have placed before it in due time the precedents which have occured in the amendments of the Act. These precedents, I think, demonstrate the importance of the suggestion I have just made; that is, that throughout the period of Confederation, the Dominion and the provinces have proceeded on the view that everything that is not provincial and cannot be said to be locally situate in the province belongs to the Dominion. Applying that principle in every case where an amendment has already been made to the constitution, it has been done in this way: if the amendment related to something which was not essentially provincial in character, but had reference to peace, order and good government in Canada, the Dominion parliament, upon an address to His Majesty, obtained the desired amendment from the Imperial parliament. In any case where the amendment would affect some matter of provincial concern, the provinces were consulted.

Q. Do you mean directly or indirectly?—A. In certain cases directly. But my own view is that a matter which only affects a province because it is one of the provinces of the Dominion, is not a provincial concern.

Q. What I mean by that is, you have all sorts of powers under the peace, order, and good government clause. Under that it would be quite easy to develop the theory that the constitution should be amended in regard to matters which the provinces might consider as infringements upon their powers. In fact, it has happened.—A. Well, on that branch, my idea would be that the Dominion authorities would not seek an amendment of that kind without consulting the provinces in advance.

Q. At least should not?—A. I think, constitutionally, would not.

By Hon. Mr. Veniot:

Q. In a consultation with the province in an amendment of the kind you refer to, do you need to have the consent of the province, or all the provinces?—A. Well, I wish to make it clear just before I answer that question; when I spoke a moment ago I meant that the protest is made by the provinces with regard to matters of provincial concern.

Q. By the provinces?—A. Yes. I would desire to negative any idea that any matter which relates to all the provinces, the mere fact that certain provinces object, would entitle them to have a voice at London or at Ottawa, wherever the constitution is being amended. That would be a matter of purely Dominion concern which should be settled in this parliament; but where the amendment would affect what we would call actual provincial rights, and there is a body of provincial opinion opposing the amendment, I would say this parliament should consult the interested provinces.

Q. Provincial rights, common to the provinces as a whole?—A. Well yes. That is, common in the sense that each province has jurisdiction to deal with that matter in its own field.

By Mr. Bourassa:

Q. Because, if I may interject, one province might consider that it is interested and not vitally affected?—A. Yes.

Q. Another province may consider otherwise?—A. Yes.

Q. And the question would be whether or not it is a matter of provincial concern.

Hon. Mr. MACKENZIE: That has happened before. It happened in British Columbia.

The WITNESS: Now I understand there have been two main objections to the theory I am putting forward, one is that it leaves the determination of the constitution in the hands of the courts, and that it is inconsistent with the sovereignty of Canada as a nation. With regard to the first objection, my experience so far has convinced me that the courts are ready at all times to

give reasonable and proper recognition to changes which take place in the development of the country, in the development of its economic and national problems; and the courts have displayed a willingness to deal with matters that are of Dominion concern as coming within the Dominion power. So that if the purpose be to enable this parliament to deal with matters which perhaps in former days were regarded as purely provincial, but which have by reason of recent experiences, become national in scope, I would anticipate a very careful consideration on the part of the courts to that question, and I would expect to be supported in the view that anything which can be shown to be national in scope will be held to belong to this parliament.

By Mr. Bourassa:

Q. You have the radio case in mind, have you?—A. The radio case particularly, but not altogether.

Q. No?—A. If the committee would like it, I could have one of our staff prepare a memorandum showing what judicial utterances have been made in recent years, which would indicate that tendency.

By Mr. Woodsworth:

Q. Do you distinguish between the Canadian courts and the Privy Council? —A. No.

By the Chairman:

Q. It is a question of what is national in scope. It is a question of fact, is it not?—A. I do not know whether we ought to touch the question of Privy Council appeals before this committee. Personally I would leave the Supreme Court of Canada as the court of last resort, and I would leave these matters to the competence of that court. If the Privy Council is the court of last resort, I would leave it to that court, always remembering that if the judicial view does produce dissatisfaction in the country, we always have the same method of amending the constitution that we have now. We can always get over any decision which appears to be unacceptable.

By Hon. Mr. Mackenzie:

Q. Were you always of this opinion with regard to questions national in scope, or is your opinion more or less occasioned by those two cases?—A. No. I think all constitutional lawyers have always been of that opinion; but the difference of opinion is not so much what the Act means. The differences that have cropped up in previous years are, whether the subject is national or not. It is a question of fact. I think every lawyer on the committee will admit once you establish that the matter is a national matter, it is clearly outside the jurisdiction of the provinces and belongs to this Parliament.

By Mr. Cowan:

Q. How do you determine that? Am I right in this, that when the subject matter does not come clearly within section 92, then you must look at section 91 in order to determine whether it is a case within the purview of section 91 under peace, order and good government?—A. With one or two exceptions, the whole field is conferred, the whole field of legislation; so that if the matter is under 92, it is only there because it is a matter limited to the provinces. If it is not limited to the provinces, it must belong to the Dominion field under section 91. You asked me a moment ago how you would determine whether or not a matter is national in scope. That was the suggestion I was making, that we would leave that in the first instance to the courts. This parliament would first decide whether a certain matter was national in scope, make a declaration to that effect and legislate upon it. If the legislation is questioned

in the courts, and it could be demonstrated to the satisfaction of the court that it is in essence a matter national in its scope, there would be no necessity to amend the constitution. If on the other hand the court gave a judgment which was inconsistent with the body of public opinion in Canada on the subject, then you still are free to seek an amendment of the B.N.A. Act so as to give effect to the desires of the Canadian people.

Mr. COWAN: I have not come to any settled conviction on the subject, but it looks to me as if I might object to the courts determining any matter on political or economic grounds.

The WITNESS: It would be a question of fact.

Mr. COWAN: I have in mind a decision in another court.

By Hon. Mr. Mackenzie:

Q. I rather expect you would be guided by matters of public policy. The Privy Council is.—A. I did not intend that. I thought the court would look at the subject and try to determine whether it is, as a matter of fact, a right or a matter of property within the province; or whether it is, in fact, something which extends beyond the limits of the province and is therefore in the Dominion field.

The CHAIRMAN: National scope was, I think, impressed on the Privy Council in the insurance case.

The WITNESS: Yes. I quite realize that the insurance case is one decision which might operate against that view. Personally, I think that very decision ought to be, and probably will be, modified in some degree in the light of more recent experience.

By Mr. Bourassa:

Q. Before you leave the subject of reference to the courts, is it not a fact that the inclination of the Privy Council at least, if not the Supreme Court, is to prefer giving a decision on a set case arising out of a dispute on legislation, than giving what I might call an opinion upon the validity of its law. I remember a straight declaration of Lord Haldane in one case—whether it came from Canada or Australia, I am not sure—in which he expressed his opinion, the set opinion of the Privy Council, that they were very reluctant to express an opinion on the validity of a law unless it came before them in the form of a court trial.

Mr. COWAN: Yes.

The WITNESS: Yes, that is true.

Mr. BOURASSA: If you will allow me, I think it is very important to have that in view with regard to your suggestion that we had better leave to the courts the interpretation of the decision we may make in parliament with regard to amending the constitution. If they took as an excuse for refusing to express their opinion that there was not a set case, it would mean we would have to amend the constitution, and leave it to the chance in the future of some individual contesting the law; and that, of course, from an economic and political point of view, is very inconvenient. Take the case of the Lemieux Act, for example, which was in operation for years and years.

Mr. COWAN: Eighteen years.

Mr. BOURASSA: Yes, eighteen years; and was declared void in one case.

The WITNESS: There are two answers, I think, to that suggestion. It is true that in the beginning, when the act authorizing reference to the court was enacted—

By Mr. Cowan:

Q. That is only to our Supreme Court?—A. Yes, but it goes from the Supreme Court to the Privy Council.

Mr. COWAN: They have not the right to apply direct to the Privy Council?

The WITNESS: When that act was passed, its validity was questioned, and it was decided that the act was valid. We have been using it very frequently ever since. It is true that there was reluctance on the part of the judges, especially in England, to give advice rather than to decide cases.

Mr. BOURASSA: Yes.

The WITNESS: But they have long ago become accustomed to our method of referring these questions to the Supreme Court; and they have answered very clearly and very definitely a large number of constitutional questions that we have submitted. As every member of the committee knows, in the water powers reference the difficulty was not that the court was reluctant to answer the questions, but they thought the questions were not sufficiently concrete to enable them to deal satisfactorily with them.

By Mr. Woodsworth:

Q. As one of the few non-legal members on this committee, may I ask this: When you say that after all the courts will decide as to matters of fact, does not what is a matter of fact relate itself directly to the public opinion of the time and hence is more or less political in character?—A. Of course, the question of whether a matter is within the national scope or not is a mixed question of fact and law. I merely wished, a moment ago, to avoid any suggestion that the courts would base their decision of what was desirable on grounds of political expediency, but would limit their consideration of the case to the actual merits of the case, as to whether or not it was within provincial jurisdiction.

Q. Take, for example, the case of women in the Senate. Are women, under the terms of the B.N.A. Act, persons? I understand, as a strict matter of legal interpretation, the Supreme Court decided they were not, and that decision was reversed by the Privy Council. Do you call that a matter of fact?—A. That was a question of the interpretation of a statute. That was a question of law. That was not a question of whether any particular matter was within one body of jurisdiction or another.

Mr. WOODSWORTH: In matters having to do with the constitution, what is fact? Do I make myself clear? Is it not true that in the decision as to whether or not a matter is of national scope, you would have to take into consideration the whole body of public opinion existing at the time, and to that extent it would tend to be political in character?

Mr. COWAN: Something after the gold decision the other day.

Mr. WOODSWORTH: Yes.

Hon. Mr. MACKENZIE: Public policy.

Mr. COWAN: That was on the sordid ground of expediency, in my opinion.

Hon. Mr. MACKENZIE: Absolutely.

The WITNESS: Possibly you might say that in interpreting the B.N.A. Act to-day, they will interpret it in the light of the decisions as they exist to-day. I think they did that in the " Persons " case. But that is not a good illustration of the sort of duty the court would have to perform when it is called upon to decide whether any particular property or civil right is a right existing only within the province or is a right which exists beyond the limits of the province. In order to determine that, you have to look at the facts and the law. There is a case decided by the Privy Council in which the question was whether a province had the right to legislate with regard to bonded indebtedness which was payable and due in another province. The court held that it could not be done, because they would be legislating with regard to a right which was not exclusively within the limits of the province, but which was to be enjoyed outside of the boundaries of the province, and therefore it was not a matter of provincial con-

cern, but was a matter of interprovincial concern. There is no doubt that that is a sound principle of the interpretation of the B.N.A. Act. The only difficulty would be to determine in each case what the true nature of the subject is.

By Mr. Cowan:

Q. Would it not be better for parliament to determine that rather than the courts?—A. Parliament would require to determine it in the first instance. I am only dwelling now upon the branch of the case which would deal with leaving the constitution as it is.

Q. Oh, yes.—A. If you are going to change the constitution, then the question you ask of course would arise. But the other objection that I have—

By the Chairman:

Q. Before you go into that, Mr. Edwards, and following the idea of leaving the constitution as it is, is it your view that the proper method of procedure is that parliament decide whether a certain class of legislation that is proposed is national in scope or otherwise; and if they decide it is national in scope, they pass the legislation, and then in some way leave it to the courts to decide?

Hon. Mr. MACKENZIE: You mean on particular questions rather than general principles?

The CHAIRMAN: Yes.

Mr. COWAN: Again, a matter of interpretation.

The WITNESS: The question of whether the government would submit it to the court would be a matter of policy. I would say, " Enact the legislation. If parliament is advised that the legislation is good, leave it to its operation."

Answering Mr. Bourassa's suggestion of a moment ago, if the Act came in contest before the courts at the instance of some private party—the provinces have legislation providing that in a case of that kind involving a constitutional issue, the provincial and Dominion governments are notified and we have the opportunity of intervening—if we thought that the private case in question was not a suitable vehicle for having the constitutional question determined, we could then, after it is challenged, refer it to the courts when desired. The question of whether you would refer it to the court before putting it in operation is a matter of policy.

By Hon. Mr. Mackenzie:

Q. If you intervene in such a case, would you refer to the court only any specific case, or the general policy of the whole legislation?—A. If we intervened, we would only be at liberty to argue the points that would arise in the case itself. That is why I mentioned that instance, if that particular case happened to be a poor one, if it did not happen to raise the precise question which we thought wise to be determined, we could at that stage refer it. We could refer it at any stage.

By Hon. Mr. Veniot:

Q. Are there not cases where the Privy Council made a decision that the province and Dominion have dual jurisdiction in administration?—A. Are you referring to agriculture.

Q. No, the fisheries case, for instance; fishery rights within the three-mile limit?

Mr. GAGNON: I think that is the only case in which the Privy Council decided there was dual jurisdiction, but it clearly defined the jurisdiction.

The WITNESS: Not an over-lapping jurisdiction.

Mr. GAGNON: No.

Hon. Mr. VENIOT: No, administration simply; between ownership and administration, regulation. Is that the only case?

The CHAIRMAN: If there is over-lapping jurisdiction, one of them must over-ride the other.

Hon. Mr. VENIOT: There is no over-lapping there.

Mr. COWAN: Was the Dominion right held to be paramount?

Hon. Mr. VENIOT: In the one case it was ownership. The decision was that the province owned the fishery rights within the three-mile limit, but that the Dominion government had jurisdiction to regulate the seasons and so forth for fishing.

Mr. BOURASSA: Even within the limits.

Hon. Mr. VENIOT: Even within the three-mile limit, yes.

Mr. GAGNON: Did they not make a clearer distinction than that? Did they not say that when the fisherman affixes his instruments to the soil, then the province has jurisdiction; but when the fisherman puts his nets or instruments in the water, then the Dominion has jurisdiction?

Hon. Mr. VENIOT: Yes, jurisdiction to say what seasons, what hours and so forth they shall fish. Is that the only case of dual jurisdiction, as it were, that has been decided, as far as you know?

The WITNESS: Oh, no. That is a very common situation that develops in the interpretation of the British North America Act. In that case they were faced on the one hand with a general subject in section 91, sea coast and inland fisheries. The question was as to what extent that impinged upon the right of the province, under property and civil rights, to deal with the soil of the province and other matters relating to fishing in the province which affected a right in the province; and they laid down the rule that Mr. Gagnon has explained. But that comes up very frequently in interpreting the British North America Act.

Then the other objection to allowing the constitution to remain as it is is that it has been said that that would be inconsistent with the sovereign status which Canada now enjoys as a nation. On that point I am inclined to agree with the suggestion made by Mr. Lapointe in the House of Commons in 1931, in which he suggested that there was nothing inconsistent with our sovereignty in allowing the Imperial parliament to be the instrument of amending the British North America Act in the future as in the past.

By Hon. Mr. Mackenzie:

Q. Was that during the debate on the Statute of Westminster?—A. Yes. If the legislation is enacted at Westminster upon the request of the Dominion authorities, then it is passed, because of the sovereign status of the Canadian people. It is passed because of the recognition of our status, and not in spite of it.

By Mr. Bourassa:

Q. As a matter of fact, that reservation in the Statute of Westminster referring to Canada was put there at the request of Canada?—A. Yes.

Q. It is Canada which asks to be limited in its constitution?—A. Yes.

Mr. COWAN: You mean the exception in regard to amending the British North America Act?

Mr. BOURASSA: Yes.

The WITNESS: So that on that branch I merely suggest that the committee consider at the outset whether the present system will not be as satisfactory for the present and future as it has been in the past. I am not attempting to

argue the matter this morning, but merely suggesting that view. In that connection, I might add that I have not yet satisfied myself that these other dominions which have power to amend their constitutions have anything superior to what we have.

By Mr. Cowan:

Q. That is right in their charter, is it not?—A. Yes. I think they have a burden. I think the power they have to amend their constitutions is a burden.

By Mr. Gagnon:

Q. You think it is what?—A. A burden. I do not think it is an advantage. I think it is a disadvantage. These other dominions are in this position, that the residue of power lies with the state, and if the federal power should at any time be enlarged for the benefit of the nation as a whole, what you have to do is get the subject matter out of the state and into the federal field, and you have to go through all the difficulties—in some cases plebiscites, and in other cases majority representations of the different states, and so on. You have a hard and fast working scheme which produces controversies and difficulties in the country, whereas with us the residue is already in the federal field, and there is nothing to transfer.

By Mr. Bourassa:

Q. Does not your reasoning apply exclusively, or at any rate mainly, to Australia? Because that would not apply to South Africa and the Irish Free State?—A. In South Africa the problem does not arise.

Q. And even in the Free State you have no provincial or state rights? —A. No.

Q. As a matter of fact, I think it is confined to Australia?—A. Well, you see, sir, the point does not arise; it is not the sort of federation in which there is any division of legislative authority.

Q. No.—A. I was limiting my remarks to countries which are subject to the limitations we have, a division of legislative authority. I was merely pointing out that it might not be an advantage to substitute for the present system which is elastic a rigid system which it might not be able to work without great trouble.

Mr. BOURASSA: As the United States for example.

By the Chairman:

Q. Had the residual power been vested in the state as in Canada would you have had that trouble with regard to amendment? Say your residual authority rests in the Dominion, and then give the Dominion power to amend its own constitution; would you have had the trouble of which you speak in relation to your very rigid system when it came to getting an amendment?—A. Well, my point is that, if I am right in my interpretation of the British North America Act, there is no constitutional advantage to be gained, because if the subject matter is national it belong to us now, if it is not national then you need no change. The only occasion on which you would need a change in our present constitution is when you want to take away from the provinces something which they have now and transfer it to the Dominion field.

By Mr. Veniot:

Q. It becomes a matter of interpretation, apparently, does it not?—A. Yes.

Q. Do you think the Parliament of Canada is the proper one after all to decide strictly upon the matter of interpretation. Of course, you said that would be possibly an abuse of the Act and you could have your redress before the Court. But perhaps I am now asking you to express an opinion upon a matter regarding which I should not ask you to express an opinion?—A. I would suggest on that

point that as the provinces are represented as well in this parliament as in their own legislatures, all the provinces are represented in this parliament, if this parliament declares that a certain subject is a matter of national concern, I would think that would lend a very great weight to any matter in issue.

Q. It might lend great weight, Mr. Edwards, but do you think we representatives of all the provinces in the federal arena are authorized to speak for the provinces on the question of jurisdiction?—A. Not for the provinces, no.

By the Chairman:

Q. Will the people of the provinces accept, in respect to matters within the legislative jurisdiction of the federal government, representation by members of the federal parliament? As I see it, they are not elected to go to Ottawa to give expression to opinions on matters of provincial jurisdiction?—A. You could not by any mere declaration transfer any power from the provinces to the Dominion.

By Hon. Mr. Mackenzie:

Q. Do you think that if we did take the power to alter our constitution the tendency would be, in your opinion, to lessen the amount of litigation between the provincial and the federal authorities with regard to the interpretation of the statute, powers, and so on?—A. That is, if you amended the constitution.

Q. I mean, under the present system it generally ends in litigation, in references to the courts; it generally finishes up in judicial interpretation, and there is a tremendous amount of it. If we did take the power to make a change in the present constitution would it in your opinion lessen the amount of litigation that is always arising in regard to interpretation in these cases?—A. I do not think I would hazard an opinion on that. My inclination would be to expect quite a bit of litigation because we have had a great many of the principles of interpretation under the British North America Act settled once for all and we know where we are. The moment you place anything new in the constitution we become worse off and have to start all over agin to settle all the new questions arising out of the new constitution.

Mr. GAGNON: Is there not a tendency for certain provinces to take advantage of any opportunity to submit litigation before the courts, especially where it appears to cut down their rights? For instance, last year we had litigation within the province of Quebec upon the advisability or the constitutionality of taxing long distance telephone calls.

Hon. Mr. VENIOT: Yes, and there was the fisheries dispute..

Mr. GAGNON: Yes. These questions were discussed for twenty years or more before the Privy Council. If I remember rightly the first case was dated 1880 and the last judgment was rendered in 1919. Is there not the tendency on the part of certain of the provinces to exaggerate and to abuse the opportunity to go before the Privy Council and have these questions of jurisdiction decided, and in the meantime the interests of the people concerned suffer?

Mr. BOURASSA: How can you stop that; you cannot deprive any province of the right to go to court?

Hon. Mr. VENIOT: You cannot deny them that right.

Mr. CHAIRMAN: But if you have every matter fairly expressive in the statutes, instead of being undefined as at present; if you have agreement as to whether a thing is national in scope or not it will eliminate this tendency to litigation.

Mr. BOURASSA: The more you allow the courts to clarify things the worse you make them.

The WITNESS: Don't forget that if you amend the constitution so as to

put some specific thing in Section 91 that is not there now you will be in exactly the same position with regard to the interpretation of that. You have under the present Act certain interpretations which would just be placed on one side and litigation would start all over again.

The CHAIRMAN: Is that so? Supposing you took property and civil rights, which are now under Section 92, strike them out of Section 92 and put them in Section 91; is that practical or otherwise?

Hon. Mr. MACKENZIE: That would be a new deal all right.

Hon. Mr. VENIOT: You would have quite a storm.

The WITNESS: What I meant was, suppose you had in Section 92, "Unemployment Insurance"; the meaning of the term "Unemployment Insurance" will have to be interpreted.

Hon. Mr. MACKENZIE: Then you would have some more cases arising out of that.

Mr. BOURASSA: Quite so.

By Mr. Cowan:

Q. You seem to think, Mr. Edwards, that we are in a very strong position in that the trend of judicial decisions has been in favour of the Dominion in nearly all of these various lines?—A. Yes; but rather on the ground that the judicial decisions have followed the actual developments. It is development which has brought about the decisions, with regard to certain subjects which they thought had ceased to be local in their scope and had become national in scope. I have confidence that the courts when faced with the facts will realize the situation and interpret the constitution as they did in the "Persons" case and in the Aviation case, and give a practical interpretation in the light of conditions as they are to-day.

By the Chairman:

Q. Take this case: railways, except those that are purely confined within a province, are within Section 91; that is, a form of transportation. Truck drivers are another from of transportation and they are said to come within the provisions of Section 92, but to the extent that they are endangering the operations of the railways could you say that they are national in nature and in scope and that the Dominion Government could control them; or shall we refer that to the courts for interpretation? Why should we not amend the British North America Act to say that "Transportation" should be under Section 91 instead of "Railways and Canals"?—A. That would depend upon interpretation, and other provisions.

Q. That is what I am getting at; leave out the question of interpretation, make it so definite that interpretation by the courts will not be necessary.

Mr. GAGNON: I think, Mr. Chariman, your observation is very much to the point. Admitting that there is a dual jurisdiction all that we have to do here is to study what would be the best method now of amending the constitution.

The CHAIRMAN: That is what I am getting at.

Mr. GAGNON: May I point out to you, Mr. Chairman, that the scope of our enquiry is very limited. If we go outside of that we will never be able to finish, and if we remain within the limits of the scope of our reference we will not need to take much time in discussion.

The CHAIRMAN: I was not suggesting that we should discuss these matters with a view to amendment of the Act or not, merely citing them as instances where, by means of amendments, we might possibly get away from much litigation.

Mr. WOODSWORTH: Mr. Chairman, Mr. Edwards' contribution has been very interesting but I submit it does not deal directly with terms of the reference.

The WITNESS: I agree.

Mr. WOODSWORTH: I think we ought to ask Mr. Edwards whether he has any suggestions as to how the constitution can be amended.

Mr. COWAN: We have been diverting his attention by our questions.

Hon. Mr. VENIOT: Is it not better for us to decide first whether or not this committee can recommend amendment to the constitution?

Mr. WOODSWORTH: That is not the point, parliament has decided that by referring the matter to this committee.

The CHAIRMAN: I think the point for us to consider is the most desirable method of amending, that is our reference.

Hon. Mr. MACKENZIE: The terms of our reference are very limited then, Mr. Chairman.

The CHAIRMAN: I think perhaps Mr. Woodsworth is correct, we may take it for granted that amendment is desirable; the question for us to consider is as to what method should be pursued.

Mr. COWAN: Quite right.

Mr. BOURASSA: That is right.

The WITNESS: If that is the meaning of the resolution then I will go on with the other point; but before leaving that I would like to point out that in Australia where they have had power to amend their constitution since 1900, they appointed a commission in 1929 to look into the question of how they could alter the constitution so as to get a more workable scheme. The commission prepared a very elaborate report and there was apparently little agreement among its members on the subject. They are faced with this same problem that we are, although they have had this power from the beginning. The question arose that is so much discussed to-day, as to what was the character and nature of the federation and the so-called compact there. My view about that is that it is not necessary to decide whether the B.N.A. Act was a compact and whether the doctrine of unanimous consent upon which it is based is of importance in determining the present question. In my view what happened in confederation was that certain peoples who had their then form of government were desirous of exchanging that form of government for another form of government, which is set out in the B.N.A. Act; that they voluntarily—there were certain minor protests which were not recognized—they voluntarily agreed to accept the new constitution; and they and the Dominion are bound by the terms of that constitution as it stands to-day; so that when you come to face any question as to how you are going to amend that constitution, and the amendment in prospect is one which will take away from the provinces a thing which they got at Confederation, you have to consult the provinces.

Mr. COWAN: That is fair.

By Hon. Mr. Veniot:

Q. Confederation is not based entirely on the Quebec Resolutions.—A. I know.

Q. Because the Quebec Resolutions make provision for certain jurisdiction on the part of the provinces which at the time of Confederation when the Act was passed in Great Britain were not included; for instance, jurisdiction with regard to Immigration, and certain other matters such as Fisheries were given to the provinces by the Quebec Resolution. When the Act of Confederation passed these were transferred to the Dominion; and further than that, it must be understood I maintain that it was a strict agreement between the provinces.—A. I agree with you, that it was an agreement.

Q. It was a straight agreement between the provinces; and the Quebec Resolutions voted here by the Fathers of Confederation reached England but were never acted upon. These resolutions were entirely changed by the London Conference.

Mr. COWAN: As a matter of fact, New Brunswick and Nova Scotia did not approve the Quebec Resolutions.

Hon. Mr. VENIOT: I know they did not.

Mr. BOURASSA: They voted against them.

Mr. COWAN: I think so.

Hon. Mr. VENIOT: We did not vote against the Quebec Resolutions, we voted against the resolutions of the conference in London; they were far different from the Quebec Resolutions.

Mr. BOURASSA: And they did not vote the Quebec Resolutions, they did not adopt them.

Hon. Mr. VENIOT: I know that. The vote that was taken in the Maritime provinces was taken against the London Conference, and not the Quebec Resolutions.

The CHAIRMAN: There were some very important alterations in the Quebec Resolutions.

Hon. Mr. VENIOT: Certainly there were. Let me go further; it is a matter of history, and perhaps you know it, that the proceedings of the London Conference were never revealed to the public, they were kept secret, and with correspondence to show why they were kept secret. There was correspondence on record to show that an order was given to keep them a secret; that is the reason why the Maritime provinces, especially Nova Scotia and New Brunswick, were so bitter in the fight against Confederation at the time, while they drifted into it afterwards. The report of the proceedings of the London Conference was only made public in 1927 when it was discovered in the archives of the old Parliament Buildings in the province of New Brunswick, and authority was then given by the Dominion Government to have it made public. That is the only time it was ever made public.

Mr. WOODSWORTH: May I ask Mr. Edwards how he would answer this question: he suggests that essentially the B.N.A. Act is an agreement between the provinces, but it was between certain of the provinces, the older provinces. Some of us come from the West, from provinces which were not original provinces, but we think that we have as much part in the Dominion to-day as anyone. Because of the provisions in the acts constituting each of the new provinces we can no longer say that the B.N.A. Act is an agreement between the provinces.

Mr. COWAN: In short, would the four original provinces be consulted, or all.

Mr. WOODSWORTH: No, that is not my point; my point is that although it may have been the original agreement I would hesitate to say that the conclusion is that it remains simply the agreement, and that the four original provinces only must be consulted, or must be consulted at all. It seems to me, if I may use another illustration, it is something like a man and his wife entering into a marriage contract. That is all very well, but as the years go by the situation changes, the family comes and there are family responsibilities and all that they mean; and that man and woman cannot suddenly say we will divorce and let the whole thing go back where it was.

Mr. COWAN: No, a new situation has arisen.

The WITNESS: That illustrates the point I wanted to make, that I do not think it of much practical importance to go back now and try to rediscover the basis of Confederation with the idea of amending the constitution, because the

people at that time did not understand it or were not properly consulted. The western provinces were admitted upon the same basis as if they had entered a union at the beginning. That is set out in the Constitutional Acts of the provinces.

By Hon. Mr. Veniot:

Q. It is set out in the London resolutions also—number 11?—A. So that in my judgment we find the nine provinces to-day each enjoying the rights, the privileges or the disadvantages, if you like, that were given to them by the B.N.A. Act; and my submission is that if the Act is to be changed so as to transfer from the provincial field to the dominion field some of the subjects that formerly belonged to the provincial field, some measure of consultation with the provinces has to take place.

Q. Number 11 of the London Resolutions reads as follows: "The North-west territory and British Columbia shall be admitted into the union on such terms and conditions as the parliament of the Confederation shall deem equitable and as shall receive the assent of the Sovereign, . . ." an exception—". . . and in case of the province of British Columbia as shall be agreed to by the legislature of said province." Thus making an exceptional case of British Columbia in the London Conference, and, based on that exception, British Columbia came into confederation.

Mr. COWAN: There is a provision in section 146 of the Act for the admission of Newfoundland and British Columbia: "It shall be lawful for the Queen by and with the advice of Her Majesty's Most Honourable Privy Council, addresses from both Houses of Parliament of Canada and from the Houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the Houses of Parliament of Canada to admit Rupert's Land and the North-western territories . . ." It was out of these that the three western provinces were created. ". . . or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve. . . ." That is one place, I say, where Canada has the right to amend its constitution, speaking of the admission of these other provinces.

Hon. Mr. VENIOT: Only on certain conditions.

Mr. COWAN: On conditions.

Mr. GAGNON: There are people who make distinction between the legal power and the political power. I think that we are able to amend our constitution any time we see fit.

Mr. COWAN: British Columbia came in on certain fixed conditions, and I do not think you could amend those conditions without the consent of British Columbia.

Hon. Mr. VENIOT: So did the Maritime Provinces.

Mr. COWAN: I think the Maritime Provinces are on a different basis.

Hon. Mr. VENIOT: No. Certain agreements and promises were made. Those promises can be produced and are official to-day. They are not incorporated in the Act; but the Fathers of Confederation pledged their word that the Act would do so and so. That became an agreement. Let me say here that the Maritime Provinces—

Mr. COWAN: Were they representations that were not included in the contract?

Hon. Mr. VENIOT: In the constitution?

Mr. COWAN: Yes.

Hon. Mr. VENIOT: No. They are not. That is where the fault lies.

Mr. COWAN: That is why I think British Columbia is in a different position.

Hon. Mr. VENIOT: There is a reason for that. Before confederation there were two divisions in British Columbia—two provinces.

Mr. COWAN: Do you refer to the Island?

Hon. Mr. VENIOT: Yes. And they had their separate governments. Then they came together, and they were separated again; and finally they came into one province again and came into confederation. That was the cause of that condition. That was the ground work. But let me say for the Maritime Provinces that so far as concerns the claim that the original four provinces should be consulted and they consulted alone in regard to any changes of constitution, we are not claiming that at all; because we recognize that the other provinces came in afterwards under almost similar conditions to the entry of the Maritime Provinces, and we grant to those provinces the same rights as we obtained under confederation, and the same right—if I may use the term—to kick at changes or discuss or dispute the jurisdiction of the Dominion government. We are not claiming that we alone have the right to kick.

The CHAIRMAN: Does anyone else desire to ask questions of Mr. Edwards?

By Mr. Gagnon:

Q. If I understood Mr. Edwards correctly he merely stated that should an amendment to the constitution be desirable and if the interests of the provinces are at stake then there ought to be consultation; is that right?—A. Yes. My view would be that any amendments which are required relating only to Dominion matters would be proceeded with in the future as they have in the past and have the constitution changed so that we could put those amendments into effect at Ottawa rather than have to go to Westminster. With regard to matters directly affecting admitted provincial rights, such as the transfer of some subject from the provincial to the Dominion field of legislation—

By Hon. Mr. Veniot:

Q. —in which there is no dispute; they are fully recognized?—A. Yes.

By Mr. Gagnon:

Q. But in the case concerning matters directly affecting admitted provincial rights such as you referred to then the provinces should be consulted? —A. Yes. I do not think the real problem is so much whether they should be consulted or not; I think the problem is more as to the extent, the machinery, the method, the system to be set up to provide what are suitable representations for the provinces in matters of that kind.

By Mr. Woodsworth:

Q. Have you any suggestions to make in that regard, Mr. Edwards?—A. It is very difficult to make any suggestion. Perhaps we might start by a process of elimination. I suppose everyone would agree that one province should not be allowed to hold up—

Hon. Mr. VENIOT: I think it is hardly fair to ask Mr. Edwards to give a suggestion on that just now. He came here to-day not knowing exactly what the situation was. He knows it now and I suggest that we adjourn and give Mr. Edwards an opportunity to go very fully into these matters and then give us some suggestions or expressions or opinion at our next meeting. I think it is unfair to ask him to do so now.

Mr. WOODSWORTH: Mr. Edwards was just going to make a suggestion.

Hon. Mr. VENIOT: He claims it is difficult. I think he ought to have an opportunity to consider what he wants to say. It is a delicate question.

The CHAIRMAN: If there are any points he desires to have time to consider he should be given time.

Mr. COWAN: But if Mr. Edwards is prepared to give an opinion now—

The WITNESS: I say, Mr. Veniot, that I am only making suggestions; I am not giving any fixed views.

By Hon. Mr. Veniot:

Q. You want to be careful about your suggestions. That is the reason why I spoke before?—A. I shall be quite pleased if the committee desires to adjourn. I was going to say, though, that I think that subject is a matter that no individual can deal with. I think what the committee has to do is to have a survey made of the constitution of all these provinces—their history, their population, their present and possible future development—and whatever system is adopted will have to be an elastic one.

Q. That will change as to provinces?—A. You could take the populations of several provinces to-day and you might work out some scheme that might fit present day conditions based upon the several populations of the central provinces, the western provinces and the eastern provinces; but I do not think any one individual could suggest a scheme. I should think the scheme would be evolved from a number of suggestions.

By Mr. Woodsworth:

Q. Might I ask if Mr. Edwards is willing to finish the statement on general principles which he began?—A. It is clearly understood that I am not putting them forward as a proposal of my own, I am merely suggesting that the committee has itself to determine how it is going to go about the problem of deciding what degree of provincial support would be required before this government would go to London—I am assuming, of course, that the Dominion is supporting the proposal—what provincial support they would require before they would go to London and ask for an amendment. Pardon me, I am always forgetting that the amendment should be made here. But do not forget that that problem has two phases also: we first have to have a certain degree of provincial support before we can go to London and have the power transferred to Ottawa; we first have to decide what degree of provincial support you are going to ask for, and having got that through and having got the power vested in the parliament at Ottawa—or rather before that you have to decide what the provincial representation will be for future amendments which will be made here. There are the two things you have to consider. I should think the steps would have to be these: you would have to make up your minds what scheme of amendment you wish to propose, and that would include in it the basis of provincial representation or consultation; then you would have to submit that to the provinces, go to London and get it through, and then you have achieved your purpose. Now, with regard to how that representation might be worked, that is a matter for statesmen rather than lawyers—it is a matter of statesmanship. One might say that if a majority of the provinces representing two-thirds of the population were in support—

By Hon. Mr. Veniot:

Q. That would not do?—A. No. One might say you would have to have at least seven out of the nine provinces including the two central provinces.

Q. The two central provinces would overshadow the others?—A. You will find this a nice problem.

Q. I know. We would not trust too much to Ontario and Quebec in the Maritime Provinces.

Mr. COWAN: We would be absolutely fair.

Mr. WOODSWORTH: Does Mr. Edwards' idea of confederation being an agreement mean that all who entered into the agreement must be consulted and that one province could prevent any step being taken?

The WITNESS: No. My suggestion with regard to that was that all that the provinces now enjoy is this right of autonomy in the province. We propose to interfere with that. The reason we propose to interfere with it is that the condition of the nation now is such that that now has to be done. That is a Dominion matter; I suggest that it is entirely within the Dominion field in law. I am only suggesting that as a matter of practical expedience you could not get that sort of amendment through without having support from the provinces whose rights are affected; but you are dealing with a matter which is not within the legislative jurisdiction of any particular province—therefore, not a matter with which the province itself can deal. What you are asking the provinces to do is to say for our guidance, in dealing with this matter which is to be a Dominion matter, what position the province takes with regard to the proposed invasion of its rights. Then you have to make up your mind how far you will listen to that voice of the province in determining what you will do in this national field.

By Hon. Mr. Veniot:

Q. No matter what decision would be taken in that respect the provinces would still have the right to present their case, would they not, before the parliament of Great Britain?—A. Possibly not a right.

Mr. GAGNON: Not as a right. I will not admit that. They would probably prefer to go before the courts.

Hon. Mr. VENIOT: Yes, they would. No, that is not the point I am making —when the presentation is made for a change in the British North America Act, not after it has been made.

The CHAIRMAN: Mr. Edwards spoke of one of his officials preparing for us a memorandum of amendments made in the past.

Mr. COWAN: I think that is included in this little manuscript that the secretary has given us.

The WITNESS: No. What I said, Mr. Chairman, was that I think a memorandum of that kind has been prepared. What I suggested was apropos of a remark made by one member of the committee to the effect that the committee would like a memorandum of the judicial decisions in which a tendency has been shown to recognize the changes in the nature of the subjects from time to time.

The CHAIRMAN: Perhaps we will have the memorandum prepared for the next day. There are two other things I will call your attention to: one is the view put forward by Professor Arthur B. Keith in "Responsible Government and the Dominions," page 586, in which he says:—

> It was most expressly recognized in 1907 by the Imperial Government that the Federal constitution is a compact which cannot be altered save with the assent both of the Dominion and the provinces.

Mr. COWAN: That was twenty-seven years ago.

Hon. Mr. VENIOT: What date was that?

The CHAIRMAN: 1907. We would like your views on that question, Mr. Edwards. The other point is a suggestion made by Honourable Ernest Lapointe at the Dominion-Provincial conference held November 3 to 10, 1927, with regard to methods of amendments.

Mr. COWAN: Yes. I was going to ask for the production of that memorandum.

The CHAIRMAN: It is sessional paper number 69 of 1928. His proposal was as follows:—

> In order that adequate safeguard should be provided it was proposed that in the event of ordinary amendments being contemplated the provincial legislature should be consulted, and a majority consent of the provinces obtained, while in the event of vital and fundamental amendments being sought involving such questions as provincial rights, the rights of minorities, or rights generally affecting race, langauge and creed the unanimous consent of the provinces should be obtained.

The Committee adjourned to the call of the Chair.

HOUSE OF COMMONS,
TUESDAY, March 5, 1935.

The Special Committee appointed to inquire into the best method by which the British North America Act may be amended, met this day at 11 a.m., Mr. Turnbull presiding.

The CHAIRMAN: We have a quorum. Let us proceed.

Mr. BOURASSA: Before we proceed I would like to ask for a correction in a couple of questions I put at our last meeting because those questions appear nonsensical unless I put them right. On page 5 I addressed a question to Mr. Edwards which appears in the report as follows:—

> Before you leave the question of reference to the courts, is it not a fact that the inclination of the Privy Council at least, if not the Supreme Court, is to refer Dominion decision on a set case arising out of a decision on legislation. . . .

Of course, what I think I said—at least, what I meant to say was this:

> . . . . is to prefer giving a decision on a set case arising out of a dispute on legislation.

I will ask that that correction be made, because it has no sense as it appears. On page 9 of the printed evidence Mr. Edwards was referring to states where the same difficulty with regard to central and provincial authority does not arise as here. He mentioned other countries generally and I said, "as the United States, for example." It was reported: "Control by states, for example."

May I suggest, as I mentioned to Mr. Fraser, that without causing any inconvenience or retarding in any way the reports—and in my experience this has been done in various committees previously—members of the committee might have an opportunity of reading the typewritten reports before they are sent to the Printing Bureau, and in that way things of this nature might be spared.

Mr. GAGNON: Usually members of the committee go to Mr. Fraser and see the evidence.

Mr. BOURASSA: Quite so. I asked Mr. Fraser to be kind enough to let us know by phone when we may see the evidence.

The CHAIRMAN: The clerk informs me that he will co-operate with the members of the committee in that regard as far as possible.

Now, is there any member who wishes to ask any further questions of Mr. Edwards.

Mr. BOURASSA: I was not here at the end of the last sitting but I read the report and I understood that Mr. Edwards was going to complete his statement after a few days of rest. It would be very interesting, of course.

The CHAIRMAN: Would you come forward, Mr. Edwards?

Mr. BOURASSA: One of the members suggested that Mr. Edwards should take a little more time before making his reply. It was Mr. Veniot who suggested it.

WILLIAM STUART EDWARDS, recalled.

By the Chairman:

Q. Have you the memorandum of which you spoke at our last meeting, Mr. Edwards?—A. Yes. It is a Memorandum entitled "Extracts from Decisions indicating a trend of Judicial Opinion regarding Jurisdiction of Dominion over Matters which are essentially National in their Scope."

The CHAIRMAN: Shall we take it as read and have it put in the record, or does anybody want to have it read now?

Mr. BOURASSA: We might have copies of it made, I suppose.

Mr. ERNST: Would it be possible for Mr. Edwards to summarize it?

The CHAIRMAN: Perhaps Mr. Edwards could give us something in a summarized form.

Mr. ERNST: As to the effect of the decisions.

Mr. BOURASSA: Yes, and we could get copies later on.

The CHAIRMAN: It will be printed.

The WITNESS: If it is to be printed do you think anything will be gained by my summarizing?

The CHAIRMAN: Your summary will serve us for the present.

The WITNESS: The extracts from cases which have been brought together in this memorandum show the trend of the different opinions merely upon the question upon which I was examined at our last meeting—that is, what is contained in the residuary power conferred on Parliament for the Peace, Order and Good Government of Canada. In the earlier cases—and by the way, they are not arranged in Chronological order—you will observe in reading the extracts that in the earlier cases the tendency of the court was to recognize the principle clearly that all matters which were not strictly within the provincial field belonged to the dominion field of legislative power. Then a little later while that principle again was emphasized and was reiterated in plain terms there was a tendency to apply it rather reluctantly in the circumstances of the particular cases that came before the court during that period. Then more recently in view of the changes which have taken place following the war and leading up to the Statute of Westminister and the introduction of new subjects in the field of legislation there has been a tendency to apply that principle just as freely as they were disposed to do it shortly after confederation.

Mr. ERNST: What were some of those cases?

The WITNESS: The Radio cases, the Aeronautics case, the Snyder case. The later is one of the cases where you have a well balanced discussion of the matter with a slight leaning towards the provincial view.

Mr. COWAN: Are these three cases decisions of the Privy Council?

The WITNESS: Yes.

Mr. ERNST: I am not familiar with the Snyder case.

The WITNESS: The Snyder case is the case which involved the constitutionality of the Industrial Disputes Investigation Act, and the question was whether a strike which had originated in Toronto and which had presumably been brought about at the instance of interprovincial or international labour unions was a matter extending beyond the limits of the province. They held in the particular circumstances that the subject mater of that case was not beyond the province because the strike actually related to a street railway operated in the city of Toronto and had not reached such proportions as to bring it within the Dominion field.

Mr. COWAN: Is that an interpretation of what we know as the Lemieux Act? —A. Yes.

By Mr. Bourassa:

Q. Is there any indication of how it would be dealt with if the strike had been all over the country?—A. Yes. That is why I cite that case. They laid down the principle clearly that if it had been a matter extending beyond the limits of the province it would have been competent for the Dominion to deal with it.

Q. Do all these decisions quoted from arise out of Canadian cases?—A. Yes.

Q. There are cases arising out of other Dominions which have a bearing upon us?—A. I might explain that there is no other Dominion which has our system, our constitutional system; so that on a question of what belongs to the field of the Dominion you have to look only at Canadian cases. I am speaking now with regard to the residuary power conferred for the Peace, Order and Good Government of Canada.

Q. None was taken from other Dominion cases? What I mean is—I talked privately to Mr. Edwards about a case in which Lord Haldane rendered a judgment which I thought at the time was illuminating as regards our constitution as well as theirs. He made a comparison between the Canadian, the Australian and the South African constitution, but I have forgotten the case. It is rather remarkable. I remember talking with Mr. Bennett about it, and he was struck with it also—with the very comprehensive view which Lord Haldane took of our constitution by comparison with Australia and South Africa. I think that would be a very important point to have before us. I do not remember the case. I wonder if you remember it, Mr. Edwards?—A. No. I will endeavour to look up that case.

Q. It is not a very old one. It occurred practically in the last days of Lord Haldane, if I remember rightly.

The CHAIRMAN: Is there anything further you wish to add to the statement you made at our last meeting, Mr. Edwards?

The WITNESS: No.

Witness retired.

(Filed by Witness W. S. Edwards)

Re: Special Committee on British North America Act

MEMORANDUM OF EXTRACTS FROM DECISIONS INDICATING TREND OF JUDICIAL OPINION REGARDING JURISDICTION OF DOMINION OVER MATTERS WHICH ARE ESSENTIALLY NATIONAL IN THEIR SCOPE.

Lord Dunedin, in the Radio case (1932), App. Cas., 304:—

> In other words, the argument of the province comes to this: Go through all the stipulations of the Convention and each one you can pick out which fairly falls within one of the enumerated heads of sec. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the province under the head either of heading 13 of sec. 92—property and civil rights—or heading 16—matters of a merely local or private nature in the province. Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the Convention. In a question with foreign powers the persons who might infringe some of the stipulations in the Convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought-of in 1867. It is the outcome of the

gradual development of the position of Canada *vis-a-vis* to the mother country Great Britain, which is found in these later days expressed in the *Statute of Westminster*. It is not therefore to be expected that such a matter should be dealt with in explicit words in either sec. 91 or sec. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by sec. 132. Being therefore not mentioned explicitly in either sec. 91 or sec. 92 such legislation falls within the general words at the opening of sec. 91 which assign to the Government of the Dominion the power 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." In fine, though agreeing that the Convention was not such a treaty as is defined in sec. 132, their Lordships think that it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the Convention with general regulations appended being signed at Washington on November 25, 1927, by the representatives of all the powers who had taken part in the reference and this Convention was ratified by the Canadian Government on July 12, 1928. The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention; and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

Macdonald, J., of the British Columbia Supreme Court, in *Rex* v. *Wong Kit*, 50 Can. Cr. Cas., page 259:—

When Lord Carnarvon introduced the B.N.A. Act in the House of Lords, he is quoted by Burton, J. A., in *Reg.* v. *Hodge* (1882), 7 A.R. (Ont.) 246, at p. 273, as stating that:—

> The object in view was to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation might be secured in those questions that were of common import to all the Provinces, and at the same time retain for each Province so ample a measure of municipal liberty and self-government as would allow them to exercise those local powers which they could exercise with advantage to the community.

Lord Sankey, L.C., in the Aeronautics case (1932), A.C., 54:—

Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as *The British North America Act*, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.

Inasmuch as the Act embodies a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of

interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of secs. 91 and 92 should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the provinces as enacted in section 92 it must no less be borne in mind that real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the provinces as members of a constituent whole.

* * * *

There may be a small portion of the field which is not by virtue of specific words in *The British North America Act* vested in the Dominion; but neither is it vested by specific words in the provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

Viscount Haldane in the Snider case (1925), A.C., pages 412-413:—

It appears to their Lordships that it is not now open to them to treat *Russell v. The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in section 91. Unless this is so, if the subject matter falls within any of the numerated heads in section 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of section 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Francis Pulp and Power Co. v. Manitoba Free Press* are highly exceptional. Their Lordships think that the decision in *Russell v. The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the begining of section 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada, so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce* case that the evil of profiteering could not have been so invoked, for Provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell* v. *The Queen* as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

Lord Tomlin in re Fisheries Act (1930), A.C. 111, laid down, among others, the following proposition relative to the legislative competence of Canada:—

> The general power of legislation conferred upon the Parliament of the Dominion by section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion.

Viscount Haldane in the Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919, at pages 200-201:—

> For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell v. The Queen*, both here and in the Courts in Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures.

Lord Watson, in the Maritime Bank case (1892), A.C., page 441:—

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

Lord Hobhouse, in the Lambe case (1887), 12 A.C., page 588:—

> And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.

Sir Montague E. Smith, in the Russell case (1881-82), 7 A.C., pages 836, 841 and 842:—

> But if the Act does not fall within any of the classes of subjects in sect. 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.
>
> Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence

for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under the colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion.

Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislatures, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in sect. 91.

Dr. O. D. SKELTON called.

The CHAIRMAN: Dr. Skelton is Under Secretary of State for External Affairs.

By the Chairman:

Q. You know the subject matter of the reference, doctor?—A. Yes.

Q. And have you prepared a statement in connection with it?—A. Yes. I am not very clear as to what phase of the subject you wish me to discuss, but in a considerable measure the nature of the contribution I have tried to make to your discussion is determined by the fact that I have not the advantage that most of the members of the committee have of a legal training and therefore I will spare you any discussion of the legal side. I thought I would deal with the general subject beginning with some observations on the general method by which changes in constitutions are effected otherwise than by direct amendment, then referring to the precedents that have already arisen in Canada as to how changes in the B.N.A. Act were made, and next making reference to some other constitutions and the methods by which they are amended. If you think that outline would be of value I shall be glad to run over it.

You are, of course, aware that in addition to direct amendment there are other methods of effecting change in constitutions, mainly by the growth of conventions or customs, and by progressive judicial interpretation. The growth of convention or custom is familiar to us in countries like England which have a constitution largely unwritten or at least not contained in a single and over-riding document, but it is equally to be found at work in countries with constitutions predominatingly written. In the United States we are familiar with the conventions which have arisen which make it practically impossible for a president to be elected for a third time and which limit the selection of representatives to persons resident in the constituency which they represent. It is an unbroken rule—but it is a rule that is not laid down in the federal constitution—that a member must reside in the constituency which he represents. Perhaps the most striking example of the way in which the written word in a constitution can be completely transformed by custom is in connection with the electoral college. The fathers of the United States Constitution distrusted democracy; they thought it would not be safe to allow the ordinary man to vote direct in such an important task as the choosing of a president and that it would be necessary to avert the influence of political parties or factions as they were termed in those days. It was, therefore, provided that all the ordinary elector could do would be to choose representatives from his state who would form part of an electoral college. Those members of the electoral college would be outstanding, independent, unfettered men who would look around the country without any precommitments and would choose the best man available for president without any direction from the common voter or from political parties. Within ten years that arrangement

had been completely thrown on the scrap heap. The very arrangement that the Fathers of the Constitution sought to avoid developed. There was no part of the constitution on which they were so unanimous and no part of which they were so proud, yet it was the first one to go in fact, though it still exists in form. Within ten years the members of the electoral college were selected and voted for as members of a political party and pledged to vote for the selection of an individual man. There is only one instance, and that was back in 1796, in which a member of the electoral college voted for a man other than the one for whom he was pledged to vote.

The same development has taken place in Canada. The power and place of a cabinet have no explicit basis in our constitution, except for one or two incidental references in our constitutional statutes. That place and power go back to the days of responsible government, but the place has changed and the power increased, both in the federal and in the provincial field, since the B.N.A. Act was adopted.

Take another example: the B.N.A. Act contemplated a wide measure of central administrative and legislative control over the provinces through the power of the federal government to appoint and dismiss the lieutenant-governor and the power to disallow provincial statutes. For a time both powers were vigorously applied. Of late years both have been falling into disuse. They still exist for use in emergencies or their more general use could be revived if a change of policy on the part of the federal government took place. But if another generation were to pass without any contentious provincial Act being disallowed or any lieutenant-governor being recalled because his conduct was not approved by the federal government, it might be said that a convention had grown up reducing these provisions to the status of the royal veto in the United Kingdom which is frequently said to be as dead as Queen Anne, the last sovereign who used it.

Sometimes the universal acceptance of conventions or customs affecting or over-riding the written word is formally placed on record by the parties primarily concerned. Take for example the provisions in the B.N.A. Act for control of Canadian legislation from London. The King, acting on advice of his London ministers, was empowered to disallow within two years any act of the Canadian parliament, and the Governor General was empowered to reserve any Bill for the assent of the King as advised by his London ministers. Conventions soon grew up, reflecting changing views of inter-Imperial relationship. The power of disallowance has never been exercised since 1873, and the practice of reservation survived little longer. At the 1929 Conference on the Operation of Dominion Legislation an agreed statement was put on record as follows:—

> The Conference agreed that the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation. Accordingly, those Dominions who possess the power to amend their constitutions in this respect can, by following the prescribed procedure, abolish the legal power of disallowance if they so desire. In the case of these Dominions who do not possess this power, it would be in accordance with constitutional practice that, if so requested by the Dominion concerned, the government of the United Kingdom should ask parliament to pass the necessary legislation.

In slightly different form it was recognized that the power of reservation could no longer be exercised so as to give London any control, and that formal amendment of the constitutional clauses bearing on that point would be in order if desired. These statements, while adopted by the Imperial Conference of 1930 and approved by the Canadian parliament, have not legal effect in the strictest sense; they are conventions still but conventions of such formal and established character that it is inconceivable that they should be disregarded. Now, it might be said, why not trust to growth of convention or custom altogether for

the necessary changes in our constitution? The obvious answer, I think, is that the process is too slow, and is applicable only in cases where unanimity has been reached. It may take a generation or more to establish a convention, and if a single contrary precedent is established, the letter of the law gets a new lease of life, like a debt subject to the statute of limitations.

In the second place, constitutions are changed by progressive judicial interpretation. In written federal constitutions, at least in English speaking countries, where certain powers are definitely assigned to the central and local authorities respectively, it is considered essential to have some impartial and competent body to determine, in doubtful cases, where the line is to be drawn. That duty is assigned to our courts. Theoretically the courts merely decide what the law is and do not make law. But inevitably, at the end of a long period of time it is found that the constitution is different from what is was at the beginning: the unconscious influence of changes in current public opinion, personal prepossessions, and logical refinements and extensions of earlier decisions, lead step by step to new interpretations. Lord Bryce once called attention to the striking difference between the direction of the evolution in this respect in the United States and in Canada. In the United States they began with a constitution which emphasized state rights, but under the guiding hand of John Marshall and his successors, it was gradually transformed in many particulars until the balance was decidedly shifted in favour of national rights: In Canada, under the guiding hand of Lord Watson and Lord Haldane, a constitution which in the mind and intent of the Fathers of Confederation was deliberately designed to profit by the mistakes of the United States, manifested in the struggles culminating in the Civil War, and to make the central government the predominant factor, the residuary legatee, has been interpreted in definitely the contrary direction. I would not seek to imply that this evolution was due mainly to personal factors, nor put too much emphasis on the fact that a distant tribunal was more likely than one seated in the country itself, to emphasize the letter of the statute and ignore historical backgrounds and current needs. The decisions of the courts in some measure reflected shifts in interests and opinion in Canada itself. For some years after Confederation, when the memory of the chaos and weakness of the sixties was strong and the enthusiasm centering about the new nation was high, the courts favoured a national interpretation. From the eighties down to a very few years ago, they favoured a very provincial interpretation, narrowing for example, the trade and commerce power of the Dominion, and ignoring the residuary grant to the Dominion of powers to make laws for the peace, order and good government of Canada, while on the other hand they expanded the property and civil rights clause in provincial powers until it became almost a second residuary grant. That provincial trend of court decisions paralleled or rather followed, with some time-lag, the changes in Canada itself, the decline of the military dangers that had driven the provinces together in the sixties, the failure to develop intimate commercial and cultural intercourse between the several parts of the Dominion before the end of the century, the accident that political parties of opposite colour were entrenched in the federal capital and in the leading provinces, the rise of an imperialist movement which divided interests and left the national government between the upper millstone of imperialism and the lower millstone of provincialism. Now the pendulum is swinging somewhat in the other direction, as Mr. Edwards pointed out. How much that is due to changes in personal factors, and how far it reflects the growth in national unity, the emergence of the national government in the war and post-war periods as the heir to former imperial powers, and the rise of new problems of such magnitude as to require national action, I shall not attempt to inquire; the fact remains of a reversal in trend, though one that has not yet gone far.

Here again, as in the case of change by custom and convention, it may be asked, why not trust in this method alone—why seek to change the constitution by direct and specific amendment if it can be transformed by progressive court interpretation? I think the answer is simple, that however useful and necessary the two methods noted may be, they are not adequate, they are not certain, they are not sufficiently rapid to meet rapidly changing needs. Courts may modify, they cannot replace. They can revise earlier interpretations, as new arguments, new points of view are presented, they can shift the dividing line in marginal cases, but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another, or modify the provisions of the B.N.A. Acts regarding the organization of the executive and legislative branches of the Dominion. It is difficult to forecast the relative importance in the future of the three methods of change, custom, judicial interpretation, and formal amendment, but it seems clear that each has an important role to play, and there is no reason why we alone of federal states should deprive ourselves of the use of any one of these agencies. In any case the terms of reference of your committee assume that formal amendment of the B.N.A. Act will be required,, and that the only question is, how?

There is a big interrogation mark after that word "how." The Canadian constitution, or the B.N.A. Act which is the backbone of it, is unique in that we alone of peoples do not know how our constitution is to be amended, are not clear as to what parties are to act in securing an amendment, what procedure is to be followed, or what majorities are to be required.

The omission from the B.N.A. Act of any provision for its future amendment has been variously interpreted. I notice that Mr. Edwards the other day suggested that the omission did not result from any failure on the part of the Fathers of Confederation to anticipate the necessity for change, and that they had deliberately framed the Constitution so as to provide, through the grant of residuary powers, ample room for the constant expansion of national power. There is undoubtedly much force in that interpretation. The framers of the Constitution undoubtedly did believe they had established a national government of predominant authority, one which would grow in power. One cannot read the debates and discussions of the time without being overwhelmingly convinced of that. But their expectations have not been fulfilled by the trend of interpretation. In any case, they had also assigned definite and enumerated powers both to the provinces and to the Dominion, and had made definite and rigid provisions for the organization of the national government itself, e.g., the composition of the Senate, and the powers of the House of Commons. These provisions, they could not expect would be altered by interpretation or expansion.

Perhaps another factor should be mentioned as explaining the omission, namely the fact or facts that the B.N.A. Act took the form—our Constitution took the form—of an Imperial Statute. That statute was passed at a time when the existing supremacy of the Mother country over the Colonies in legislation or in policy was unquestioned, whatever views might be held as to changes in the future, views such as Sir John A. Macdonald held in trying to have the new federation called the Kingdom of Canada. The constitution of the Canadas had been profoundly modified on previous occasions by Imperial Acts which also included no provision for future amendment. It was only 24 years before the Quebec Conference that the Act of Union had been passed, a period little longer than the time that has elapsed since the beginning of the Great War. It was 73 years since the Constitutional Act of 1791 had been passed, just about the same period as between Confederation and the present time. Neither Act provided for its own amendment. These precedents doubtless were in the minds of the framers of the B.N.A. Act. Even if they had not been, it must be remembered that our constitution was to take the form of an act of the Imperial

Parliament. Perhaps one reason why our B.N.A. Act is not known to young people in Canada as the constitution of the United States, for example, is known to every school child in that country, is that it is a dry, legal, routine instrument, designed for an immediate purpose, not like some other constitutions, a flaming and rhetorical charter of human liberties, full of abstract principles and well-rounded political philosophy. An Act of Parliament does not ordinarily provide for its own amendment. The occasion, it was hoped, would not arise for a considerable time, and could be faced when it did arise. The Imperial parliament would be there, to implement the changes desired, and if the Canadians of 1867 had worked out a way to make the change, the Canadians of 1897 surely could do likewise; meanwhile the men of 1867 had enough to do to get the constitution as it was accepted without worrying about the future.

A generation later, when Australia came to frame its constitution, and nine years later still, when the South Africa Act was passed, a marked change in inter-Imperial relations had come about. Continued control by the United Kingdom was no longer conceivable. Neither Dominion was prepared to leave future amendment to Westminster and definite provision was made for amendment at home. Canada was mainly responsible for the growth in inter-Imperial relations which brought this about, but its own constitution remained in form a vestige of an earlier day, while its younger sisters obtained up to date models.

By Mr. Cowan:

Q. With regard to the Union of South Africa and of Australia, was there an Imperial Act as well as a local act?—A. There was an Imperial Act in each case, but, as I will indicate a little later, South Africa has now added a local act to the Imperial Act.

At this point it would be well to recall that the B.N.A. Act has four aspects: it deals with Imperial, Dominion, Provincial and Federal or Dominion-Provincial phases of our constitution.

(1) *Imperial phase*

The B.N.A. Act provided expressly for a measure of Imperial control through the agency of the Governor General and through the disallowance and reservation powers to which reference has already been made. For the most part, however, the limitations on Dominion action, particularly in relation to foreign powers, rested on convention and usage, and it has been mainly by convention and usage that they have been removed. With the growth of the conception that the Government of Canada was His Majesty's government just as was the government of the United Kingdom, and that His Majesty's Ministers in Canada had the right to advise the King on matters affecting Canada, power to act in the international field was gradually transferred from London to Ottawa, siphoned through the Crown, as it were. Some of these transfers of power were accomplished without any formal action; some were recognized and recorded at Imperial Conferences; some were embodied in the Statute of Westminster, e.g. the abolition of the over-riding authority of Imperial legislation formerly maintained through the Colonial Laws Validity Act, the clear recognition of the extra-territorial effect of Dominion legislation, as to which court decision had been divided, and the restraint imposed on any future legislation by the United Kingdom parliament affecting a Dominion except with its consent.

By Mr. Ernst:

Q. That came later. That came as a result of the 1929 declaration?—A. Yes.

Q. It came through the subsequent decision of the Privy Council?—A. No, I do not think so. I think it was effected by statutory action rather than a judicial decision.

Mr. COWAN: I think you are right.

Mr. ERNST: I think the question was raised in connection with the seizure of a Canadian vessel, and it went to the Supreme Court of Canada, which gave a view of the law that I did not subscribe to in regard to our extra-territorial power. The Supreme Court held that our legislation had no extra-territorial power, and the Privy Council held differently, because the Statute of Westminster had.

The WITNESS: Yes.

Mr. ERNST: Yes. It was not the statute. It was a matter of judicial interpretation from that statute.

The WITNESS: The statute was very explicit.

Mr. ERNST: The Courts in Canada did not think so.

The WITNESS: I am not sure whether the Supreme Court decision in that case, Croft v. Dunphy, was given after the Statute of Westminster was passed, but the Privy Council decision was. The Dominion Act under fire had been passed before the Statute of Westminster, and the Privy Council decision, while perhaps influenced by the Statute, avoided the question of its retroactive effect.

Mr. ERNST: I remember having an argument with Mr. Lapointe, the then Minister of Justice, about the matter, and I was wrong and he was right.

The WITNESS: The Statute of Westminster further embodied provisions imposing restraint on any future legislation of the United Kingdom affecting a dominion except with its consent. There is room for argument as to the legal effectiveness of any such action, one parliament binding its successors, but there is little doubt as to its constitutional effectiveness. By these changes the powers of external control and action relinquished by the Imperial authorities fell inevitably to the Dominion; there was no thought or possibility of their being transferred to the provinces. That is one shift in power that has come about through the national government becoming the heir of the Imperial government in external matters.

(2) Next is the *Dominion phase*

The B.N.A. Act provides in the second place for the organization of the Dominion to carry out the powers assigned to it; the establishment of the Privy Council for Canada; the composition of the Senate; the power of the House of Commons to originate money bills; the requirements of twenty as a quorum in the House, etc., etc. All these matters are embodied in our B.N.A. Act. With the possible exception of the provisions regarding the Senate, these provisions clearly do not affect the relationship between Dominion and provinces, and there is no ground for provincial intervention in their amendment.

(3) *Provincial phase*

The B.N.A. Act in addition to the provisions for distribution of power between Dominion and provinces, provides constitutions for the new provinces of Ontario and Quebec, and for continuing the Constitutions of the Maritime provinces. Most of these provisions were temporary, or subject to amendment by the provincial legislatures; the significant exception being the office of Lieutenant Governor.

(4) *Federal phase*

Finally the B.N.A. Act provided for (1) a measure of executive control by the Dominion over the provinces through the appointment of the Lieutenant Governor and the power of disallowing provincial acts and, (2) for the distribution of powers between Dominion and province which is the vital and best known part of the Act. Broadly speaking, it is only as regards amendments in this field that the question of provincial co-operation with the Dominion seems to arise.

Now, may I next review the amendments already made to the B.N.A. Act and indicate briefly the procedure adopted in each case.

1. *B.N.A. Act, 1871*—

The object of this Act was to settle doubts as to the competence of the Canadian parliament to establish new provinces out of the western territories, to give them constitutions and representation in the federal parliament.

The procedure was that the Act was passed by the United Kingdom parliament at the request merely of the Canadian government. There was no consent of or consultation with the provinces in 1871. There was not even an address from the federal parliament—an omission defended on the ground that parliament had implied concurrence by passing in the previous session the Manitoba Act, which the United Kingdom statute was sought to validate. On a motion by Holton, the House of Commons voted by 137 to 0: "That no change in the provisions of the B.N.A. Act should be sought by the Executive Government without the previous assent of the Parliament of this Dominion."

David Mills moved a resolution to the effect that any alteration in the principles of representation in the House of Commons without the consent of the several provinces to the original compact, would be a violation of the federal principle of the constitution, but the resolution was rejected without debate.

Mr. WOODSWORTH: What was rejected without debate?

Mr. ERNST: The right to change.

The WITNESS: It was moved, but voted down without discussion. Is there any further point in regard to this first amendment? The second amendment is this:

2. *Parliament of Canada Act, 1875*

The object of this Act was to settle doubts as to the power of parliament under section 18 of the B.N.A. Act to define its own privileges, powers and immunities, and to validate the Oaths Bill. It was enacted to settle a question that had arisen as to the power of a parliamentary committee to require evidence on oath, and also to validate the Oaths Bill, which had been passed by the Canadian Parliament, but later disallowed. The procedure again was that this Act was passed by the United Kingdom parliament, merely at the request of the Canadian government. This procedure was defended in the Dominion parliament on the ground that parliament had already approved the object by passing the Oaths Bill which had been held ultra vires, and the purpose of the United Kingdom Act was to validate it. A resolution demanding parliamentary rather than executive action was introduced but withdrawn.

Mr. GAGNON: Was there some opposition in the House of Commons or the House of Lords to the passing of the Act?

The WITNESS: No, none whatever. There was no consultation with the provinces. The next amendment was:

3. *B.N.A. Act, 1886*

Its object was to empower parliament to provide for representation of territories in the Senate and House of Commons. The 1871 Act had been to empower the Dominion to make provinces out of the territories, and give them representation; this act was to empower them to give territories, as such, representation in the Senate and House of Commons, as parliament saw fit. The procedure was that the Act was passed by the United Kingdom parliament in accordance with an address from the Senate and House of Commons. The provinces were not consulted, and did not ask to be consulted, though if the B.N.A. Act was a treaty, modification in the representation in parliament, changing the balance of sectional power, might have been contended to require the consent of the existing provinces.

By Hon. Mr. Mackenzie:

Q. The power of disallowance was specially referred to in the statute—the power of disallowance by the Imperial Government?—A. Yes.

Q. It is still in the Act?—A. Yes. Then, in 1907, after twenty years, there came the fourth amendment. This one is of particular importance. The object was to provide an increase in and definite settlement of federal subsidies to the provinces. I see in the press this morning the reports of a commission recommending final changes in Maritime subsidies—

Q. It is not final in the case of British Columbia. I can assure you that.

Mr. COWAN: Will it be final for this year?

The WITNESS: The procedure in this case was that the Act was passed by the United Kingdom Parliament in accordance with an address from the Senate and House of Commons based on a series of resolutions passed by a provincial conference in 1887 and re-affirmed with some changes in similar conferences in 1902 and 1907.

It has been contended that by adopting this procedure the Dominion recognized the necessity of securing an amendment to the B.N.A. Act to effect any change in the subsidy section and the necessity also of consulting the provinces before an amendment was requested. Perhaps it should rather be said that the Dominion recognized the desirability from its point of view, of preventing any further provincial demands, and sought by consultation with the provinces and by utilizing the formal method of amendment, to give some degree of permanence to the arrangement. Its efforts were in vain. The proposal made by Sir Wilfrid Laurier included the words "final and unalterable settlement," but that was rejected in London as inappropriate in a United Kingdom Statute, and revision of the terms then granted his proceeded apace, without formal amendment and without incidentally the consent of all the provinces.

If there was any provision which the Fathers explicitly endeavoured to make unalterable, it was this very financial provision (see section 118 of the B.N.A. Act: "such grants shall be in full settlement of all future demands on Canada") and there has been no provision that has been as freely and repeatedly varied—always of course by revision upwards.

The CHAIRMAN: May I point to the fact that this Act of 1907 followed an address from parliament without reference to resolutions passed by provincial conferences?

The WITNESS: Yes. That is an important point. As early as 1869 increased subsidies were granted to Nova Scotia by Dominion statute. Edward Blake moved in the Canadian House of Commons against that procedure on the ground that it was an unauthorized assumption of power on the part of the Dominion, but the Dominion parliament declined to accept his view and the law officers of the Crown in London, when consulted, advised that the Act was one which the Dominion parliament was competent to pass under section 91. Later in the same year the Legislature of Ontario voted an address to the Queen to have it declared that parliament had not power to disturb the financial relations between the Dominion and the several provinces as established in the B.N.A. Act. Blake, admitting that the Federal parliament now possessed the power to vary those relations, in view of the interpretation that had been given by the law officers, sought vainly to prevent the power being used—but a resolution was passed by the House of Commons by 130 to 10, against any further increases in provincial grants, a resolution which proved not worth the paper it was written on. Mr. J. A. Maxwell sums up the development thus: "In the sixty odd years since 1869, there have been three general revisions scaling up the grants given to all the provinces, and more than a score of special revisions affecting every one. Despite heavy withdrawals from capital account (i.e. debt allowances) the four original provinces in 1928-1929 drew more than 3½ times as much from the federal treasury as had been promised in the B.N.A. Act."

Hon. Mr. MACKENZIE: What is the reference?

The WITNESS: It is an interesting article entitled The Flexible Element in the Constitution, and will be found in the Canadian Bar Review, 1933, by J. A. Maxwell.

It is also frequently stated that the British authorities by their action in this 1907 instance recognized the B.N.A. Act as a compact which could only be varied by unanimous consent. At this point I might call your attention to a statement by Mr. Winston Churchill in the House of Commons. He was then, I think, parliamentary Under-Secretary of State for the Colonies.

Hon. Mr. MACKENZIE: What year?

The WITNESS: 1907.

> On the other hand he would be very sorry if it were thought that the action which His Majesty's government had decided to take meant that they had decided to establish as a precedent that, whenever there was a difference on the constitutional question between the federal government and one of the provinces, the Imperial government would always be prepared to accept the federal point of view as against the provincial. In deference to the representations of British Columbia, the words " final and unalterable" applying to the revised scale, have been omitted from the bill.

Hon. Mr. MACKENZIE: It helps the Maritimes thereby.

Mr. ERNST: I can only say you can quote Mr. Winston Churchill on anything, in support or opposition.

Mr. COWAN: You do not open the B.N.A. Act every time a suggestion of an increase is brought up, do you?

The WITNESS: No.

Mr. COWAN: The B.N.A. Act said the amount then awarded was final and unalterable.

The WITNESS: No.

Hon. Mr. MACKENZIE: They tried to say that.

The WITNESS: Sir Wilfrid Laurier tried to get that in, that is correct.

Mr. COWAN: The B.N.A. Act itself?

The WITNESS: No—that Act reads as follows:—

> Section 118—Such grants shall be in full settlement of all future demands on Canada,—

Mr. GAGNON: Section 118.

Mr. COWAN: "Final settlement." How have the subsidies been increased, by Imperial act?

Hon. Mr. LAPOINTE: Yes.

The WITNESS: Only in this one case, in 1907. In other cases, by arrangement with individual provinces, by unilateral action on the part of the Federal government.

Mr. COWAN: By action of the federal parliament?

The WITNESS: Yes. As regards a subsidy, you may always get more money than you are promised, but not less.

By Mr. Gagnon:

Q. On that point, clause 118 reads as follows: "Such grants shall be in full settlement of all future demands on Canada and shall be paid half yearly in advance to each province." It tends to show that no additional grants could be made unless the Act itself was amended?—A. As I indicated, within two years an Act was passed increasing a provincial subsidy; David Mills attempted to argue that that was a violation of the constitution and was overruled.

Mr. ERNST: Would it not relieve the situation if it provided that the provinces should not claim from the Dominion, as a legal right, without an amendment to the Act? The Dominion had gone on the theory that it could gratuitously give to the provinces additional sums. Take, for example, the instance of the Duncan report. This parliament every year since has voted, not as a subsidy, but as an additional grant, sums to the Maritime provinces pending—

Hon. Mr. LAPOINTE: —pending final settlement.

Mr. COWAN: Has final settlement been made?

Mr. ERNST: The report was made public this morning.

Hon. Mr. LAPOINTE: That was the recommendation, of course.

Mr. COWAN: With regard to the recommendation of this commission that you have referred to, has that to be approved by the Dominion Parliament?

Hon. Mr. MACKENZIE: Yes.

The CHAIRMAN: Is it not a fact that the 1907 arrangement was opposed by British Columbia, and unanimous consent was required for that arrangement?

Mr. GAGNON: It is referred to in Edward VII. Chapter 11.

The WITNESS: I think the position is as Mr. Ernst stated: that the provinces could not claim as a right more than is set forth in the B.N.A. Act of 1867, as revised in 1907, but there was no reason why the Dominion, of its own free will, could not grant additional subsidy.

Hon. Mr. LAPOINTE: The provinces called them better terms. There was an agitation for better terms. It has been a long matter.

The WITNESS: I shall refer to the other point—the position as to British Columbia. That was touched on in a letter from the Colonial office to the Premier of British Columbia who had gone to London in 1907 to protest against the inadequacy of the new British Columbia subsidy. All the other provinces had agreed to accept what the Dominion proposed to give, but British Columbia stood out for a much larger grant. Here is the letter addressed from Downing street, under date of June 5, 1907, to Premier McBride:—

> I am directed by the Earl of Elgin to inform you that His Lordship has given the most careful consideration to the documents which you presented to him and to the views advanced against the proposed amendment of the British North America Act fixing the scale of payments to be made by the Dominion of Canada to the several provinces.
>
> 2. Lord Elgin fully appreciates the force of the opinion expressed that the British North America Act was the result of terms of union agreed upon by the contracting provinces and that its terms cannot be altered merely at the wish of the Dominion government.
>
> 3. But, in this case, besides the unanimous approval of the Dominion parliament, in which British Columbia is of course represented, to the proposed amendment of section 118 of the British North America Act, His Lordship is bound to take into account the fact, that at the conference of 1906 the representatives of all the other provinces of Canada have concurred in fixing at $100,000 annually for ten years the additional allowance payable to British Columbia, while rejecting the claim of Manitoba, Alberta and Saskatchewan for additional grants, and that they also rejected the proposal that the claim of any province should be referred to arbitration.
>
> 4. His Lordship feels, therefore, that in view of the unanimity of the Dominion government and of all the provincial governments, save that of British Columbia, he would not in the interests of Canada be justified in any effort to override the decision of the Dominion parliament or to compel the reference of the question to arbitration.

5. I am to add that no mention will be made in the Imperial Act of the settlement being "final and unalterable," such terms being obviously inappropriate in a legislative enactment.

6. His Lordship also desires it to be understood that he expressed no opinion upon the sufficiency or otherwise of the quantum of extra contribution awarded to British Columbia.

I am, Sir,

Your obedient servant,

(Sgd.) H. BERTRAM COX.

It will be noted that while this letter recognized the force of the opinion that the B.N.A. Act was the result of terms of union agreed upon by the contracting provinces, and that its terms could not be altered merely at the wish of the Dominion government, still it rejected the plea that the opposition of a single province could block a revision. It must be agreed, however, that the episode left undetermined what the attitude of the British parliament or of Mr. H. Bertram Cox would have been if three or four or five provinces instead of one had protested.

That was the most important instance of amendment, and the only one on which any question arose in London.

5. B.N.A. Act, 1915

Object: To increase the number of senators and alter the main senatorial divisions.

Procedure: The procedure adopted was that the Act was passed by the United Kingdom parliament following an address by the Senate and House of Commons of Canada. Prince Edward Island made representations before a House of Commons committee, which were not accepted. Other provinces were not consulted and made no representations. The suggestion was made in the House of Commons by Mr. O. Turgeon, now Senator Turgeon, that the provinces should be consulted, but it was not acted upon.

6. B.N.A. Act 1916

The object of this amendment was to lengthen the term of the existing parliament for one year. The procedure was on an address by both houses. The provinces were not consulted and, as far as I recall, they were not referred to in the debate.

7. B.N.A. Act, 1930

Object—return of natural resources to British Columbia, Alberta, Saskatchewan and Manitoba.

By Hon. Mr. Lapointe:

Q. Doctor, with regard to number 5, the amendment which had reference to Senate representation, was there not a provision to the effect that the number of members from one province should never be less than the number of senators?—A. The main purpose of the Act was to provide for increased representation of western members. It also included a provision that the number of members should never be less than—

Q. You remember there must have been an amendment some time because Prince Edward Island would have had, according to population, less than four members and still would have had four senators; and there was an amendment covering that?—A. Yes.

Q. To dispose of that matter?—A. That is right.

Q. And no province would ever have a lesser number of members of parliament than of senators?—A. "Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators."

Q. That was at the same time?—A. Yes. It really affected the House of Commons as well as the Senate.

By Mr. Gagnon:

Q. Do you remember in what year that amendment was passed?—A. 1915.

Hon. Mr. MACKENZIE: 5-6 George V, Chapter 45.

The WITNESS: The main purpose was to set up four sections of the Dominion, each returning twenty-four senators.

By Mr. Ernst:

Q. Did you say that the only province consulted at the time was Prince Edward Island?—A. It was not consulted; it made representations.

Hon. Mr. LAPOINTE: Really this amendment was to benefit Prince Edward Island.

Mr. ERNST: But it was to affect them all.

Hon. Mr. LAPOINTE: Yes, it affects the other Maritime provinces too because they were losing members at every redistribution.

Mr. ERNST: It affects the whole of Canada in this respect that if one province can elect representatives on a smaller number of electors than other provinces it is in a preferred position as compared with the other provinces.

The WITNESS: The representations of Prince Edward Island were not accepted in toto.

Hon. Mr. LAPOINTE: It really favoured those provinces whose populations were not keeping up to the same speed as others.

The WITNESS: The procedure in the 1930 Act was the same—action by the United Kingdom parliament, following an address from the House of Commons and the Senate, following in turn agreements with the several provinces directly concerned. There was no general consultation with the other provinces, though the point was raised in debate, I think by Colonel MacLaren.

Mr. GAGNON: What was the date?

The WITNESS: 1930.

Mr. GAGNON: What month? I want to know if it was before the election.

Mr. ERNST: After the election.

Hon. Mr. LAPOINTE: There is no politics in this.

Mr. GAGNON: No, it is not a matter of politics.

The WITNESS: To sum up these precedents in a few conclusions: it would appear first, as indicated by the resolution of the Dominion House of Commons, that a request to the United Kingdom parliament by the Dominion government alone without action by the Dominion parliament, is not adequate—

By the Chairman:

Q. When was that resolution passed?—A. 1871.

Q. Was it concurred in by the Senate?—A. No.

By Mr. Ernst:

Q. There have been several amendments since that resolution, have there not?—A. There were two, made merely on request of the federal cabinet: one United Kingdom Act passed in 1895, providing for appointing the deputy speaker of the Senate. As a matter of fact, parliament had previously approved the purpose of the other amendment of this kind, in 1875.

Mr. ERNST: In 1886 an Act to provide representation of territories was passed in accordance with an address to parliament alone, and the provinces were not consulted. The only reference is subsequent to the resolution of 1871; there were a number of amendments to the British North America Act in which the provinces were not, in fact, consulted.

Mr. GAGNON: At this point may I say one thing: if I understand the matter well, with regard to the Constitution in 1930, at the Imperial Conference, there was some discussion about the provinces being consulted, and finally I think the matter was discussed at the request of Mr. Taschereau and Mr. Ferguson. Now, I would like to ask you if at that conference there was a resolution passed before the conference whereby in the future the provinces might be consulted?

The WITNESS: No.

Mr. GAGNON: That is why I asked a moment ago in respect of 1930 if the Act passed in London was after the elections. I had no view of affecting political parties.

Hon. Mr. LAPOINTE: My remark was in fun.

Mr. GAGNON: I know, but the journalists might think you were serious.

The WITNESS: The Statute of Westminster did not involve any amendment to the B.N.A. Act. The provinces were consulted by the Dominion before final action on the Statute of Westminster was taken by the United Kingdom parliament for two reasons: one, that a question arose whether the removal of the Colonial Laws Validity Act barrier should extend to provincial legislation as well as to Dominion legislation. As it stood then any provincial Act which was repugnant to an Imperial Act was, under the Colonial Laws Validity Act, void. The Dominion was getting that barrier removed, and the provinces stated that they also wanted it removed. The other question which called for consideration by the provinces was due to the fact that the framers of the Dominion Legislation Conference report of 1929 and of the Report of the 1930 Imperial Conference, which were to be in part embodied in the Statute of Westminster, had tried to preserve the status quo with regard to the distribution of powers between federal and provincial governments, and as regards constitutional amendments. They had endeavoured to make it clear that the new powers given to the Dominion government, or at least the removal of Imperial control over certain Dominion powers, would not change the way in which the B.N.A. Act was to be amended. The view was taken, particularly by Mr. Ferguson, that the words were not aptly designed for that purpose. A conference was held with the provinces in April, 1931, and some slight revision in the words was made which did not alter the purpose but was thought to express it more clearly, and those words were utilized in the recommendation made by the Dominion parliament and incorporated in the Statute of Westminster. No resolution was adopted at this Conference with the provinces as to the method of amendment of the Constitution, because it was announced at that time that a conference would be held beween the Dominion and the provinces at a later date when the whole question would be taken up. All that was sought to do in 1931 was to ensure that for the time being the status quo was not altered by the Statute of Westminster, as regards constitutional amendment.

Hon. Mr. LAPOINTE: By the Statute of Westminster itself, Ontario and Quebec did not oppose the changes to be made affecting the Dominion parliament without their consent; they rather wanted that the Act should be further amended by applying to themselves and the other provinces the non-application of the Colonial Laws Validity Act to their legislation as well as to the Dominion.

The WITNESS: Yes. That was one purpose.

Hon. Mr. LAPOINTE: What they wanted was a further and a larger amendment rather than a smaller one.

The WITNESS: Yes, though they were also apprehensive that the proposed wording might increase the federal power as regards the Constitution.

To return to the summary of these precedents:

1. It would appear that a request to the United Kingdom parliament by the Dominion government alone, without action by the Dominion parliament, is not adequate;

2. That in six out of seven amendments, amendment has been based on action by the Dominion parliament alone without consent of or consultation with the provinces generally.

3. That in two of these cases (the definition of parliamentary privileges in 1875 and extension of the life of parliament in 1917), the amendments were of minor or temporary character and involved no provincial interest;

4. That two at least of the remaining cases (1871, empowering the federal parliament to admit new provinces and assign them representation in Ottawa, and 1915, revising the Senate provisions) might have been considered to possess some provincial interest but were effected wholly by federal action;

5. That the 1907 case, while involving provincial action, through representatives of the provincial governments, does not support the theory of unanimous consent; and while indicating some measure of British adherence, twenty-eight years ago, to the view that provincial consent was necessary, left the question of degree undetermined and uncertain—as to how many provinces were to consent.

6. Finally, that the instances include no major alteration of the distribution of federal and provincial powers and do not touch, in that sense, the heart of the matter. They throw no certain light on the attitude the United Kingdom parliament would take on a request from the Dominion parliament for a change in powers if opposed by, say, three or five provinces.

Now, to pass to the next point—the example of other countries. The constitutions of interest in this respect are those of federal states, particularly Australia, Switzerland and the United States. South Africa's constitution is for all practical purposes a unitary one. I might say in connection with the point raised a few moments ago that the constitution of South Africa was embodied in an Act of the British parliament—the Union of South Africa Act of 1909. Last year, in cleaning up the whole constitutional question in South Africa, the parliament of the Union passed a Status Act, a Royal Executive Functions and Seals Act and a Constitution Act. The main purpose of the Constitution Act was to repeat word for word the United Kingdom Act of 1909 with the amendments since made, including, I think, the amendments made in the Status Act, as an Act of the South African parliament, and also to include in it an Afrikaans version but with the proviso that where there was a conflict the English version would govern. So South Africa has a constitution both in a United Kingdom and in a South African Act now.

Hon. Mr. LAPOINTE: Was the Seals Act the same thing as in the case of the Irish Free State?

The WITNESS: Very much the same. A new King's Seal and Signet were sent out to South Africa where they are placed in the charge of the Prime Minister and used by him on documents of a particularly formal character signed by the King.

New Zealand started out in 1852 with a shadowy federal system which was abolished in 1876 by an ordinary statute of the New Zealand parliament in accordance with a provision in the Act of 1852 empowering it "to alter from time to time any provisions of this Act"—a provision which might be held to

contradict what I said earlier about the conditions surrounding the B.N.A. Act of 1867; perhaps de minimis non curat lex: the provinces had had a precarious financial existence from their creation.

Germany's republican constitution of 1919 provided that the constitution might be altered by ordinary legislation, except that a two-thirds vote was required in each House. If the upper house or Reichsrat rejected an amendment, and the lower house or Reichstag overruled its veto by a two-thirds majority, the amendment went into effect unless the Reichsrat within two weeks' time demanded a submission of the amendment to the people. Of course this constitution and the States themselves have since virtually disappeared. The Reichstag elected in 1933 virtually set aside the Weimar constitution by giving the Chancellor and his cabinet power to make laws by ordinance, even such as were not in accord with the Weimar constitution. By later legislation the sovereign rights formerly enjoyed by the States passed into the hands of the Reich Cabinet, and Reichshalter or governors were appointed directly responsible to the Fuhrer. The Weimar constitution, it may be noted, gave the central government wide power; instead of an absolute division of powers between federal and State authority, it set up a threefold division: powers belonging exclusively to the federal government; second, powers shared by the States, but which the federal government could at any time act on concurrently; and third, those not mentioned, in which case, as in the second case federal action would overcome State law.

Switzerland. In this land of direct democracy the initiative and referendum are largely utilized.

Specific amendments may be effected in two ways:—

1. By a majority vote of each House of the Federal legislature, and ratification by a popular referendum, requiring a majority of the total vote and a majority in a majority of the cantons ($11\frac{1}{2}$ out of 22); there are three cantons each divided into half cantons. Most amendments thus proposed have been ratified. When the two Houses agree the people usually accept.

2. Proposal by initiative petition signed by 50,000 electors. If this proposal is in the form of a specific amendment it must be submitted by the federal authority as it stands; if it takes the form of a demand that the National Assembly prepare an amendment embodying a general principle set forth in the petition, the Assembly must first submit to popular vote the question whether such an amendment should be prepared, and if this is approved, then prepare an amendment and submit it to popular vote, subject in each case to the same requirement as to majorities. Most of the amendments so proposed have been rejected.

   Provision is also made for a complete revision of the constitution, initiated by a vote of both houses or by one house alone, or by a petition of 50,000 electors. If demanded in either of these three ways, the proposal is submitted to popular vote. If approved, the legislature is elected afresh to draw up the new constitution, and this revised constitution is then submitted to popular vote.

United States

The provision for amendment is very concise:—

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid

> to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed to Congress.

In other words, four different methods are available:—

1. Proposal by Congress by a two-thirds vote in each House, and ratification by legislatures of three-fourths of the States.
2. Proposal by Congress by a two-thirds vote in each House, and ratification by convention called in three-fourths of the States.
3. Proposal by two-thirds of the State legislatures and ratification by three-fourths of the legislatures.
4. Proposal by two-thirds of the State legislatures and ratification by conventions called in three-fourths of the States.

Only the first method has even been used. Twenty-one amendments have been adopted in this way (some 2,500 have been proposed in Congress at different times and 25 passed by Congress). None has been effected by any other method. Four passed by Congress have not been approved by the States. The Child Labour amendment is one of the latter.

The first ten, constituting a Bill of Rights, were adopted immediately and were virtually part of the original constitution, a condition of its approval. Two others of minor importance were adopted in 1798 and 1804 respectively. Then came a long blank until after the civil war when the 13th, 14th and 15th were adopted to clinch the results of that struggle. In our own time amendments for a federal income tax, direct election of senators, prohibition, women's suffrage, abolition of lame-duck sessions, and the repeal of prohibition have been effected.

It may be noted that the president's approval is not required for Congressional action on an amendment nor has the governor a veto right on State action. Congress may impose a time limit for State action—seven years was given in the case of the 18th Amendment. A State legislature may not revoke a ratification it has once given, but it may reverse a rejection. The only limitations on the amendment power are—

Hon. Mr. LAPOINTE: What was the difference?

The WITNESS: Once a legislature agrees it cannot go back on its agreement.

Mr. ERNST: It is like marriage.

The CHAIRMAN: You cannot say "no" after saying "yes."

The WITNESS: The only limitations on the power of amending the constitution are: 1. No State can without its own consent be deprived of its equal representation in the Senate: 2. No State can be divided or two States combined without the consent of the legislature or legislatures concerned.

Finally, we come to Australia. Both the United States and the Swiss methods influenced the Australian founders.

The Commonwealth of Australia Constitution Act, 1900.

128. This Constitution shall not be altered except in the following manner:—

> The proposed law for the alteration thereof must be passed by an absolute majority of each House of Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half of the electors voting for and against the proposed law shall be counted in any State in which proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

Constitutional amendments require for their proposal an absolute majority of both Houses of Parliament, but one House with the support of the government may, under the circumstances noted, place an amendment before the people, provided it has been passed twice. Secondly, ratification is effected by referendum and requires a majority of electors and a majority in four of the six States. The proposal has to be made by a vote of the two Houses, or in some cases of one House, and approval has to be given by popular vote of the electors. The only exception is that in addition to these requirements, an amendment proposing an alteration of the limits of any State or "in any manner affecting the provisions of the Constitution in relation thereto" must also have a majority of the electors in that state. There is also, it may be noted, provision whereby any state or states may transfer power to the Commonweath, a provision not yet utilized.

The Australian system has proved unexpectedly rigid. Only three amendments have been effected, two minor ones in 1906 and 1910, regarding Senate elections and State debts, and one important one in 1928, authorizing the Commonwealth to enter into financial agreements with the states regarding past debts and future borrowing. The latter amendment and the agreement based upon it has largely centralized financial power in the hands of the Commonwealth; some Australian commentators contend the public was not aware of its sweeping possibilities when it was accepted. Sweeping proposals for increasing the Commonwealth's control over commerce and industry have been put forward by parliament and supported in turn by labour and the opposing parties, but rejected by the people, though in some instances with small majorities, in each

case. It is not surprising that the method adopted has been considered unsatisfactory and a Royal Commission was appointed in 1929 which made an exhaustive report, on which no action has yet been taken.

From these precedents a few general conclusions may be drawn:—

(*a*) That no other Dominion has recourse to action by the United Kingdom parliament to effect amendments in its constitution;

(*b*) That in all federal states some scheme of double action is involved, action by the federal parliament supported by action by the legislatures or the electors of a majority or more of the states;

(*c*) That in no case is unanimous action by states or provinces required for ordinary amendments;

(*d*) That in several cases special provision is made for safeguarding a limited number of definitely named state rights by special procedure.

Applying these Canadian precedents and this outside experience to our immediate problem, how best amendment is to be effected, the first question appears to be, should the parliament of the United Kingdom be retained as the instrument for effecting amendments? I cannot see any reason for such a solution. No other country in the world looks to the parliament of another country for the shaping of its constitution. This solution could only be supported if we believed that Canadians are the only people so incompetent that they cannot work out a solution of their constitutional problem, and so biased that they alone among the peoples of the world cannot be trusted to deal fairly with the various domestic interests concerned. To retain permanently the intervention of the parliament of the United Kingdom is either superfluous or dangerous. If that parliament is to act automatically, its intervention is superfluous; if it is to exercise its own discretion, its intervention is fraught with danger to continued good relations between Canada and the Mother Country. It would be unfair to the United Kingdom to ask it to intervene in our local differences, and it is a task this parliament would not desire to exercise. It will of course be necessary, once we in Canada have reached as wide a measure of agreement as it possible on the method we desire to use in the future, to go to the British parliament and ask it to act once and for all, but that is a very different thing from asking it to exercise indefinitely this anomalous and outgrown task.

It might be argued that as opinion and events are now in rapid flux, it would be wiser to postpone deciding upon a method of amendment, postpone asking the British parliament to exercise its final intervention, exhaust its power of constitution making for us, lest any method decided upon now should in thirty years prove to have been inadequate or unduly rigid. There is some force in that contention, but it is not conclusive. It is not safe to leave the question open and ambiguous indefinitely; for at any time a dispute on a concrete issue may arise, embarrassing for the British parliament and a hindrance to a calm solution of the general problem of amendment procedure. No other country has postponed seeking a solution of to-day's problems out of fear that to-morrow's may require a different approach. The certainty of political and economic change in the generation ahead of us is not an argument for failing to provide ourselves with the machinery to bring our system of government into line with changing facts; it is an argument for making the method of amendment adopted a flexible and feasible rather than a rigid one.

Next, would it be sufficient to grant the power of amendment to the parliament of Canada acting alone, but with the safeguard of requiring special procedure or special majorities? Clearly there are phases of our constitution, Imperial and national, which would most appropriately be dealt with by Dominion action alone. Surely if every province is entrusted with amending

its own constitution, as far as the organization of its government is concerned, the Dominion, checked and hampered by the wider diversity of interests, might safely be accorded the same privilege. I suppose no one would doubt we do not need to consult the provinces to change the quorum in the House of Commons from twenty.

A marginal case is the amendment of the provisions regarding the Senate. It may be urged that the Senate was designed to protect provincial interests, and that the provinces should participate in any proposed reform of the Senate, e.g., fixing an age limit, or altering the basis of selection, election by the people, or selection by the provincial legislature, whatever is desired. On the other hand, it may be contended that the Senate is not based on a definitely Federal principle of equal representation as the United States and Australian Senates are, that it was not constituted wholly or mainly to protect provincial interests; that the selection of Senators by the Federal cabinet without the intervention of the provinces indicates it is federal in character, and that broadly it has not acted as the representative of the provinces. The Cabinet, under the convention that has grown up that every province is to be represented, is the real federal element.

But when it comes to the definitely federal element in our constitution, to changes affecting the executive relations or the distribution of legislative powers between Dominion and provinces, the consensus of Canadian opinion, the weight of experience elsewhere and the inherent requirements of a federation, clearly call for participation by both Dominion and provinces. As regards the action to be taken by the Dominion in that case, that is action taken by the Dominion in effecting amendments, there seems no necessity, in view of the strong sectional interests represented in both houses, to require more than a majority in each house, in fact there is much to be said for the Australian and Swiss precedent of making it possible to submit an amendment, if after repeated attempts, one house refuses to concur, perhaps with the proviso of a two-thirds majority in the other house, or for the South African method of a joint sitting of both Houses.

As regards the co-operation of the provinces in this joint process, three methods may be considered: action by the provincial government; action by the legislature; or action by the electors of the Dominion voting in a referendum and counted by provinces.

1. There is something to be said for the first suggestion, action by the provincial governments, preferably through an interprovincial conference, where points of view will be exchanged and modified, but on the whole this method would probably be considered too informal and inadequate to the high occasion; if the government of the Dominion cannot speak for it, there seems no reason why the government of a province, as distinct from its legislature, should assume greater authority.

2. The third method, popular vote. There is precedent and argument also for a popular vote, but the experience of Australia and the inherent unsuitability of such a method for dealing with many technical questions throw doubt upon it.

3. On the whole, the second alternative, a vote by provincial legislatures, possibly to be completed within a specified term of years—three, five, seven years might be given—seems the solution best adapted to our needs. As to the majority required, consent of five or possibly six provinces would appear reasonable. Any amendment that runs the gauntlet of either or both the Senate and the House of Commons at Ottawa, and the majority or two-thirds of the provincial legislatures, is pretty sure to express a clearly felt national need.

By Mr. Ernst:

Q. That is general amendments you are talking about?—A. General amendments.

Q. You are not talking about amendments which would affect one particular province?—A. No. On most questions there seems no valid argument for requiring unanimous action by the provinces. The compact or treaty theory which is sometimes advanced in support of this proposal has been endorsed by a number of eminent public men, but it has no historical validity; any careful examination of the actual facts of Confederation will show it has no adequate foundation. The acceptance of the general rule of unanimity would give us the most rigid and unworkable constitution in the world. The substantial argument in its behalf is based on the desire to set special safeguards around certain provincial or minority provisions of the constitution, which, it may fairly be urged, were an indispensable and continuing part of Confederation. I think the majority of Canadians are agreed that such safeguards are fair and necessary, but they can be effected without petrifying the rest of the constitution. It should be possible, and there is precedent to guide us, to provide for provincial unanimity in amending, for example, section 93, which safeguards minorities' educational rights, against provincial action; section 133, regarding the use of the English and French languages; and section 92, subsection 12 (solemnization of marriage in the province) and subsection 14 (administration of justice in the province). Section 92, subsection 13 (property and civil rights in the province), has some claim to be included in this category if it is defined as covering private contractual rights and provisions for the holding or transfer of property, say, the points on which the Civil Code of Quebec differs from the law prevailing in other provinces, and is not construed so broadly as to prevent federal action if desired, in the fields of general social and economic legislation, matters of public policy rather than private right.

Some of the legal members of the committee would be better able than I am to consider whether it is possible to interpret that phrase "property and civil rights" in such a way as to cover what is desired, to make it possible to retain the special features, for example, of the Quebec Civil Code without imposing a barrier to action by the Dominion in the wider fields of public policy. It will not be an easy task.

Hon Mr. LAPOINTE: No.

The WITNESS: It will not be an easy task for the members of the committee to decide upon a plan of amendment, neither so rigid as to make change impossible, nor so easy as to make it too frequent. Someone has said the amending clause in the constitution ought to be like a safety valve, requiring a considerable pressure of steam before it will go off, but allowing the steam to escape before the explosion occurs. It will not be easy afterwards to reconcile differences and allay apprehensions so as to bring your plan or some other plan into effect. It cannot be effected in a month or a year. When effected, it will not be a perfect or eternal scheme, but it is a task no greater than that which faced the man of 1867, a task not beyond the capacity and reasonableness of the Canadian people.

Hon. Mr. MACKENZIE: Hear, hear.

The WITNESS: It is a task necessary and feasible.

Hon. Mr. MACKENZIE: I think we have had a very brilliant presentation from Dr. Skelton, and we all feel under great obligation to him.

Mr. GAGNON: I heartily join with my friend Mr. Mackenzie in that remark.

Hon. Mr. LAPOINTE: It is unanimous.

Hon. Mr. MACKENZIE: Has the committee decided to call any of the provincial attorneys general, or deputy attorneys general, to get the provincial viewpoint?

The CHAIRMAN: No, not yet. In my view, it would be desirable to have them here, or have them send in a memorandum giving us their views.

Hon. Mr. MACKENZIE: Yes, I think so.

Mr. GAGNON: All the deputy ministers?

Hon. Mr. MACKENZIE: Ask them to be present or to send in a memorandum to the Chairman in regard to their position.

The CHAIRMAN: Is there anything you wish to ask Dr. Skelton?

Hon. Mr. MACKENZIE: I do not think so. It was a very lucid presentation.

Mr. STEWART: It may be necessary to ask him some questions next day.

Hon. Mr. LAPOINTE: I am sorry I was not here at the beginning, but it must have been as good as the end. This is being published?

The CHAIRMAN: Yes. If any member indicates to me his desire to ask questions before the next meeting, we shall try to arrange to have Dr. Skelton back.

Hon. Mr. LAPOINTE: We shall read the evidence, and I may have to ask some questions.

The CHAIRMAN: There was some question raised about the possibility of witnesses, and the desirability of amending the reference, perhaps. My view is, so far as the reference is concerned, we have to deal with the method of amending the constitution, and that is as far as the reference goes. When shall we meet again?

Mr. STEWART: At the call of the Chair.

Mr. WOODSWORTH: What other witnesses are you going to have?

The CHAIRMAN: I have not any in mind at the moment. I know Mr. Guthrie has several that he mentioned when he was here. Unfortunately, owing to his illness, I have not been able to consult with him to see whether he is satisfied with the witnesses we have heard so far, or if there is anyone else from his department that he desires to call.

Mr. WOODSWORTH: I suggested several names of gentlemen who I think have given special attention to this. Professor Frank Scott of the Department of Law, McGill University, and Professor Kennedy, Department of Law, Toronto University, are two men who have given a great deal of thought to this matter, and I know there has been a memorandum prepared by Mr. Olivier of our own law department on certain aspects of the case. I think he has for some years been specializing on these matters. It seems to me these men should be heard.

The CHAIRMAN: If it is the desire of the committee, we shall hear them.

Mr. GAGNON: Before we decide on witnesses, should we not discuss the advisability of sticking to the scope of the reference, or enlarging it, if it is desirable. I for one, would prefer to stick to the terms of the reference, because if we embark upon another phase of the question, we do not know whether we will have time to finish it before the Session concludes.

Mr. WOODSWORTH: I am not suggesting an enlargement of the term.

Mr. GAGNON: No, but the Chairman a moment ago raised the question. Therefore I may be presumptuous, but I hasten to give my opinion.

Mr. ERNST: The reference deals with the method, but if an amendment is necessary, we can ask for it.

Hon. Mr. MACKENZIE: It seems to me, repeating what I suggested before, the method of the procedure in regard to amending our constitution must, or may at least, involve, the desirability or otherwise of conferences with the provinces. To deal with our terms of reference, I think we should get the provincial viewpoint, if at all possible.

The CHAIRMAN: I am inclined to agree with you, Mr. Mackenzie.

Mr. GAGNON: My purpose, Mr. Woodsworth, in ascertaining as to the advisability of sticking to the reference is to advise the witnesses who will be called. If they come here prepared to speak on the advisability of amending the constitution, it is a different thing altogether from coming and advising us on the procedure to be followed.

Hon. Mr. LAPOINTE: Mr. Ollivier tells me that he has given you a copy of his work, Mr. Woodsworth, and that he will have nothing to add to it. Perhaps you might file it, and have it published in the evidence.

Mr. WOODSWORTH: Well, it might be filed, although I think he should be called and permitted to present it in the ordinary way.

The CHAIRMAN: Would it be agreeable to you if I appoint a small committee to consider further witnesses?

Hon. Mr. LAPOINTE: Very well.

The CHAIRMAN: I will do that. We will now adjourn.

Committee adjourned at 12.50 p.m., to meet again at the call of the Chair.

HOUSE OF COMMONS,
March 21, 1935.

The Special Committee appointed to inquire into the best method by which the British North America Act may be amended met this day at 11 a.m., Mr. Turnbull presiding.

The CHAIRMAN: Gentlemen, I see we have a quorum; let us come to order. Following the understanding at the last meeting, I named a sub-committee on witnesses consisting of Messrs. Gagnon, Woodsworth, Mackenzie, Cowan, and Ernst. I understand they have met, and we will hear Mr. Gagnon's report.

Mr. GAGNON: I think it has been agreed that the provinces would be requested to submit their views either by memorandum or by delegates, and further it has been agreed that the following gentlemen will be called upon to appear as witnesses: Professor Kennedy from Toronto, Professor Scott from McGill, and Professor Norman Rogers from Queen's. The name of Mr. Louis St. Laurent, K.C., from Quebec, has also been suggested, and I think Mr. Woodsworth was of the opinion that a telegram or night letter might be sent to the various Prime Ministers or Attorneys General of each of the provinces giving the terms of the reference and asking them to submit their views. That is all I have to report.

The CHAIRMAN: Is the report satisfactory?

Hon. Mr. LAPOINTE: As far as I am concerned, yes.

The CHAIRMAN: Do you think, Mr. Woodsworth, that those three professors will cover pretty much the same ground, and could we hear them all at the one sitting? I am afraid myself that these gentlemen may cover pretty much the same ground.

Mr. WOODSWORTH: I do not know whether we can do it in one sitting or not.

Hon. Mr. LAPOINTE: I think they will have arguments of their own.

Mr. WOODSWORTH: I think so. As far as I know they have not been in consultation. I know that Professor Kennedy's presentation will be different from those of the other two.

Mr. ERNST: Could we not have them all here for the same day and ask leave to sit while the House is in session?

The CHAIRMAN: We will ask Professor Kennedy and Professor Scott to be here next day. We will meet at 10.30 and see if we can get through with two of them in one morning.

Hon. Mr. LAPOINTE: Professors Scott and Kennedy?

The CHAIRMAN: Unless you have any other preference. I suggest them because their names are the first I have written down here. With regard to this telegram, will it be satisfactory to the committee if I prepare a telegram and submit it to the sub-committee?

Hon. Mr. LAPOINTE: Yes.

Mr. WOODSWORTH: I think the chairman can do that.

The CHAIRMAN: I will not take the responsibility.

Hon. Mr. LAPOINTE: You can show it to Mr. Gagnon and Mr. Woodsworth, and that will satisfy me.

The CHAIRMAN: Dr. Ollivier, a member of the Law Branch of the House of Commons, is here this morning and will give us his views on the terms of the reference.

Dr. MAURICE OLLIVIER, K.C., called.

He said:

This memorandum had already been prepared at the time of your second meeting. The reason I wished to file it then was that after listening to Dr. Skelton's statement I could not help but think that the Under Secretary of State for External Affairs covered the whole field so admirably and completely that there was very little one could add as a contribution to the study of the question of amending the B.N.A. Act, more specially so after it has been noted how the Deputy Minister of Justice, Mr. Edwards, had exhausted the series of legal decisions as affecting the Constitution.

A further reason was that unconsciously I had covered some of the points also covered by Dr. Skelton, more specially in studying the ways and means provided for the amendment of the constitution in other Dominions or in other countries with a federal constitution, and also in considering the amendments already made to the B.N.A. Act, and how they had been made.

Therefore, when I come to these parts of my memorandum, I will ask your permission to pass them over for I would only be repeating a part of what has already been said by Dr. Skelton. I might add further that unconsciously again I had found myself quite in agreement with his conclusions.

In his statement before your special committee the Deputy Minister of Justice indicated that the object of the resolution now before the committee was to enable parliament to deal effectively with urgent economic problems which are essentially national in their scope, and that in his view, problems of that kind are now within the competence of parliament under the B.N.A. Act as it stands, because the Fathers of Confederation by vesting in the Dominion Parliament the residuary power had provided a scheme whereby all matters that are essentially national in their scope would be within the exclusive competence of Parliament.

I have no doubt that this statement respecting the powers of the Federal parliament is correct specially in view of the trend of the judicial decisions of the Privy Council respecting constitutional questions, more particularly in view of the decision in the Aerial Navigation Case where Lord Sankey said that the B.N.A. Act was a great constitutional charter, the underlying object of which "was to establish a system of government upon essentially federal principles," adding a little later that "the real object of the Act was to give the central government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the provinces as members of a constituent whole."

I think it has been demonstrated that the decisions of the Privy Council which at first were rather favourable to the provinces are now rather in favour of the Dominion. The interpretation of the law might change, the law itself however does not change. An interpretation of the Privy Council might give more power to the Federal parliament to-day, but the same court might to-morrow take us back to the first position. This is specially true of such a political tribunal as the Privy Council. As Mr. Cahan said in the House the other day: "Decisions of the Court, like the opinions of people in the course of time, swing like a pendulum."

Therefore, we have no assurance that the decisions of the Privy Council will not some day revert to the former type of decisions that were rendered when Lord Haldane presided, and for that reason, I beg to differ from the opinion expressed, that "The matter of amendments of the B.N.A. Act should proceed

as it has proceeded in the past and forever be determined by the Courts." Then the many reasons given in the House in the debates of this session and also in the debates of the month of May, 1931, are more than sufficient reasons in favour of giving the Dominion of Canada alone or the Dominion of Canada and the provinces the right to amend the constitution.

Furthermore, I do not think that one could take away matters that come definitely under section 92 and legislate upon them simply because the federal authorities estimated that they were urgent economic problems of national character. And as the constitution now stands you could not do this even with the consent of the provinces, for if the Dominion attempted to legislate outside its constitutional limits there is no doubt that such legislation would be declared ultra vires. There are a great number of subjects now within the exclusive jurisdiction of the provinces or within the concurrent jurisdiction of the Dominion and the provinces which should be within the exclusive jurisdiction of the Dominion parliament and no decision of the Privy Council can transfer them from one jurisdiction to another. The legitimate use of decisions is to ascertain principles and to interpret the law as it stands and not to alter it.

Lord Sankey (in the Aerial Navigation Case already quoted) confirms this view when he says:—

> Inasmuch as the Act embodies a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of subsections 91 and 92 should impose a new and different contract upon the federating bodies.

Many problems have arisen which could not be contemplated by the Fathers of Confederation and which cannot be dealt with without a rearrangement of the powers of the Dominion and the provinces.

Hon. Mr. LAPOINTE: Where does the quotation end?

The WITNESS: After the words "federating bodies."

Mr. ERNST: The words "founded on contract" are your own?

The WITNESS: No. That is in Lord Sankey's statement; but I will come back to it.

I. THE RIGIDITY OF OUR CONSTITUTION

There is hardly any necessity of demonstrating the rigidity of our present written constitution and I could add of our unwritten constitution as both have been mentioned. This has resulted of the compact theory of confederation of which more will be said later on.

The Federal House is even in a much worse position than the legislatures. Despits its often expressed inclination to do so it can neither abolish nor reform the Senate. It can affect the quorum of the Senate with the consent of the Senate but not the quorum of the House. In changing the number of its members it is bound by fast rules, among others that Quebec must have a fixed number of 65 members.

The Imperial parliament had to be resorted to for the appointment of a Deputy Speaker to the House and to increase the number of Senators and their regrouping. Further, it cannot alter the most important provisions of the B.N.A. Act, that is, the distribution of powers in sections 91 and 92.

II. Plans Previously Suggested

Many different ways of amending the Constitution have been suggested. A plan has been proposed for instance in 1927 by the Canadian League as follows:—

Parliament may by law amend any of the provisions of the B.N.A. Act provided:—

(*a*) That no repeal or alteration of any of the provisions of Sections 91 and 92 or of the basis of representation in the House of Commons or of the Senate shall be valid unless approved by the legislatures of a majority of the provinces or by a referendum supported by a majority of the total vote and by a majority of the voters in a majority of the provinces.

(*b*) That no repeal or alteration of any of the provisions of section 93 shall be applicable to any province until assented to by the legislature of that province.

(*c*) That no repeal or alteration of any of the provisions of section 133 be valid unless assented to by the legislature of the province of Quebec.

(*d*) That if any proposed Act amending the B.N.A. Act or its amendments be rejected by the Senate after having passed the House of Commons in two successive sessions the Governor-General may submit the proposed law by referendum to the voters competent to vote in the Dominion elections, and if passed by a majority of voters it shall be deemed to have been passed by the Senate.

Hon. Mr. Lapointe: What is the Canadian League?

The Witness: It is a sort of study associatoin that was formed in Winnipeg about ten years ago which had representatives in all the larger cities of the Dominion.

Mr. Woodsworth: I think it is practically out of existence now. There are a large number of study groups. Francis Hankin, of Montreal, is one of the promoters.

The Witness: And Mr. Herridge was also one of them.

Mr. Woodsworth: Yes.

The Witness: In 1929 we find the following plan suggested by Mr. Brook Claxton, K.C., from Montreal:—

It is apparent that the provinces would require some check on the federal power of free amendment. In providing this check, we should endeavour to see that the constitution be made as flexible as possible; that the check, while provincial, should as far as possible emphasize the national rather than the provincial capacity of the people; and that the provinces and minorities be given the rights secured them by the British North America Act and as intended by the Fathers of Confederation, no more and no less.

Keeping in mind these considerations, it is suggested that power be given to the Federal government to amend the B.N.A. Act by Federal Act with the consent of the legislatures of five provinces or alternatively at the option of the Federal government, a favourable vote on a referendum of the majority of votes in the country and in at least five provinces. An amendment effecting the rights of a minority would require the consent of the province concerned or alternatively, at the option of the Federal government, a favourable vote of the electors in the province concerned. It will be realized that the number of possible arrangements is practically unlimited. Once the principle is agreed upon the method would be worked out by the Federal and provincial governments.

A few months later, the *Manitoba Free Press* (1st August, 1929) suggests the following:—

> The right to pass upon proposed amendments should in no case be exercised by the provincial legislature. Nearly all the amendments will in some way or another touch upon some right claimed by a province; and if approval is sought from a body which by its very nature is bound to think provincially, it will never be obtained. Ratification should be sought, not from the legislatures of the provinces, but from the people of the provinces who are citizens both of the Dominion and the provinces, and therefore competent to decide between conflicting interests. The Dominion parliament, we suggest, should, subject to limitations covering the rights of minorities, have the power to pass legislation amending the B.N.A. Act; and this should come into effect unless a certain number of provinces, by their governments, ask for a vote of the people. In that event a national referendum should be held, ratification being contingent upon a majority vote over the whole Dominion and in five of the nine provinces. A simple arrangement like this would work like a charm. Amendments plainly necessary would go through by consent, since no provincial government would care to invite a rebuff by forcing a vote in cases like these. But if the ratification of the provincial legislatures is required we shall never get anywhere, because there will always be pin-headed provincialists who will see in every proposition some diabolical conspiracy against provincial rights.

That appeared in the *Manitoba Free Press* on the 1st of August, 1929. It is not a signed article; it is an editorial.

Then in January, 1932, it was suggested by one of the members of this committee, the Honourable Mr. Lapointe, that any amendment proposed should first be passed by a two-thirds majority of the House of Commons and of the Senate, but that it should come into force after having been adopted either by a majority of or by all the provincial legislatures.

In ordinary cases the ratification of a majority of the provinces should be sufficient; in vital question, as for instance in cases concerning language or school questions, or minority rights, then the unanimous consent of the provinces would be required.

It is not without interest, by way of comparison, to say a word of the amending powers of the United States, Australia, Ireland, South Africa and Switzerland. I will pass over that portion of my memorandum however as it has been covered by Dr. Skelton.

III. The Statute of Westminster and the Constitution

By the Statute of Westminster, passed on the eleventh of December, 1931, Canada has achieved its sovereignty. It would therefore appear to every one supremely absurd and inconsistent with our status of equality with other nations if we have not the right to amend our constitution.

The Statute of Westminster, the Magna Charta of our independence, has not granted us that right. On the contrary it has enacted that nothing therein contained " shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930 . . . " Section 7.

" Those who claim autonomy for Canada, says Professor Keith, naturally cannot acquiesce in a position under which the supremacy of the Imperial Parliament is insistent and undeniable. A sovereign state whose constitution can only be altered by another power is a contradiction in adjecto."

(The Sovereignty of the British Dominions, 1929 p. 201.)

The report of the Conference on the Operation of Dominion Legislation of 1929 after noting that " Canada alone among the Dominions has at present no

power to amend its Constitution Act without legislation by the parliament of the United Kingdom " concludes with the statement " that the question of alternative methods of amendment was a matter for further consideration by the appropriate Canadian authorities."

Speaking of the Statute of Westminster, Mr. Gagnon, one of the members of your committee, said:—

" This Act crowns the efforts of our parliamentariens to assure for Canada the status of a sovereign state. Henceforward, Canada will be free from any political and legislative control. England cannot bind Canada by any legislation and any treaty. Canada may, when she wishes, amend her constitution and abolish all appeals to the Privy Council."

(Canadian Bar Association.)

Mr. ERNST: That is very much in controversy at the moment.

The WITNESS: On the other hand, Canada cannot at present directly amend its own constitution, but this fact although inconsistent with our present status, is not a denial of our sovereignty as this restriction exists by our own will, and further because the power still remains in the federal parliament of saying what amendments this country desires should be made to the constitution.

This has been made amply clear by section four of the Statute of Westminster which reads as follows:—

> No Act of parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.

No mention is made of the states or of the provinces which leaves us in the same position we were in before of obtaining amendments by the adoption of joint resolutions of both houses of parliament.

The CHAIRMAN: You do not mean that the only method is by joint resolution of both Houses?

The WITNESS: No; but it is the only method that has been used since 1871.

The CHAIRMAN: I understand there was an amendment asked for without joint resolution.

The WITNESS: Once, in a special case, at the beginning, in 1871. There was no address from the federal parliament. I think Dr. Skelton discussed that the other day. Concurrence was implied by the previous adoption in the House of the Manitoba Act. The amendment was passed at the request of the Canadian Government.

The fact that we have not the right to amend our constitution although not a denial of our sovereignty is certainly absurd and inconsistent with our status of equality. In noting that the power to alter the Dominion constitution still remains with the Imperial parliament alone Keith adds:—

> Mr. Lapointe has argued that this matter, as well as the right to appeal to the Privy Council, are not inconsistent with autonomy, but the difficulty in this argument is that not a single modern autonomous state has thought it compatible with its status to leave to an external power the function of constitutional change and the judicial protection of the constitution, not to mention the correct interpretation of the laws of he Dominion and the provinces. The truth, of course, as Mr. Lapointe has himself admitted, is that there is a conflict of autonomies in Canada.

(Journal of Comparative Legislation and International Law. Third Series, vol. XIV, Part I, pp. 105-106, 1932.)

Before the Statute of Westminster was passed a Dominion provincial conference met to discuss its contents as far as Canada was concerned, the main reason for the conference being that the provinces thought the article on the subject of the non-application of the Colonial Laws Validity Act should apply to them. Of course they were anxious that the Constitution of Canada should not in any way be made liable to alteration by the effect of the Statute, but this had already been provided for in the draft of the Statute as submitted by the conference of 1929.

Paragraph 66 of the report contains a clause to the effect that "Nothing in the Act shall be deemed to confer any power to repeal or alter the Constitution Acts of the Dominion of Canada . . . etc." And also "Nothing in this Act shall be deemed to authorize the parliament of the Dominion of Canada . . to make laws on any matter at present within the authority of the provinces of Canada . . . not being a matter within the authority of the parliament or government of the Dominion of Canada . . . . etc."

That is in the report of 1929.

The only important change therefore to the statute as drafted was the application of section 2 to the provinces.

That is the non-application of the Colonial Laws Validity Act.

There are those, like Professor Keith (1931), who are of opinion, that following this interprovincial conference there is now a constitutional ground for consulting the provinces before affecting the constitution in any way because "the assent of all the provinces was then formally asked and obtained and because practice in these matters outweighs all other considerations." I must confess this argument does not impress me so much because one single incident does not constitute practice, although it is a precedent but a precedent that may be put aside to-morrow by another precedent. Then consulting a Dominion-Provincial Conference is not the same thing as formally asking and obtaining the consent of the provinces.

When we come to discuss the question of obtaining the right to amend the constitution the first thing to ask ourselves is whose consent would be required to such a procedure. The House of Commons has already emphatically pronounced itself in favour of this resolution. I believe it is also agreed by everyone that safeguards for language and education could not be varied except by unanimous consent.

Writing on this subject (1931) Keith asks the following questions: "Or might the passage of a measure in the parliament, say by a two-thirds majority in each House, and the assent of the majority of the provincial legislatures be adequate to authorize change? No doubt in matters not bearing on provincial rights the power of change could be accorded to the Dominion parliament itself by suitable majorities. But again should not the Upper House of the Dominion be made truly federal by means of election by the provincial legislatures? All these issues appear at present insoluble, and it is rather ominous of the difficulties of early progress that Ontario is now represented as regarding the existing constitution as a security for her rights as much as was once the case with Quebec, where, despite the firmness of the provincial Premier in holding to the existing constitution, a section of the Dominion representatives of the province has adopted the attitude of insistence on independence long associated with the name of M. Bourassa."

The CHAIRMAN: What is that from?

The WITNESS: The Journal of Comparative Legislation, 1931.

The CHAIRMAN: It is in this Journal of Comparative Legislation?

The WITNESS: Yes.

Hon. Mr. RALSTON: In Keith's article?

The WITNESS: Yes. In January, 1907, on the debate of a motion respecting an address on the representation of the provinces, Sir Robert Borden had declared:—

> I agree with what has been said regarding the undesirability of lightly amending the terms of our constitution and am inclined to agree on the necessity of some consultation with the provinces, although, of course, all the provinces are represented here.

In February, 1925, however, Mr. Meighen said:—

> Undoubtedly, the pact of confederation is a contract and there are rights involved therein not represented by the parliament of Canada.

This is in line with Keith's opinion expressed later (in 1931) that the House of Commons does not speak for the provinces.

Some doubt, as we have seen, has been created as to the power of the Federal parliament in obtaining amendments to the constitution by joint resolution of both Houses in matters of provincial jurisdiction or in matters of disputed jurisdiction.

IV. OUR CONSTITUTION IS NOT A CONTRACT

The problem has needlessly been made harder to solve by the supporters of provincial rights who are forever repeating that confederation is a contract, therefore that it cannot be changed without the unanimous consent of all the provinces.

On page 17 of the minutes of the proceedings of the committee the chairman has called attention to a view put forward by Professor Arthur B. Keith in which the latter says:—

> It was most expressly recognized in 1907 by the Imperial government that the Federal constitution is a compact which cannot be altered save with the assent both of the Dominion and the provinces. (Responsible government and the Dominions, p. 256.)

As a logical conclusion to the first proposition, some time later, that is, in 1929, Professor Keith in his book on the Sovereignty of the British Dominions, speaking of the power of amendment to our constitution as vested in the Imperial parliament wrote (p. 202):—

> It appears, therefore, that this fundamental limitation of Canadian autonomy must remain indefinitely, and with it, of necessity, the supreme power of the Imperial parliament over Canada.

Which means, of course, that if confederation is a contract we shall never be able to amend the constitution ourselves. However, the same Professor Keith, who had written in 1929 that this limitation respecting amendment must remain indefinitely, wrote the following, three years later:—

> But it remains clear that Canadian politicians have before them a plain duty to create a machinery for amendment of their constitution without extraneous aid and for the local decision of their own lawsuits. Even if we admit that they are better decided in London, the present regime derogates from Canadian status and renders somewhat absurd the reiteration of the doctrine of equality with the United Kingdom.

(Notes on Imperial Constitutional Law, Journal of Comparative Legislation and International Law. Third Series, Vol. XIV, part 1, p. 107.)

To revert to the statement that confederation is a contract this proposition contains a number of fallacies; first, confederation so called is not a confederation; second, it is not a contract; third, there is no reason except in very special cases why the consent of all the provinces should be required to an amendment to the constitution.

On the first point, a confederation is a union of independent and sovereign states bound together by a pact or a treaty for the observance of certain conditions dependent upon the unanimous consent of the contracting parties who remain free to withdraw from the union. The states forming part of the confederation retain their political independence and are, from the point of view of international law, still recognized as sovereign states. The best example of such a confederation is the Confederation of the Rhine created by Napoleon in 1805.

It is therefore easy to see why Canada is not a confederation, for the provinces have been merged or federated so as to form a judicial state enjoying all the privileges and rights belonging to a sovereign and autonomous community. It has been aptly said that " the bond which unites the states in a federation is a treaty, a pact, or a contract, in the strict sense, the principle of cohesion of our provinces is the constitution which is its juridical source and the limitation of its power."

This is the second propostion. The first condition of a contract is that there should be persons or states having the capacity to contract and to give force of law to their own agreement. Were the representatives of the provinces clothed with sufficient authority to draft a new constiution and to bring it themselves into force? A national constitution might spring from some sort of agreement, be based upon it, but when has it been considered that it is itself a bilateral pact?

On this subject Professor N. McL. Rogers is quoted as follows in Proceedings of Canadian Political Science Association (1931, pp. 205-30) :—

> It is evident that difficulties arise the moment we attempt to identify the parties to the alleged treaty or agreement of confederation. Is the Dominion a party? It did not exist prior to the passing of the British North America Act. Are Ontario and Quebec parties to the agreement? They were not distinct provinces during the confederation negotiations, although it is true that Upper and Lower Canada were accorded a seperate status at the Quebec and London Conferences. Are Prince Edward Island and British Columbia parties to the compact? They made no agreement with the other provinces but only with the Dominion. Are Manitoba, Alberta, and Saskatchewan to be regarded as parties to the agreement? They were created by Acts of the Dominion Parliament.
>
> The Crown did not authorize the delegates at the Quebec Conference to conclude a binding agreement among themselves. All that was sanctioned by the despatch to Lord Mulgrave was a conference on the subject of a union of the provinces of British North America.

Furthermore, our constitution is a law adopted by the British Parliament exercising its incontestable right of sovereignty towards its colonies. The British Parliament alone had the power and the jurisdiction to grant us a new political constitution, for there was not executive power in Canada capable of imposing a new constitution on Canada—there was however in England a legislative power having the right and the authority to legislate for the provinces of British North America. This explains the fact that the B.N.A. Act is not a reproduction of the Quebec resolutions and the fact also that the changes therein made were never referred back to the provincial legislatures.

The Quebec resolutions had 72 paragraphs, the statute consists of 147 sections. The Quebec resolutions underwent considerable changes in London at the hands of the British officials and of the Canadian delegates who had no authority to agree to any departure from the original resolutions.

Even if there had been no change in the resolutions, and even if Nova Scotia had been agreeable to the scheme, we maintain that even then that would not make of our constitution a contract.

The desires and wishes of the colonies do not take away from an Imperial Act its formal character of law of an indisputable authenticity, and England was free to agree to the resolutions or to disregard them entirely.

One may read the preamble to the B.N.A. Act to get further proof that it is not a pact: " Whereas the provinces have expressed their desire to be federally united." It does not say, " Whereas the provinces have passed a treaty or a convention, or even a draft convention, for the purpose of being federally united."

From these two propositions that we are not a confederation and that our constitution is not a contract naturally flows the third one that there is no reason, except in very special cases (to which reference will be made later on) why the consent of all the provinces should be required to an amendment to the constitution.

If Canada is to have the right to amend its own constitution, the method adopted should be one that would not make the task harder than the actual method of getting amendments. This method as defined by the Prime Minister from the strictly legal point of view is that if parliament adopts a resolution embodying a petition to the sovereign for the enactment of legislation by the Parliament at Westminster amending the B.N.A. Act, under the Statute of Westminster, such legislation would be enacted accordingly. This is in conformity with what we have already said and in agreement with the fact that all the provinces are represented in Parliament.

V. How Past Amendments Have Been Made

It is also in accordance with the practice that has obtained in the past and which was outlined in 1871, when Honourable Mr. Holton moved, seconded by Honourable Alexander Mackenzie, that ". . . . this House is of opinion that no changes in the provisions of the B.N.A. Act should be sought for by the Executive Government without the previous assent of the Parliament of this Dominion."

The vote was: yeas, 137; nays, none.

However, in 1875 an amending Act was passed by the Imperial Parliament at the request of the Governor in Council. To quote Hansard of 1876:—

> On the 18th of February 1875, the House being in session, the government passed a minute in council recommending that the Imperial Government should be asked to pass an act to amend the B.N.A. Act, and to remove all doubts as to the construction of one of its sections. The Imperial Government had accordingly passed an Act repealing the section in question—Sec. 18—and re-enacting another in lieu thereof, thereby legislating with regard to this country without any wish to that effect, being expressed by this Parliament. Hansard 1876, p. 1140.

LIST OF AMENDMENTS TO BRITISH NORTH AMERICA ACT

1. British North America Act, 1867.
2. British North America Act, 1871,
   (Establishment of provinces in Dominion).
3. Parliament of Canada Act, 1875.
   (To remove doubts as to privileges, immunities and powers to be held by Senate and House of Commons and members thereof. New section 18 substituted in B.N.A. Act).
4. British North America Act, 1886.
   (Provision by Parliament of Canada for representation of Territories, and effect of Acts of Parliament of Canada).
5. British North America Act, 1907.
   (New provisions for Provincial subsidies). Prefix 1908.

6. British North America Act, 1915.

(Number of Senators increased from seventy-two to ninety-six; number of Senators from Newfoundland upon admission to the Union; representation of any Province in House of Commons to be not less than number of Senators representing such Province.)

7. British North America Act, 1916.

(Extension of duration of Twelfth Parliament for one year).

NOTE.—The proposed amendment in 1920, relating to extra-territorial jurisdiction has not been enacted by the Imperial Parliament, although adopted by both Houses in Canada. The matter was to be taken up in the Imperial Conference and was acted upon in the Statute of Westminster (section three).

In 1871 a joint address was passed respecting the establishment of provinces in the Dominion of Canada. (*Re Rupert's Land, Manitoba, and future provinces*).

(Journals of the House and the Senate of 1871—*See also* B.N.A. Act 1871).

In 1886 a joint address was passed respecting the representation of the territories.

(1886 Journals of House and Senate. *See also* B.N.A. Act of 1886).

In 1889 a joint address was passed respecting the Ontario Boundary. (See Imperial Act 1889).

In 1906-07 a joint address was passed respecting the increase of provincial subsidies. (Provinces consulted).

(See Journals of House and Senate 1906-07. See Imperial Act 1907).

An address to H.M. was passed by both Houses in 1915 respecting the number of Senators and Members.

(See Senate and House Journals of 1915).

In the same year another address for the purpose of extending the 12th Parliament to the 7th of October, 1917.

(See Senate Minutes and House of Commons votes and proceedings).

On the 24th of June 1920, the House of Commons, and on the 26th of June, 1920, the Senate passed a joint address asking for extra-territorial power. (Not acted upon till covered by section 3 of the Statute of Westminster.)

Addresses:

1915}
1916} See Prefix to Statutes, 1916, pp. CXLV-VII.

1920 See Prefix to Statutes, 1920, p. LIV.

1921 See Prefix to Statutes, 1921, pp. XV-XVII. (Establishment of Provvinces, 1871, and subsidies, 1907.)

As a matter of fact, the constitution has been amended six times and on only one occasion was the assent of the provinces sought or given, although the amendments of 1871 and 1915 were of interest to the provinces which practice is certainly against the compact theory of confederation.

By the Chairman:

Q. On which occasion was the consent of the provinces sought?—A. Only on the question of subsidies.

Hon. Mr. LAPOINTE: In 1907.

The WITNESS: British Columbia was the province.

The CHAIRMAN: British Columbia refused to consent?

The WITNESS: Yes. It was not unanimous consent, consent of all provinces but British Columbia, the interested province. However, as on the other hand the provinces are separate entities, sovereign in their own field of action and in their own jurisdiction, there is no doubt that a system of amendment providing for consultation, agreement or ratification would prove more satisfactory.

In the debates of 1925 on this same subject Mr. Meighen explained why the constitution had been amended without the consent of the provinces: He said:—

> We have amended the B.N.A. Act many times upon address of this House without speaking to the provinces at all, why? Because the amendments we asked for did not affect in any way minority rights, did not affect in the remotest way provincial rights, were amendments in which the provinces or minorities were not concerned at all.

VI. SUGGESTED METHOD OF AMENDMENT

Before entering into the discussion of what changes should be made to the B.N.A. Act it is necessary to provide for the method of amendment, once this method has beeen devised and agreed upon, the desired changes can be made one by one as the necessity or opportunity arises.

Hon. Mr. LAPOINTE: Are you not quoting Mr. Meighen?

The WITNESS: No, I finished the quotation just before the last paragraph. They may originate in the House of Commons either at the suggestion of the Government of the day, or as a result of an inter-provincial conference.

We would humbly suggest they should be incorporated in a bill to be passed by a two-thirds majority in each House, provided that if such bill should fail to obtain a two-thirds majority in the Senate, it might be introduced again in a subsequent session in the House and if it then passes again with a two-thirds majority, a two-thirds majority shall not be required from the Senate in this subsequent session.

The CHAIRMAN: It will require an amendment to the Constitution to get that method through?

The WITNESS: Yes, it will be the first amendment.

The CHAIRMAN: You would have to get an amendment to the Constitution in order to get the amendment that you are describing.

Mr. WOODSWORTH: If it is not interrupting the sequence of your brief, why do you suggest a two-thirds majority?

The WITNESS: Well, it is a method that has been suggested, amongst others. by Mr Lapointe.

Hon. Mr. LAPOINTE: That is the procedure adopted in South Africa on many points.

Mr. ERNST: And in the United States.

Hon. Mr. LAPOINTE: In that way it would not be too easy to alter a national character.

The WITNESS: This is a medium course.

Mr. ERNST: It is a protection against a mere government majority in both Houses.

The CHAIRMAN: You mean a substantial body of opinion.

Hon. Mr. LAPOINTE: Yes; otherwise it would be the plaything of political parties who may change the constitution by a majority.

The WITNESS: The Act, as passed by the Federal Parliament, should then be sent to the different provincial authorities to be incorporated in a ratification bill in the different legislatures who would either adopt or reject the measure

within one year from the date of the royal assent. If no action be taken in a legislature during the said period, said legislature to be deemed to have assented to the Act.

No repeal or alteration of any of the provisions of the constitution shall be valid unless approved of by a majority of the legislatures.

Mr. GAGNON: By assent or neglect to take action?

The WITNESS: If they neglect to take action, they are deemed to have approved—that is, in general cases.

Hon. Mr. LAPOINTE: Within a certain time?

The WITNESS: Within a year. No repeal or alteration of any of the provisions respecting the boundaries of the provinces or of the provisions of sections 93 and 133 (education and language) items 12, 13, and 14 of section 92 (solemnization of marriage, property and civil rights, administration of justice) shall be valid unless assented to by all the provinces—I will come back to civil rights later—and as to the question of boundaries it is provided for in the B.N.A. Act, of 1871.

The CHAIRMAN: Why is solemnization of marriage so important as to have legislative approval?

The WITNESS: In Quebec it is part of the Civil Code.

Mr. ERNST: It is almost as important in Quebec as religious and minority rights.

The WITNESS: Yes.

The CHAIRMAN: If it is so important in Quebec, they would insist on it staying in the Civil Code.

The WITNESS: I think they would. I do not think there is any change asked for there. (2) As to the representation of any province in either House of Parliament, such amendments to be approved by the legislature of such province. This is an amendment that will affect the federal government and one province alone.

Provided that the repeal or alteration of any of the provisions of the Constitution respecting and affecting only one province shall be valid if approved of by a vote of the legislature of the said province.

And provided further that the repeal or alteration of any of the provisions of the Constitution respecting and affecting the Dominion of Canada alone may be effected by Parliament without the approval of the legislatures.

When all the formalities above prescribed for the making of an amendment to the Constitution have been followed, the Act passed by Parliament and ratified by the legislatures would come into force upon proclamation of the Governor in Council published in the *Canada Gazette*.

The procedure for a referendum or a plebiscite has been left out intentionally of this suggested method of amendment as too cumbersome, too complicated, and too expensive.

The following table will indicate how the plan outlined above would work out with the different sections of the B.N.A. Act, 1867.

BRITISH NORTH AMERICA ACT, 1867

Sections spent or not required to be amended: 1 to 4, 9, 10, 11, 13 to 16, 102 to 127, (except 118) 129 to 131, 134 to 145. 51 sections	Sections where the consent of the provinces would not be required: 17 to 57, (except 51) 40 sections	Sections requiring the consent of only one porvince 69 to 80. 12 sections	Sections requiring the consent of a majority of the provinces: 8, 12, 51, 58 to 68, 81 to 92, 94 to 101, 118, 128, 132, 146, 147. 39 sections	Sections requiring the consent of all the provinces 5, 6, 7, 93, 133
				5 sections and items 12, 13 and 14, of section 92.

Some sections in the first column might be transferred to columns 2, 3 or 4.

Finally a section should be inserted in the Imperial Act stating that no change in the method adopted for amending the B.N.A. Act shall be valid unless assented to by all the provinces.

VII. Property and Civil Rights Within the Provinces

It is here suggested that any amendment to the Constitution changing the law on this subject, that is, taking away from the provinces the right to legislate on any subject coming under this heading, should not be passed without the unanimous consent of the provinces.

There should however be this exception that if it should happen that one or more provinces are not directly concerned with the amendment then the consent of said province or provinces would not be required, provided the amendment was agreed to by the provinces concerned.

And also that in the case of social services where it is for the general advantage of Canada or where some of the provinces have declared themselves unable financially to bear the burden involved, an amendment might be passed with the consent of a majority of the provinces.

As every member of this committe is aware, property and civil rights is not a subject where there has never been any interference by the federal power.

> The legislature of the province is sovereign while acting within the powers given by s. 92 of the B.N.A. Act except that where a subject of legislation is already dealt with by the Dominion Parliament, enacted within its powers, provincial legislation must give way to that of the Dominion Parliament. So while a provincial legislature may not pass legislation affecting civil rights outside the province, the Dominion Parliament may pass legislation affecting civil rights in any province. For example, among the enumerated classes of subjects in section 91 are patents and copyright. It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the province (Lord Watson in Tennant v. Union Bank (1894) A.C. p. 31, at p. 45, followed in Regina v. C.P.R., 16 C.R.C. 238; see also Cushing v. Dupuy, 5 A.C. 409, followed in Re Gimli Election, 14, D.L.R. 872).

In Cushing v. Dupuy, 5 A.C. 409, sections of the Insolvent Act (Dominion) limiting the right of appeal were held intra vires, quote:—

> It is therefore to be presumed, indeed, it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them.
>
> In Russell v. Queen 7 A.C. 829; applied in Haywood v. Burke, 60 D.L.R. 247. The "Scott Act" passed by the parliament of Canada and which was temperance legislation dependent for its application upon its acceptance by a majority vote of parliamentary counties, held intra vires as being legislation dealing with peace, order and good government of Canada, although it did interfere with property and civil rights.
>
> In Toronto v. Bell Telephone (1905), A.C. 52, a Dominion statute which authorized and empowered the Telephone Company to carry on its business throughout Canada and erect poles in the streets and towns of the various provinces held intra vires, and was not such an interference with property and civil rights within the provinces to render it invalid.

In G.T.R. v. Attorney-General (1907), A.C. 65, applied in Swale v. C.P.R., 15 D.L.R. 816. A statute of the Dominion parliament prohibiting " contracting out " by employees held to be intra vires of the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affected civil rights within the several provinces.

The Migratory Birds Convention Act, Can. 1917, c. 18, being to implement a treaty in accordance with section 132 of B.N.A. Act is intra vires of the Dominion, though trenching on provincial powers over property and civil rights, and is paramount over provincial statute; R. v. Stuart (1925 1 D.L.R. 12).

A Dominion statute supersedes a provincial statute, though both intra vires; R. v. Sheridan (1924), 3 D.L.R. 339, holding the Dominion Patent Medicines Act, Can. 1919, c. 66, to overrule the B.C. Pharmacy Act. The principle has been applied to provincial statute as to evidence of intent of crime; R. v. Richtman, 42 Can. C.C. 1.

The Dominion Bankruptcy Act is not ultra vires as conflicting with Quebec Civil Code; re Gilbert, 4 C.B.R. 56. But that Act is ultra vires insofar as it interferes with rights under leases; re Stober, 4 C.B.R. 34.

The exemptions of provincial laws as to property under the Soldier Settlement Act are intra vires of the Dominion; R. v. Powers (1923), Ex. C.R. 131.

VIII. A New Constitution

It is suggested further that your committee recommend the appointment of a commission to draft a new constitution using the B.N.A. Act as a basis. The first step would be to consider the sections in the Act which were temporary and now spent, which therefore be left out.

The new Constitution Act would then be divided into seven parts, as follows:—

1. Preamble and preliminary;

2. Those provisions which affect the Federal power alone and where the consent of the provinces would not be required for the purpose of amendment;

3. Provisions affecting the internal constitution of the provinces and which could be amended by the provinces without the consent of the Federal parliament;

4. Ordinary sections requiring for purposes of amendment the consent of a majority of the provinces;

5. Certain sections which would require the consent of all the provinces before they could be amended;

6. A section providing that in cases amendments relate to only one or to a restricted number of provinces the consent of that province or those provinces alone would be sufficient;

7. A section providing in the manner before described for a mode of amendment to the constitution. After a new constitution has been devised and agreed upon, it should then be adopted as a Canadian Act, that is, as a Dominion statute, and we should then obtain from the Imperial parliament their consent to repealing the B.N.A. Act.

The reason for this suggestion is that even if we succeed in obtaining from the Imperial parliament the insertion of a clause in the B.N.A. Act allowing us the power to amend the constitution, the Act will still remain an Imperial Act, and as the British parliament is sovereign they would still retain the right to amend it theoretically.

It is true that a clause could be inserted similar to the one in the Statute of Westminister stating that no amendment shall be made by the United Kingdom to the B.N.A. Act unless requested by the Dominion of Canada, or even that,

having given the power to amend the Act they would not interfere with it in any way, but this clause would not be legally binding on the Parliament of Great Britain as a statute cannot bind future parliaments and can always be repealed in a subsequent session.

This suggestion of having our own constitution replace the Imperial Act might not appear very important at first glance, nevertheless the fact that if we simply obtained the right to amend the B.N.A. Act we would still be exactly where we started was Mr. Meighen's main argument against our obtaining the right to amend the constitution in 1925.

On page 337 of Hansard of that year you will find Mr. Meighen quoted as follows:—

> When we have gone through all this and got our substituted system, when we have obtained the legal right to amend in our several parliaments this British North America Act, the legal foundation is not one iota better than it was before. Why do I say that? Though the British North America Act may be amended, in such a way as to give the Parliament of Canada, after a long series of provincial approvals, the right to amend the Act, and after that is all done the legal power will still remain in the British Parliament to change the Act at will.

I might add perhaps that the same objection could be raised to section 4 (already quoted) of the Statute of Westminster.

The obvious answer would be that Parliament cannot bind future Parliaments legally, but the Parliament at Westminster would certainly, as in the case of the Statute of Westminster, feel itself bound morally and constitutionally just as it is at the present time.

As Sir Robert Borden has said:—

> The Government of the United Kingdom is based, to a remarkable extent, upon usage and convention. There is a sharp distinction between legal power and constitutional right. It was natural and indeed inevitable that, in the growth of constitutional relations between the colonies and the Mother Country, there should be continual resort to and reliance upon conventions superimposed upon the law and modifying political relations without in the least affecting legal ones.
> (Canada in the Commonwealth, page 83.)

In closing this argument, I would like to summarize some of my conclusions by quoting just one paragraph from Professor N. McL. Rogers when he writes:—

> It would appear that federal practice and political expediency call for a limited measure of provincial consultation and consent in the future amendment of the Canadian Constitution, and for definite guarantees with respect to the rights of certain minorities. But that is a far different proposal from the logical implications of the compact theory. The alarming feature of that theory is the doctrine of unanimous consent which has been based upon it. It is essential that an amendment procedure should be adopted in the near future which will set at rest the present uncertainty and make it possible for the will of the Canadian people to prevail in the conscious development of their own Constitution. The first task, however, is to remove the barbed wire that has been set in our path by the proponents of the compact theory of confederation. This must be cut down and destroyed if the major objective is to be attained.

Or in the words of Mr. Gagnon:—

> Since Canada is the master of her own destinies within and without her borders, it behooves the powers that be to direct their attention and devote their energies to setting Canada's house in order as completely and effectually as possible.

The CHAIRMAN: Are there any questions that any member wishes to ask?

By Mr. Lapointe:

Q. You say that Canada is not a Confederation. Will you describe under international law what a confederation is? What do you say the Canadian system of government is?—A. A federation of provinces, not a confederation.

Q. What?—A. A federation of provinces.

By Mr. Ernst:

Q. The distinction is, the word " confederation " is based on a contract and presupposes the right to withdraw later?—A. Yes; it is an agreement between the sovereign states who have the right to retire and who have the authority to bring their new constitution into force themselves.

By the Chairman:

Q. Have you noted anywhere any expression of opinion from anybody in authority regarding the working out of the Australian system of amendment?—A. Nothing except this, that it seems to be a burden upon the shoulders of the Australian people rather than a help, especially on account of the plebiscite system. That was one of the reasons why I have let it out.

Hon. Mr. LAPOINTE: On the other hand, without expressing an opinion, it is possible it would be better to have approval by the legislatures rather than by referendum; there may be cases, I suppose, where, for instance, the representatives of the provinces in the federal government would be in favour of some amendment, and the provincial government which controls the legislature would be of a different opinion. It is possible the people of the provinces would vote according to the views of the federal representative.

The WITNESS: Perhaps then it might be suggested as an alternative method when all others have failed. The government might submit the amendment to the people if other methods have not been successful.

The CHAIRMAN: I have heard Professor Douglas has expressed some opinion in regard to the matter. Have you heard of that at all?

The WITNESS: No, sir.

Mr. STEWART: Major Douglas did not make a request to the province of Alberta. I presume the Committee know that Major Douglas has been called by the province of Alberta as their economic adviser. He is to be there for two years, during 1935 and 1936, and before he came he sent a cablegram to the Premier of Alberta, which reads as follows:—

> February 22nd, 1935—this cablegram is taken from the *Lethbridge Herald.*
>
> Please send earliest available legal opinion on currency position; also limitation of general provincial sovereignty. Cannot reach Alberta before middle May. Obstruct hasty changes B.N.A. Act.

That is from Major Douglas. He is being called by the province of Alberta as their legal adviser for 1935, 1936, and in the cablegrams which were exchanged between the Premier of Alberta and Major Douglas, Major Douglas made the foregoing statement.

Hon. Mr. LAPOINTE: Will you read it again?

Mr. STEWART: From Major Douglas:—

> Please send earliest available legal opinion on currency position; also limitation of general provincial sovereignty. Cannot reach Alberta before middle May. Obstruct hasty changes B.N.A. Act.

Mr. ERNST: It is somewhat of an anomaly. He wants to know what it is all about, and then he says, " Obstruct any change."

The CHAIRMAN: In your opinion, which is the better method of amending the Act, having some rigid method laid down in a statute which must be validated

before an amendment can be had, or adopt a method which seems most expedient for the time.

The WITNESS: Well, I think the best method would be to have a sort of rigid method with an open door, as Mr. Lapointe has suggested, with a referendum in special cases, as the people of the provinces may not think exactly like their governments.

Hon. Mr. LAPOINTE: Elastic rigidity.

Mr ERNST: You must have some degree of rigidity, otherwise you have no constitution.

Hon. Mr. LAPOINTE: You must have both.

The CHAIRMAN: The two-thirds majority to which you have referred, and which has been proposed, is it a two-thirds majority of the total membership of the House, or two-thirds of those present and voting?

The WITNESS: The way I put it is, two-thirds of those voting; two-thirds in the House and two-thirds in the Senate. If the Senate did not agree the first time, then the following session if it is passed by two-thirds majority of the House, an ordinary majority would be sufficient in the Senate, so that you would not be held up by the Senate on every amendment.

Mr GAGNON: You are aware, of course, that in 1911 a proposal was voted on in the House of Commons in England to prevent the check which was brought about by the House of Lords. In that legislation it was provided that if an Act was carried by the House of Commons during three successive sessions, then notwithstanding any position taken by the House of Lords, the Act would become the law of the land. Could we not say if during three successive sessions a two-thirds majority of the House of Commons agreed to a certain proposal— ,

The WITNESS: I would be agreeable to that. I do not think the provinces would all agree, however, because some of the provinces look upon the Senate as the protector of their rights.

Mr. ERNST: Let us assume further than Bonar Law's proposition had been adopted, that before it became law the people ought to be consulted, and if they ratify the stand of the House of Commons, then it becomes law, whether the House of Lords agreed to it or not.

The CHAIRMAN: I prefer it for two successive parliaments rather than two successive sessions.

Mr. ERNST: The fight over the Parliament Act really centered around Irish Home Rule. The Bonar Law proposition at that time was that if it passed the House of Commons and was twice rejected by the House of Lords then it was to be appealed to the country and if the country endorsed the stand of the government it automatically became law in the House of Commons whether the House of Lords agreed or not.

Mr. COWAN: Did I understand you to say you favoured the system where the people of the provinces have an actual vote?

The WITNESS: No, just the legislatures. If there were no views from the legislatures within one year—

The CHAIRMAN: Of course, it was suggested, in case this method should fail, they might take a referendum of the whole people.

Mr. COWAN: That would be for the whole of Canada.

The CHAIRMAN: It occurs to me that the way it now stands is that if the Imperial parliament on an application for an amendment exercised its own discretion as to what support they shall require from Canada to warrant them making the change, and if their discretion is wisely exercised, the question arises in my mind whether we should tie the expression of that support up to a rigid

method or whether we should allow the Imperial parliament to exercise a discretion as to the amount of support they will require in a particular case. If it is a minor amendment, perhaps the support of the House of Commons alone would be sufficient; if it is a major amendment they might, in their discretion, require something further; if it is an amendment that touches upon the particular rights of minorities I have no doubt the Imperial parliament would refuse the amendment without the consent of the minorities. The question to my mind is whether it is desirable for us, by a rigid system, to limit the discretion of the Imperial parliament.

The WITNESS: On this point of taking the Imperial parliament as a referee I might quote a statement by Mr. Brooke Claxton in the *Manitoba Free Press* under date July 30, 1929. He said:—

> Consider what would happen if the Canadian parliament forwarded to Westminster a request for an amendment which was opposed by one or more of the provinces. A Bill would be drafted and introduced in the British House of Commons. It would be referred to the committee and there the representatives of the opposing provinces would appear and argue their case. Witnesses would be called. The hearing might drag on indefinitely. All kinds of political, racial, and religious feeling might be stirred up. The work of the British House would be interrupted while it was forced to adopt the position of an umpire between the conflicting parties. We would see racing peers and Tyne-side dock-workers assisting in deciding a question concerning a country they had never seen, and a people that they neither knew nor wanted to know. Imagine the play of the press on this, and the return of the disappointed and dissatisfied Canadian statesmen to a people who might find it hard to understand some of the reasons advanced for the decision arrived at. Such a performance would never be repeated. It might finish the Imperial connection.

Mr. GAGNON: Who said that?

The WITNESS: Mr. Brooke Claxton said that. It is quoted in the *Manitoba Free Press* under date of July 30, 1929.

The CHAIRMAN: Nothing of that kind has ever occurred with respect to any request we have referred to the Imperial parliament from 1867 until now?

The WITNESS: No.

The CHAIRMAN: I imagine he has drawn on his imagination considerably.

The WITNESS: Most of the amendments we had did not touch the provinces directly.

Hon. Mr. LAPOINTE: You might add Mr. Claxton to your list; he is very interested in these matters.

Mr. WOODSWORTH: I know he is. I saw Brooke Claxton when he was here a few weeks ago and he said he and Professor Scott would try to get together on a memorandum. I would be delighted to have him here. He is a good man.

Mr. ERNST: He thinks along common lines with Professor Scott, does he not?

Mr. WOODSWORTH: Yes.

Mr. GAGNON: One of them would be sufficient; if we had Mr. Claxton we could dispense with Mr. Scott.

Mr. COWAN: A moment ago something was said about an appeal to the Privy Council. Is there not a reference now pending to the Supreme Court of Canada?

The WITNESS: Before the Privy Council; considering the question from the point of view of the criminal code.

Mr. ERNST: That matter is before the Privy Council now.

Mr. COWAN: It is before the Supreme Court.

Mr. ERNST: No, the Privy Council.

The WITNESS: The two main reasons that were given in the Nadan case in 1926 why we did not have the right to abolish appeals to the Privy Council were, first, that we could not give to our laws the benefit of extra-territoriality; second, that the Colonial Laws Validity Act still applied; and as there had been two Imperial statutes, in 1833 and 1844, respecting the Privy Council, allowing appeals from the decisions of our courts, therefore we could not legislate to abolish those appeals without enacting legislation that would be repugnant to Imperial legislation.

The CHAIRMAN: You refer to appeals to the Privy Council?

The WITNESS: Yes. On the question of extra-territoriality the Privy Council said: you have not got the right to pass laws having extra-territorial effect, therefore, once an appeal is before the Privy Council you cannot do anything about it.

Hon. Mr. LAPOINTE: It is outside of Canada.

The WITNESS: Even if you had the right to stop it from going to England, once it is there you cannot affect it. The present appeal is based on the question of the prerogative.

The CHAIRMAN: There might be some difference in an appeal to the Privy Council with regard to a criminal case and a civil case.

Hon. Mr. RALSTON: I think not. The whole question is one of our right to over-ride the prerogative of the Crown without the express consent of the Crown.

Hon. Mr. LAPOINTE: The prerogative can be repealed by the Imperial parliament; and if we now have the same right as the Imperial parliament has with regard to matters which are Canadian we have the right to appeal the prerogative.

Hon. Mr. RALSTON: The question is whether His Excellency is the King.

Mr. ERNST: Yes.

Mr. GAGNON: May I ask you if you would favour a difficult machinery to bring about amendments or a loose one?

The WITNESS: A loose one?

Mr. GAGNON: Yes.

The WITNESS: Not too loose.

Hon. Mr. RALSTON: The first thing or the last thing we want to decide is what consent is going to be necessary in order to pass an Act which will permit an amendment. How are you going to get started? Parliament raised that question. Are we going to recognize it as a fact in fact whether it is so in law or not for the purpose of starting machinery and drafting an Act which will provide the machinery for an amendment? Are we going to pass a new Statute of Westminster or another section repealing that section which saves the right of amendment and putting in something with regard to machinery? How far do we go with respect to consent of the provinces in the Statute of Westminster?

Hon. Mr. LAPOINTE: There is nothing.

Hon. Mr. RALSTON: In passing the Statute of Westminster was it assented to by the Dominion-Provincial conference?

Hon. Mr. LAPOINTE: In the draft of the Statute of Westminster the Colonial Laws Validity Act was repealed as far as Dominion legislation was concerned, meaning that any law passed by the Dominion parliament would have its full effect even if it is repugnant to an Imperial statute; but that did not apply to provincial legislatures in their own spheres, and there was that

conference for the purpose of ascertaining whether the provinces would have the same autonomy in legislation and that their legislation would be sovereign even if repugnant to any Imperial legislation.

Hon. Mr. RALSTON: There was consent at least by conference of the provinces to the Statute of Westminster.

The CHAIRMAN: With the reservation with regard to amendments insisted upon by some of the provinces.

Mr. COWAN: Was not that the time that Mr. Taschereau and Mr. Ferguson objected?

Hon. Mr. LAPOINTE: That was after.

Mr. GAGNON: The first time was at the 1930 Imperial Conference, and in 1931, I am informed, when the Statute of Westminster was passed in the House of Commons and the Senate there was a special inter-provincial conference convened at Ottawa for the purpose of ratifying that statute.

Hon. Mr. RALSTON: And they said they reserved their sovereign right to pass legislation affecting them and repugnant to the Colonial Laws Validity Act.

The CHAIRMAN: I think that is right. That is what Mr. Taschereau and Mr. Ferguson objected to. Would Tuesday be satisfactory for another meeting?

Hon. Mr. LAPOINTE: Have you decided whether provincial representatives are to appear?

The CHAIRMAN: It was left to me in the early stages of this meeting to draft a telegram to the provincial governments asking them to express their views on the subject matter of the resolution. The telegram will be submitted to Mr. Woodsworth and Mr. Gagnon for their approval.

Hon. Mr. LAPOINTE: Yes. That is all right. That was one of the great difficulties when I was discussing this matter with Mr. Woodsworth in the House. He said that the B.N.A. Act is not only our constitution; it is the constitution of the provinces. If there is any change made to it—a new form—having an Act of our own here, and no longer having any Imperial statute—well, there must be something to give some constitution to the provinces outside of a purely Dominion act. That is where the difficulty will come to a large extent.

Mr. WOODSWORTH: Would not that be about the only procedure we could take now to get their representations?

Hon. Mr. LAPOINTE: Yes.

Mr. COWAN: I think the provinces are just as sovereign in their right to ask for an amendment to this constitution as we are.

Hon. Mr. LAPOINTE: Yes.

The CHAIRMAN: One of the things I had in my mind, if Mr. Ollivier could get it for us, was that while he had discussed machinery to enable the Dominion to get an amendment to the constitution we had not discussed any machinery to enable a province to get an amendment, even though the British North America Act was the constitution of the provinces as well as the Dominion. Of course, I realize that within their own jurisdiction the provinces have power to amend, but have no power to expand their jurisdiction.

Mr. COWAN: It is their constitution as much as ours.

Mr. WOODSWORTH: I would suggest that copies of this evidence so far taken might be sent to the provinces at the same time so that they would have our ideas before them.

Mr. GAGNON: I think the provinces have received our reports.

Mr. WOODSWORTH: Probably.

The CHAIRMAN: We will try to meet again next Tuesday.

The committee adjourned to the call of the Chair.

HOUSE OF COMMONS,

OTTAWA, March 26, 1935.

The Special Committee appointed to enquire into the best method by which the British North America Act may be amended, met this day, at 10.30 a.m., Mr. F. W. Turnbull, chairman, presiding.

The CHAIRMAN: Gentlemen, I see a quorum. We have Professor Kennedy present this morning. He is to speak to us with respect to the subject matter of the reference.

Professor Kennedy, will you just tell us something about who you are, and what your qualifications are.

Dr. W. P. M. KENNEDY, Professor of Law, University of Toronto; called.

I am a professor holding the chair of Law at the University of Toronto.

In the evidence that I want to submit to the committee, Mr. Chairman, I want to keep away as far as I can from what has been submitted to you before; and the way I approach the problem is this—

The CHAIRMAN: Does that mean, that with respect to what you keep away from it meets your approval?

The WITNESS: I am going to keep away from it as much as possible. I do not want to cover ground that has already been covered.

Hon. Mr. MACKENZIE: You are going to break new ground then.

The WITNESS: I will not guarantee that.

I approach this problem as a practical problem, and I think we have got to get away from the idea that the B.N.A. Act is "contract" or "treaty." I do not want to go into that, but it is true neither in history nor in law. The B. N. A. Act is a statute, and has always been interpreted as a statute. It is perfectly true that if you read cases on the B. N. A. Act—we hear very frequently of the Quebec resolutions and such like—but the courts have interpreted the B. N. A. Act uniformly as a statute. There is one case where as you know, the judicial committee did refer very strongly to the Quebec resolution and to outside matters; but Lord Sankey apologized for the reference, and he was careful to make it clear that he was interpreting a statute. In all the cases which I have read the statutory idea has governed.

By Hon. Mr. Lapointe:

Q. What case are you quoting?—A. The "Persons Case," Edwards et al v. Attorney General for Canada.

Now, with regard to what the Deputy Minister of Justice said; there are two cases to which I would like to draw the attention of the committee—in order to get them fuller into the record. He quotes from the Aviation Case, but I should like to emphasize an important statement in the Aviation Case. The Privy Council in the Aviation Case speaking through Sankey, L. C. J., stated as follows:—

> The real object of the Act was to give the central government these high functions and almost sovereign powers by which uniformity of

legislation might be secured on all questions which were of common concern to all the provinces.

That is a most interesting statement. I think the committee will be interested to know that these words of Lord Sankey's are taken almost verbatim from Lord Carnarvon's speech introducing the B.N.A. Act.

Hon. Mr. MACKENZIE: Lord Carnarvon distinctly said that in his speech.

The WITNESS: Yes. There is another reference to which I want to draw the attention of the committee. One of the great problems in interpreting the B.N.A. Act has been the clause covering the regulation of trade and commerce. Now, the committee will remember—the members of the profession will remember—that in the argument in the Board of Commerce Case Lord Haldane said it is beyond controversy now that it is settled that the clause covering the regulation of trade and commerce is only to be relied to as an ancillary power; that is to say, a power to assist other powers given elsewhere to the Dominion. And he repeated that in stronger terms in *Toronto Hydro Electric* vs. *Snyder,* where he said it is a power that only can be called in aid of a Dominion capacity conferred independently in the B.N.A. Act. Now, there is a most important statement in the *Proprietary Trade Association* Case—I am quoting from 1931 2 D.L.R. at page 11. Lord Atkin went out of his way, deliberately out of his way—this is the most important thing that has appeared in the Privy Council I think in the last 15 years—he deliberately went out of his way to correct a generally accepted impression. He said it is not correct to consider the power over the regulation of trade and commerce as a mere ancillary power. He said it is an independent power and it must be construed as an independent power; it is just like the Dominion control over taxation, it is just like the Dominion control over criminal law. It is an independent power. Whatever content and meaning the courts may give to it is another proposition—but it is a power that is not to be called in aid merely as an ancillary power. Now, those are the two cases that I want to get on the record.

The third point. I am not concerned to discuss at the present time the method by which the B.N.A. Act can now be changed. I subscribe to what Dr. Skelton says in his evidence at page 38; but I would like to say this—I do not think there is the slightest necessity in law for the parliament of Canada to consult the provinces in the process. It may be very good politics, but politics is not the law.

Mr. COWAN: Parliament could not do anything with the powers which come under section 92.

The WITNESS: I think the parliament of Canada can present any address to the parliament of the United Kingdom.

Hon. Mr. LAPOINTE: You would not advise this parliament to do so.

The WITNESS: I do not think it would be a very wise thing.

The CHAIRMAN: It would be a matter for the Imperial Parliament to say whether they would accept it or not.

The WITNESS: I think they would accept it. I do not believe the parliament of the United Kingdom would refuse to pass an act implementing any address from any Dominion parliament.

Mr. BOURASSA: Then, what protection would any of the provinces have, what protest could they make?

The WITNESS: You mean, how would the provinces protest—there might not be need for that.

Mr. BOURASSA: That may be, but every British subject and every body of British subjects can have access—by right of petition.

The WITNESS: Oh, yes, I know. I believe however, that the parliament of the United Kingdom would act as I have indicated; however, that is only a matter of opinion.

The CHAIRMAN: The provinces hold their sovereign rights direct from the Imperial Parliament; why shouldn't they be able to go there?

Mr. COWAN: The provinces would find some way of having representation. Your argument is, Professor Kennedy, they would not be listened to.

The WITNESS: I think they would be very courteously listened to.

Mr. COWAN: But without effect being given to their representations.

The WITNESS: I do not think they would be given effect to. I have known the law officers of the crown for many years, especially since the Statute of Westminster. I do not think any law officer of the crown would recommend his government to refuse legislation, it would put the Parliament of the United Kingdom in a very awkward position if it refused an Act implementing an Address from a Dominion parliament.

Hon. Mr. LAPOINTE: Do you think, Professor Kennedy, that when confederation took place that those who represented the provinces at that time, or the provinces themselves, ever contemplated that at any time the Act might be changed or amended without their having anything to do with it, or without regard to whether they were being hurt or not.

The WITNESS: I do not think they thought of the matter at all. I do not think the method of changing the constitution or anything of that kind ever occurred to them, their great object was to get union.

Hon. Mr. LAPOINTE: Possibly; but, Professor, do you think they should have or would receive any consideration in such circumstances?

The WITNESS: That is a theoretical question; I cannot answer it, I do not know.

Mr. COWAN: They could not have contemplated the Statute of Westminster.

Hon. Mr. LAPOINTE: Quite so.

Mr. GAGNON: You are concerned only with questions of law, not with questions of policy, Professor Kennedy?

The WITNESS: That is it.

Mr. COWAN: Your idea is that the Imperial Parliament would not act as an arbitrator between the provinces and the Dominion?

The WITNESS: That is what I think; that is only my opinion.

Mr. COWAN: You have made that clear.

The WITNESS: I don't think I need pursue that any further.

Mr. BOURASSA: Is not the logical conclusion of your argument that Canada is not a confederacy? that the provincial governments have no real autonomy? because, after all, the power of amending the constitution is a sovereign power par excellence.

The WITNESS: Yes.

Mr. BOURASSA: If under an address from the federal parliament any power now possessed and exercised by the provinces can be wiped out by the final decision of the Imperial Parliament, which we have preserved—because, we have preserved it, although the Imperial Authorities did not care about it particularly—if any of these provincial rights can be wiped out, then it means that eventually—following to a logical conclusion the argument you present—it means that provincial governments and legislatures have no real autonomy. Theirs is a subject position with regard to the Canadian parliament. It is no more the mere exercise of residual powers at Ottawa; by residual powers it was not contemplated, as you know—and Sir John A. Macdonald made this point

clear in his comment upon the Quebec resolutions—that the Federal authority would exercise those powers which heretofore have been acknowledged as being in the sole possession of the provinces, including their exclusive right to amend their constitution under section 92. Now all that may be wiped out by a single address from the federal parliament. That would be the logical end of your argument; I do not see as you do but I mean, that is the logical conclusion of your argument. Isn't that so?

The WITNESS: Quite so.

Mr. BOURASSA: I want to make that clear.

The WITNESS: I do not deny it. I am only expressing an opinion.

Mr. BOURASSA: Quite so, I wanted to get it clear.

The WITNESS: I want to leave this phase of my argument and come down to certain suggestions, if I may. I am going to presume that changes are necessary, for the moment; but I want to keep, if I can, as strictly as possible to the reference of the committee. Now, the first point I want to make is this: We must keep strictly to the idea that we are a federation, that is fundamental; and keeping that idea in mind I think we are going to get somewhere, if we get away from the idea of provincial "rights" and federal "rights"; provincial "rights" and federal "rights" may become national wrongs. I think if we can only approach this subject from the point of view of what is in the best interests of Canada and its provinces, we shall touch the real issue behind all law—what changes will work for the social benefit of Canada? Now, it is comparatively easy to change the law. We know that the statute books of the world are just cluttered up with acts of parliament which are futile, but it is no easy thing to change the laws in a real beneficial way. I think there has happened in New York State something which is of extreme value. I refer to Legislative Document number 60, (1935). The legislature of New York have now appointed a standing committee to report annually to the legislature on the actual workings of the law. And it is from that point that I want to begin. I do not think, honestly, we are going to get anywhere in relation to the British North America Act by sentiment.

Hon. Mr. LAPOINTE: By what?

The WITNESS: By sentiment. The truth is, the situation is full of sentiment.

I think a method of approach which can be very useful would be to have a Royal Commission to study the workings of the Act, an independent commission, as far as possible. The members of the committee will know, of course, that there was a Commission appointed to study the Australian constitution; and it was a failure because it was an entirely political commission and each political party had representation on it and they got nowhere. But I believe that a commission formed of judges and men of independence, men commanding public respect, to go around the country and take evidence as to how the B.N.A. Act is actually working would get somewhere; because, the problem of the British North America Act is an economic problem, it is a social problem and it is a financial problem and it is emphatically necessary that we should find out how it all works. You say casually and it is easy to say, "Oh, this power ought to belong to the Dominion, that power ought to belong to the Dominion." The question is who is going to administer it, who is going to carry the financing? How are things to-day? There are all these problems and they are very grave problems. I am very nervous of anything that is theoretical. I think that we want to get our feet down to earth and see the thing examined scientifically, and a body of evidence put in. Reference to a Royal Commission might be made as to the workings of the British North America Act and matters incidental thereto. I would like to see that, but my idea may not be a possibility.

By Mr. Bourassa:

Q. Will you allow me to ask a question here? Have you ever considered the institution in Canada of a body similar on broad lines—and I insist on the words "broad lines"—to the Conseil d'Etat which was instituted by Napoleon, as you know, and which, after all, was perhaps the only body of the Napoleonic foundations which stood the test of time, and rendered the most services. It acted as a buffer between the autocrats and the subservient representative bodies, and between the people and the government. You know what services it rendered in the making of the civil code, and the initiation of so many projects of laws, and the interpretation of laws already in existence. It is still rendering great service in France. It is a modest and therefore an efficient body. Have you ever thought of something similar to that for Canada?—A. No, I have not.

Q. Which would include, and under the conditions of our country, I suggest should include representatives from the provinces?

Hon. Mr. LAPOINTE: You do not mean this to be a permanent body?

Mr. BOURASSA: Yes, a permanent, consultative body.

Mr. GAGNON: A sort of a new economic council?

Mr. BOURASSA: No, not quite.

Hon. Mr. LAPOINTE: A constitutional brain trust.

Mr. BOURASSA: It would be a body to which suggestions might be made, either by the provinces or by outside people. It would digest all those suggestions and make reports, leaving to the various legislative bodies the full responsibility.

Mr. COWAN: Your idea is that that body would continue to function even after it made its report?

Mr. BOURASSA: Yes, a permanent body, but not too numerous, consisting of representatives of the various provinces. For example, suppose each province were represented by one member. That would be amply sufficient. It could be changed once in a while. I simply suggest the idea. I remember suggesting it to Sir Lomer Gouin in Quebec, for the province. Of course, he opposed it. He was bound to oppose it because I proposed it. But he was struck with the idea, and I do not think I go beyond the mark when I state that after I had gone from Quebec he had thought of adopting it as his own. Pardon me for the interruption.

The WITNESS: Not at all. Suppose now that we assume that it is necessary to have constituent powers in Canada: powers to change the constitution. I approach that problem from two angles. First of all I want to break the North America Act up. You must look at it from three very distinct angles. The first thing is this: There are certain sections of the British North America Act which I emphatically consider fundamental. They are the very basis of the federation; and no person except a pure doctinare would suggest that any one of certain sections should be changed without the unequivocal and categorical support of all the provinces. I refer to such sections as aspects of the civil law in Quebec, the position of the French language, the provincial control over education, the power of a province to change its constitution, the provincial control over the solemnization of marriage. I would like to see put in there another clause—I am not enumerating them all—but I would very much like to see a clause protecting the judges.

By Mr. Gagnon:

Q. The judges?—A. That the tenure on which the judges hold office should never be changed without the consent of all the provinces. I feel very strongly on that. There is a tendency, as you know, in North America towards the

judiciary declining and towards a lack of respect for the law. I think it would be a very fatal thing if the tenure on which the judges hold office were changed in any manner except with the consent of the whole of the provinces.

By Mr. Bourassa:

Q. You mean including exclusively federal jurisdiction like the Supreme Court?—A. No, I mean what is provided in the British North America Act, judges of the superior and higher courts.

By Mr. Cowan:

Q. Under the provision of the Act on that subject, as it stands to-day, the federal government appoints and pays those judges?—A. Yes.

Q. The number of the judges is fixed by the province?—A. Yes.

Q. Is that not just open to this, that the provinces might say, "Well, the federal government is paying; we might as well have as many judges as we can possibly get by with." In some provinces have we not too many judges?—A. I do not think that is pertinent to what I mean. That is another problem, as to whether the provinces should have the power of creating judicial offices. I am discussing the question of the tenure of the judges. There are two distinct questions.

Hon. Mr. LAPOINTE: In practice, my experience is that there has to be an understanding between the province that increases the number of its judges and the federal government; because after all, if we do not vote the money it is useless to appoint judges.

The WITNESS: No money, no judge.

By the Chairman:

Q. What about the Senate?—A. I am coming to that. These are what I call the fundamentals. Then, I think I might submit to the committee—and I think it is beyond controversy—that there are certain sections of the British North America Act which the parliament of Canada might change without any consultation with the provinces; that is to say, the quorum of the Senate, and powers to bring the matter of the reservation and disallowance of bills into line with modern development. There are sections like those. It is obvious that there are some sections which it would be absurd to submit to any detailed and complicated machinery.

By Mr. Bourassa:

Q. What would you say of the representation of the Senate, of the four sections?—A. Well, I do not think that I would like to enumerate them. I am only giving you a basis of discussion. I think the least you say about enumerated things before you start to enumerate, the better.

Q. The only thing is, the question was alive this year?—A. Yes.

Q. And it still remains?—A. Yes.

Q. It was considered that the Senate, something like the American Senate, should be representative of the various groups and not of the people at large. There were twenty-four from Quebec, twenty-four from Ontario, twenty-four from the maritimes, and the western representation was increased from six to twenty-four?—A. Yes, in 1916. Now, we come to the real crux. I want to state a commonplace to the committee—of all the more value because it is a commonplace—and that is that there is no method that I have ever come across, or that the mind of man has ever conceived, of changing a federal constitution that will satisfy everybody. It is hopeless to think of it. Professor Skelton has explained to you the constitutions of the United States and of Australia, and I do not want to go into all this, but I want to make two or three remarks.

It seems strange that in all these generations there have been only twenty-one amendments to the American constitution. It is in form the most rigid constitution in the world. But the committee will remember, of course, that it has been amended countless times by judicial interpretation since the days of Marshall C. J., when he, in *McCulloch* v. *Maryland*, laid down his doctrine of implied powers. The judicial power has become the constituent power in the United States. Then in addition, the Constitution of the United States is not a statute. The Supreme Court is able, as has been said, to see the constitution from without, and to bring to it an idealized picture of the life of the United States. Our judges on the other hand are always face to face with the issue that the B.N.A. Act is a statute; and in the late nineteenth century, statutory interpretation has become somewhat ridiculous. Professor Skelton has told you something about Australia, and I have a great deal of belief in the Australian method of changing that constitution; but it has failed. I do not think the failure of the Australian method is due to the method itself. It is due to two things. First of all, from the earliest constitutional case, which was called the Federated Railway case (1906, 4 C.L.R.), it was laid down by Griffith, C. J., that the Australian constitution was not merely a statute, but a solemn contract and must be interpreted as such; and for twenty-two years they pursued this method of interpretation and there grew up an extreme mentality about state rights. On top of that there is labour politics. The Labour party, as you know, is very strong in Australia, and they are not interested in having amendments to the constitution. They appear to desire that the amending power should not work, because their whole policy is towards unitary government. I think that the committee ought to know that Australia's method might work very well apart from these conditions, which do not exist in Canada.

Here is my problem. I have got to give reasonable weight to the provinces and I have got to give reasonable weight to the federation. Now, in giving reasonable weight to the provinces, the provinces should not control the federation; and in giving reasonable weight to the federation, the federation should not control the provinces. The real problem is not the revision of legislative powers, it is the integration of Canadian interests. That is what it is, and that is the way I approach it. There is no solution that will satisfy every province, any more than there is any law which satisfies every citizen, but we are trying to run this modern country with a constitution—for which I have the most profound respect; I think it is a most magnificent creation for the time when it was done—but it was created for a small agricultural community. We have got to ask ourselves, "Is the dead hand of the past to be constantly laid with numbing effect on the body politic?" That is really what it amounts to.

I think I shall put my proposals to you shortly in a concrete form. First of all, I would like a royal commisison. The second part of my proposals I submit with the greatest diffidence, Mr. Chairman, and I certainly submit it in no dogmatic spirit. I am fully conscious of the limitations of the proposals, and I certainly submit them apart from all party politics. I am not a provincial rights man. I am not a federal rights man. I try to look at this thing judiciously, and I think that my second line of proposals will appear to the committee best in the form of a draft act, very roughly done, which I drew up last night. This would be an act saying that the parliament of Canada has passed an address, and has requested under Section 4 of the Statute of Westminster that effect be given to it; and then be it enacted by the King, the House of Commons and Lords assembled that on and after the passing of this act the parliament of Canada shall have power to change the following sections of the British North America Act—then enumerate the sections on which there might be agreement and which do not involve any controversial matter. That would be section one.

2. Nothing in this act shall confer or be deemed to confer powers on the Parliament of Canada to change the following sections of the British North America Act except after agreement with and on request from the provinces of Canada; and such changes, if and when made, shall not be in any respect altered by the Parliament of Canada except by similar agreement.

I would then enumerate certain sections such as I have suggested, as the Quebec Civil Code, education, marriage and so on and bring them in this new British North America Act. The Parliament of Canada could change them only by unanimity.

The third clause to my proposed bill would deal with changes in the British North America Act other than those referred to in sections 1 and 2 and these should be made in either of the following ways:

1. A proposed change must be approved by a majority of each house of the Parliament of Canada.

You are there representing the national idea. It is approved by the House of Commons which is the national house, and then approved by the Senate, which, perhaps not entirely logically, but for purposes of our constitution, is the provincial house. When it is so approved—

Mr. WOODSWORTH: Simple majority.

The WITNESS: Yes, I think so, because—well, I won't pursue that. When it has passed the two houses I would then submit it to the legislatures of the provinces and two-thirds of the legislatures approving is all I would ask.

By Mr. Bourassa:

Q. For those sections not included in 1 and 2?—A. 1 and 2. I think that if you get a resolution passed by both houses of parliament—and if you have two-thirds of the provinces agreeing, I think it will pretty well represent Canadian opinion. But I would go on and say that the approval of a province shall be taken for granted if it takes no action within two years.

Q. Two years?—A. Two years. Now gentlemen, you will notice I do not refer to a referendum; I will tell you why. I do not believe it is possible to drive in double harness referendum and cabinet government. I believe a referendum is something that politicians have invented for "passing the buck." I throw the responsibility where it belongs, on the legislature. A referendum has an extraordinary bad effect. Take a proposition like this: "do you believe in the St. Lawrence waterway, or something like that"? You ask the people to vote "yes" or "no." It is like asking them if they believe in eternity. You cannot isolate important questions and answer them with "yes" or "no." The ramifications of a question are too profound, and I should like to have the problem argued out in each provincial house. I am very strongly opposed—I cannot say it too emphatically—to referenda.

Q. Have you studied the Swiss system?—A. Yes, I have.

Q. Do you not like that?—A. No, and I do not think the Swiss people do themselves.

Q. I suppose you are not ready to say so but I think the Swiss people have more sense then we have?—A. I think comparing great peoples is very invidious.

The CHAIRMAN: It is a much smaller and more compact country.

The WITNESS: But I would have an alternative way. In changes under section 3 all the provinces might agree. Then why go to the trouble of having an address submitted to the legislature of each house and so on? You see what I mean? Then I would go on to say that the parliament of Canada shall have power to change section 3 and the method of amendment in 3 A, if the change in method is carried out by the method referred to in section 3 A. I now sub-

mit my bill with a clause in it which has more emphasis than anything that I have very humbly suggested. I would like to see that clause put in a new bill in the following form. It would be section 4. Before speaking of it is obvious, Mr. Chairman and gentlemen, that there are certain things—I do not know whether I should refer to them or not—but the position of the Crown would have to be preserved in both the federation and the provinces, and I think the basis of union might be preserved. I cannot form my mind on that. I have not worked out the idea; but I contemplate with great dread anything that could break up Canada. I do not know how you are going to preserve what I have called the federal basis. Are you going to allow the parliament of Canada either with consultation with the provinces or without consultation or in any way, to break up the federation, give them legal power? That is the question.

By Mr. Bourassa:

Q. You are not decided as to whether it is essential?—A. No—the question is, if you are giving power to change the British North America Act in the form I have given, then you are giving powers to break up the federation, and I am not quite sure if there should not be a covering clause as there is in the Australian Act.

Q. To put a hypothetical case, suppose the four western provinces decided that they would be better off outside the confederation and form a confederation of their own, and the eastern provinces equally agreed—divorce by common consent— —A. A decree of nullity?

Q. I would not go the length of saying that we should put a permanent obstacle—of course there is no such thing as a permanent obstacle—or go so far as to say we should oppose for all time to come the stated view and decision of a group of provinces that are united by nature to form a confederacy of their own. I think it would be against the principle of confederation—A. Yes; except I do not contemplate a situation where provinces would come along with their hat in their hand and say to Ottawa, if you do not help us out "we won't play in your yard any longer." In the Australian Act there is a covering clause which protects the confederation and Australia cannot touch it. That particular clause cannot be amended by the Australian people.

Q. That is why the people of Western Australia have gone to London?—A. That is why the people of Western Australia have gone to London. I think it is a question which should form the basis of discussion. I think it should be decided.

By Hon. Mr. Veniot:

Q. Under the present Act has not a province the right to secede?—A. No, sir, not without the permission of the parliament of the United Kingdom.

Q. With the permission of the United Kingdom?—A. Yes.

Q. It has not to have the permission of this central power?—A. No, sir. I think if the United Kingdom wanted to change the British North America Act to allow the provinces to go out they could do it.

Mr. COWAN: How far has the movement for secession gone in British Columbia?

Hon. Mr. MACKENZIE: Pretty far.

The WITNESS: And now to return to clause 4. The clause I should like to put into my bill is, I am sure, very controversial, but it is a clause I would support very strongly. I should like to put in this clause:—

> On and after the passing of this Act the Supreme Court of Canada shall constitute the final authority and subject to no appeal to the judicial committee in interpreting any question whatsoever under the British North America Act and its amendments.

I want to get on record this: a great many people go about this country talking about the right to go to the foot of the Throne. The Privy Council has nothing on earth to do with the foot of the Throne, the right to go to the foot of the Throne is the right of petition that is preserved by the bill of rights. "Going to the foot of the Throne" by way of appeals to the Privy Council is nonsense. In addition we hear Privy Council appeals upheld as being a link of empire. That also is nonsense. You do not hold the empire together by institutions. Institutions have nothing whatever to do with holding the empire together. If we in Canada are not capable of interpreting our own constitution we should not have a legislature at all. If we are given the power to make laws, we surely should have the power to interpret them, and I say that with the greatest respect. I have read, I think, every judgment that has ever been delivered by the high court of Australia, and the strength of insight, the judicial capacity, the quality of their jurisprudence is magnificent, because from the day they started out they felt they had to build their own house.

Mr. BOURASSA: Hear, hear.

The WITNESS: If my clause were enacted it would have from my point of view, two or three effects. First of all it would have a great effect in the legal profession.

The CHAIRMAN: Are you not getting outside the scope of our reference?

The WITNESS: I think we are.

Hon. Mr. MACKENZIE: It is not dangerous.

Hon. Mr. LAPOINTE: It is very interesting.

The CHAIRMAN: In another forum.

The WITNESS: I submit to the Chair. That is all I have to say. I thank you for your patience.

The CHAIRMAN: Are there any questions any of you gentlemen would like to ask within the scope of the reference?

The WITNESS: I hope I have not been too long.

By Mr. Cowan:

Q. You referred to a memorandum connected with New York State. Do you want it put in the record?—A. No. It is an account of the revision committee of New York State. They have a permanent revision committee, which was suggested by Mr. Justice Cordoza before he went to the Supreme Court.

Q. It would not help us on this?

The CHAIRMAN: We have something of the same nature in our own bar association.

Hon. Mr. VENIOT: I am sorry I was not here at the beginning. I understood the witness made a reference to the status of Canada as a federation or confederation. I am not going into the legal interpretation of it, because I do not know anything about it, but I wish to touch on it historically. Is it not a fact that at the London Conference the word "confederation" was the basis of all the resolutions?

The WITNESS: I beg your pardon.

Hon. Mr. VENIOT: The word "federation" was the basis of all resolutions of the Quebec Conference. Then another conference took place in London and I think it was changed by resolution of the conference to "confederation," on the 11th December, 1866, proposed by Mr. Henry of Nova Scotia, and seconded by Dr. Tupper representing the Nova Scotian government, and adopted by the conference on the 11th December, 1866. The basis of the British North America Act was the London Conference, not the Quebec Conference.

The WITNESS: The Westminster Palace Conference.

Hon. Mr. VENIOT: Yes. We call it the London Conference. I am trying to correct some historical statements, which I think should be corrected. It has been stated that—Dr. Ollivier stated here—I was not at the last meeting but I read his report—they could not be party to an agreement because the different provinces represented were not authorized to enter into an agreement, that they were merely representatives without authority to enter into an agreement. Now, that is not in accordance with history. At the London Conference a resolution of the provinces of New Brunswick and Nova Scotia, passed unanimously by the governments of those provinces and sanctioned by the Governor General of the two colonies, authorized them to act on behalf of those provinces to enter into an agreement. Those resolutions were presented to the London Conference. They were accepted at the time by the representatives of the Imperial government acting on behalf of the Imperial government. Now, if that is the case, from the historical standpoint, at least, Canada continued in confederation. I do not know what the legal effect would be of the difference between federation and confederation in interpreting international law—but I wish to have the historical end of it properly placed before this committee and not have this committee under the impression that the province of Nova Scotia and the province of New Brunswick had no legal authority as representatives of their provinces to enter into an agreement on behalf of those provinces. That statement is not correct. I know the facts; I know the history of it; and you will find in Sir Joseph Pope's unpublished proceedings of the London Conference —I just looked them up last evening by way of verification—you will find what I thought was the case, and it is there. I have here the resolutions; it is not necessary to put them on record; but I merely want to state that so as to have the historical facts correct. Now, that statement has been made here, and I claim it is not a proper statement.

Mr. WOODSWORTH: After all, Mr. Chairman, we can hardly go into that.

Hon. Mr. VENIOT: I think I have a perfect right to make my statement. If anything is stated here which we consider contrary to the historical facts, it should be corrected. I am leaving out the legal end of it altogether.

The WITNESS: I am afraid I am not able to deal with the history of it; I do not know it.

Hon. Mr. VENIOT: I know it.

The WITNESS: But I do not, sir.

Hon. Mr. LAPOINTE: Mr. Chairman, don't you think we might allow Professor Kennedy to finish what he had to say about the privy council. Although it may not be directly within the terms of the reference, yet if we are studying methods of changing the British North America Act, if we get for Canada the right to amend our constitution, that constitution will have to be interpreted by some court, and he was proceeding to argue that the court ought to be the Supreme Court of Canada. I think he might be permitted to go on.

The CHAIRMAN: I would say, Mr. Lapointe, that if I have to make a ruling on this question, we are bound on a question of order to stay within the scope of our reference, no matter how interesting some subjects outside of that scope might be. With regard to amending the constitution to strike out appeals to the privy council, it seems to me that there might be one amendment that might be made, but when you decide to amend there are hundreds of others, and if you started to discuss them I do not know where we would finish. I am afraid my ruling would have to be that the matter is outside the scope of our reference. However, I am in the hands of the committee.

Mr. ERNST: As a matter of grace and as a matter of academic interest I would like to know what Professor Kennedy was saying on the matter. Could

we not hear what he has to say. I know Mr. Lapointe is interested and so am I.

Mr. COWAN: I think we might hear him.

The WITNESS: I do not think I have much more to say, but I am in the hands of the chair.

The CHAIRMAN: And I am in the hands of the committee.

Mr. ERNST: I realize, Mr. Chairman, that your ruling is correct, but my request is made as a matter of grace.

The CHAIRMAN: I would suggest that if you want to hear the Professor on this subject the discussion be informal. I really think that it should not appear on the record. For the moment we are out of committee and will listen to Professor Kennedy.

Discussion followed.

Witness retired.

Professor F. R. SCOTT, called.

By the Chairman:

Q. Professor Scott, will you tell the committee who you are and then proceed with your statement?—A. Mr. Chairman, I am professor of civil law in the law faculty of McGill University and I have been lecturing on constitutional law for some few years. I understand, Mr. Chairman, that the terms of the reference in this committee exclude any discussion of what specific changes ought to be made and also discussion of whether or not such changes would be advisable.

Q. That is correct; we are considering only the method of making changes, in case changes are considered advisable at some time?—A. I have had the advantage of reading Dr. Skelton's evidence and the very thorough survey which he made of the previous amendments to the British North America Act which make it unnecessary for me to deal any further with that aspect of the question. I would like to emphasize more than he did, however, that on at least three of the occasions in the past when the British North America Act has been before us, issues very definitely concerning the provinces have been raised and yet there has been no provincial consultation. I refer to the amendment of 1871 authorizing parliament to admit new provinces, that of 1886 providing for representation of the territories and that of 1915 altering the structure of the Senate. I think one need only ask oneself how such proposed amendments would be viewed to-day by the advocates of provincial rights to realize how recent is the growth of the feeling that amendments to the British North America Act require the assent of some Canadians outside of the Dominion parliament. In that connection I should like to quote some remarks made by Colonel A. T. Galt, one of the fathers of confederation, during the debates in the Canadian parliament which preceded the passage of the British North America Act of 1871. The quotation is commented upon by Mr Dafoe, editor of the *Manitoba Free Press,* in an article which he wrote in the Queen's Quarterly in 1930. It will be remembered that that amendment of 1871 was passed at the mere request of the Canadian government, and that following that the resolution was introduced into the House that in future no amendment should be changed except by resolution of parliament. And Mr. Galt said:—

> He thought the greatest care should be exercised in dealing with the British North America Act. Under the old province of Canada the Act of Union had never been changed except on an address of the legislature, and it was most important that some rule should be followed in dealing with the British North America Act.

> He would not prepared to allow the government to exercise the power which should alone be exercised by parliament; and he hoped the government would see the propriety of proceeding by way of address. The matter was one of great importance for the only security the provinces had was that their constitutional rights could not be changed by any government that might be in power, but by parliament only. He thought the government before taking the vote should consider whether it would not be better to decide that for all time to come no change should be made in the British North America Act except in the usual approved method of address to the Queen.

There, Mr. Chairman, was at least one of the fathers of confederation who was convinced that Canada had a very flexible constitution.

But, carrying out that thought a little further, and analysing more closely the idea of provincial rights, I do not think that anyone who studies the history of the development of the law and conventions of our constitution can come to any other conclusion than this: That the conception of confederation with which the fathers of confederation started and which was written into the B.N.A. Act when it was passed in 1867 was one which cannot be harmonized with the theory of "provincial rights" as it is at present put forward by its proponents. Sir John Macdonald expressly pointed out in the debates on the Quebec resolution before the parliament of Canada that the Canadian constitution was designed to avoid the difficulties which the Americans had met on account of their doctrine of "state rights". Again I would like permission to quote an extract from Sir John's speech. He said:—

> Ever since the (American) union was formed the difficulty of what is called "state rights" has existed, and this has had much to do in bringing up the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their constitution that each state was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the constitution, were conferred upon the general government and congress. Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the general government and legislature. We have thus avoided that great source of weakness which has been the cause of disruption in the United States.

Hon. Mr. VENIOT: What was the date of that?

The WITNESS: That is taken from the speech of Sir John A. Macdonald.

Hon. Mr. MACKENZIE: That would be, August of 1865.

The WITNESS: I would suggest that the present doctrine of provincial rights with its tendency to emphasize the diversity rather than the unity of Canada, the provincialism rather than the nationalism of Canadians, has brought into our politics a new element which the framers of our constitution did their best to avoid.

It seems to me that the provincial rights movement did not spring from any weaknesses in the B. N. A. Act. The basis of the division of powers in the original act is that between matters of national importance on the one hand, and matters of local importance on the other. All matters of national import, either then existing or future, were intended to be subject to and to belong to the Dominion, whereas matters of local import were intended to belong to the

provinces. The second of the Quebec resolution makes that perfectly clear as the basis for the division of powers; that is why under our constitution there are the residuary clauses. It is not true to say that the Dominion has the residue of power; the Dominion has the residue of power over matters of national importance, but at the same time the provinces have the residue of power over matters of purely local importance, even though not mentioned in section 92.

Now, I should like to analyse what I think is the cause of the provincial rights theory as we now have it. The new attitude is the product, I think, of several causes. It is in part the political expression of the fact that a series of privy council judgments from about the end of the 19th century down I think to the time of the death of Lord Haldane, have enlarged provincial powers and restricted Dominion powers to a very considerable extent. I think these victories encouraged the provinces to ask for more and greater rights. And then, of course, there is also the idea that the protection of minorities seems necessarily to involve the defence of the doctrine of provincial rights. But a more important cause of the growth of provincialism is economic. Within the past decade or so I think there has been a movement in Canada towards the idea that there must be greater state regulation of industry. That movement, of course, has accelerated within the past five years. Now, on the whole, I think it fair to say that the larger business interests oppose the idea of regulation. Hence the large economic interests in Canada are instinctively on the side of provincial rights, since regulation of business by provinces would necessarily be less effective and less extensive than regulation by the Dominion. We may note that Canada's two most highly industrialized provinces; namely, Quebec and Ontario, have been the strongest upholders of the doctrine of provincial rights in recent years. The fact that an essentially English speaking province like Ontario has backed the provincial rights theory shows that there is much more in it than can be explained in terms of race, and I suggest that considerable support for it comes from economic groups that are thinking of their personal freedom from state interference rather than of any constitutional right. Possibly the attitude of the Montreal Gazette, a strong advocate of provincial rights, represents something of that point of view.

Now, here I think it is important to stress that "provincial rights" and "minority rights" are by no means the same thing. Some confusion is caused, certainly in the public mind, by failure to distinguish between these two terms. By provincial rights is meant the right of the provinces generally to the fullest possible degree of control over every matter within the province; it is the maximum of provincial sovereignty. Part of that doctrine of provincial rights is that the British North America Act is a compact which requires unanimous consent of the provinces for a change. Now, by minority rights is meant those special guarantees given by the constitution to the racial and religious minorities in certain matters. I would point out to the committee that a diminution of provincial rights is by no means necessarily a diminution of minority rights. If the Dominion, for the sake of argument, should provide a maximum working week for the country, this would be a limitation upon the power of the provinces and hence of provincial rights, but it would not in any way interfere with or injure the rights of minorities as such. I consider that the defence and protection of minority rights is fundamental to the whole scheme of confederation; but I would suggest that the provincial rights do not deserve as great a degree of consideration; the safeguarding of provincial rights I do not consider so much a duty as a matter of expediency to be determined in the terms of national needs. Perhaps an example of the difference between provincial rights and minority rights is to be found in the history of the school question in Canada. The right of the province to decide what language shall be used in its schools came not so long ago in Ontario into conflict with the right claimed by the French-Canadian minority to carry on instruction in their own language. A provincial right was invoked against a minority right.

That situation brings out another aspect of the minority right question which I think is relevant to a discussion of any proposal to change the British North America Act. We have to distinguish between legal minority rights, those expressly mentioned in the constitution (such as the right of language in section 133) and the "moral" or "natural" minority rights—if I may invent a term—which are those rights which the minority feels it may justly claim, but which are not safeguarded by the constitution.

Now, it is obvious, I think, that the natural minority rights are very much wider in Canada than are legal minority rights, and will grow and increase with the increase in the population and the geographical extent and situation of the minority. In the province of Quebec, for instance, it is always understood that the English speaking minority will have a certain representation on the Bench; no provision of that sort is to be found in the law. The claim of the French-Canadians to the use of their language in the schools in Ontario is a moral claim only, as the Privy Council decided in that school question case.

Mr. ERNST: You could go further, on practically every Bench in Canada there is a certain religious proportion shown in appointments.

The WITNESS: It is a convention.

Mr. ERNST: It has become a convention of the constitution, you might say.

Hon. Mr. LAPOINTE: Except that there must always be two civil law judges in the Supreme Court.

Mr. ERNST: I was not thinking of that particularly; I mean more the situation in the provinces generally; the right of representation by minorities is generally recognized, and I think will continue to be recognized fairly in proportion to the religious population of the province.

Hon. Mr. VENIOT: It is a matter of mutual agrement down your way, is it not?

Mr. ERNST: All I can say is, it is a matter which is accepted by both political parties, and I think it will be followed up; I think it is essential if you are going to have harmony.

The WITNESS: Mr. Chairman, I make these various distinctions in order to show, not only that less consideration need be shown for provincial than minority rights, but also that insofar as the natural minority rights are concerned I do not think they are necessarily more likely to be preserved through the extention of provincial powers than they are by the extension of Dominion powers. Where a minority is confined to one province, minority and provincial rights are co-extensive, but where the minority is to be found in several provinces, a strong central government may provide better protection for it than a number of strong provincial governments. In other words, it is possible that the strengthening of the federal powers will give the minority more actual influence throughout Canada than it can possess under the theory of provincial rights.

There is another matter that was touched upon by Dr. Skelton, namely the method of revision to be found in other federal constitutions. I have only one comment to make, that I would entirely agree with him, and I note that Dr. Kennedy is also agreed with him, that there is little to be said in favour of a referendum as a necessary part of the machinery of amendment. Perhaps I need do no more than state my complete accord with both Dr. Kennedy and Dr. Skelton on that point.

Now, Mr. Chairman, I would like to come to the central question that is before us. What is the best method by which our constitution in future may be amended?

Before dealing with the details of that I would like to say two things. The first is that flexibility is a particularly desirable element in a constitution. To my mind only exceptional circumstances could justify the introduction of

rigidities. A flexible constitution means ease of adaptation to changing circumstances; it means that reforms may come when needed, and that people will not be frustrated in social aspirations because of purely legal difficulties. We all know how frequently the constitutional argument has been used in Canada to excuse inaction when action was called for. If our constitution is to be "similar in principle to that of the United Kingdom" as the preamble to the British North America Act declares, then the flexibility should be characteristic of it. Sir John Macdonald put the idea clearly when he said, at the Quebec conference, "we should keep before us the principles of the British constitution. It (that is, our constitution), should be a mere skeleton and frame-work that would not bind us down. We have now all the elasticity which has kept England together." And, carrying out his idea, perhaps I might point out that that was true in the act of union of the two Canadas. Changes in that constitution would naturally come by the same means, an address of the parliament of Canada; and that when the Fathers of Confederation met they were accustomed to the idea that the constitution could be changed and that it required no more than the presentation of an address to the Imperial parliament. In fact, on one occasion they changed their legislative council by their own act, without even an Imperial act. So that the Fathers of Confederation having had that experience in Canada were accustomed to that method of change; and I would suggest that one of the reasons why there was no necessity to make provision for the amendment of the British North America Act is the existence of this principle by which the previous constitutions could be changed and had been changed, and the understanding that it would continue.

But, Mr. Chairman, there is a stronger argument for flexibility in the constitution, I think than that even of mere convenience. I think that flexibility creates a desirable social attitude towards the constitution. The elastic constitution implies a trust and confidence in the people towards their institutions and towards one another. A people like the British people, the French people or the South African people, who are not afraid of themselves or their future, and who rely upon their own mutual respect and understanding rather than on law for the protection of their rights, do much by that symbol of trust to create the very spirit of tolerance and goodwill which makes legal protection superfluous.

We in Canada to-day rely on that spirit in great part. I have shown how the natural minority rights themselves are protected by that spirit. In Quebec, for instance, the right of minorities like Protestants or Jews to practise their religion freely is declared in the Freedom of Worship Act, chapter 198 of the Revised Statutes of Quebec. I have no doubt that that Act could be repealed by a mere majority vote in the Quebec Legislature; it is not protected by the British North America Act. Yet no one fears that this right will ever be withdrawn, and the idea of religious tolerance is inherent in the traditions of the province.

South Africa is a particularly interesting example to us, I think, because that dominion has a racial problem and a minority problem comparable or analagous to that in Canada; and yet, after beginning with an Imperial statute in 1909 as the basis of their constitution, which contained special guarantees for minorities, special entrenched clauses, they have now re-enacted that statute as their own constitutional act, as a statute of their own parliament, and have thus destroyed the legal basis of the safeguards for minorities which were found in the earlier Act. The South Africans now admit that the adoption by them, by their own parliament, of their own constitution, puts it into the category of an ordinary Act of Parliament in so far that in future it could be changed legally by the procedure of an ordinary act. But they have stated in the debates and discussions of that change that, where minorities are protected, they will continue

to respect that protection, relying in future not on legal protection, but simply on one another. I feel that if we can agree, at this juncture, to choose flexibility, reasonable flexibility, rather than rigidity, we shall, besides greatly simplfying the whole process of government, be stimulating still further the development in Canada of that spirit of trust and tolerance without which even legal safeguards are of little value.

The second general observation I would make is that I do not see that there is much point now in arguing whether or not the British North America Act is a compact. It seems to me that the terms of the reference to this committee are to devise the best method of revision; and even if the conclusion was arrived at that the British North America Act was a treaty—which I do not think can be shown—it would still leave unanswered the question as to whether or not it was desirable to adopt that point of view. In considering the process of amendment, it seems to me that what we must do now is to start considering what is the best method by which amendments may be obtained in the future.

From this point of departure, I would urge that a new section be added to the British North America Act, providing for amendments, and that in future we do not use the method of address to the British Parliament. I notice that Dr. Skelton has urged that idea, and I need do no more than express my approval of it. The next point, of course, is—and again I must agree with the previous witnesses here—that there must be a distinction made between minority rights and the other sections of the constitution. I quite recognize that, in dealing with the suggestion of the method of amendment of the ordinary sections of the constitution, I shall be going beyond anything that has been put before this committee yet, in the degree of flexibility which I shall suggest. I would seriously urge that on all matters that do not touch minority rights, the best method would be to have amendments made as they have been made in the past; that is, by an absolute majority vote in the Dominion parliament alone. All our provinces are represented in the Dominion parliament. The cabinet, by the convention of the constitution, is necessarily constituted on federal lines, and I think it is perfectly reasonable to assume that no amendment could be adopted which was opposed by any considerable section of the country. For example, no proposal could be adopted which Quebec and Ontario opposed, since their representatives alone control a majority in the House of Commons; and it is perhaps not irrelevant to note that the Roman Catholic population is now 41 per cent of the total population; and the Dominion parliament, to my mind, is in the nature of an annual—

By Mr. Hackett:

Q. The Catholic population is 41 per cent of the population of the Dominion, you mean?—A. Yes, of the Dominion. That is, according to the 1931 census. The Dominion parliament may be legitimately considered in the nature of an annual interprovincial conference. That method is, to my mind, in keeping with historical precedent. It is conveniently flexible, we will admit, and is quite in harmony, I think, with the principles of confederation in this way, that any changes made there may be assumed to be of national importance and therefore come within that division as between matters of national and matters of local importance which the Fathers of Confederation themselves started from. What I feel is this, that the constitution changes anyway; even if you have a rigid constitution, it changes. If you have a rigid constitution the changes then come through the judiciary, as in the United States. If you have a more flexible constitution, the changes will come by something nearer to a legislative process. I do not think it is possible to make an absolutely rigid constitution no matter how carefully you tie it down with legal safeguards. Changed conditions of a

country will change its constitution. If you have a flexible constitution change will come naturally and easily by process of legislation. If you have a rigid constitution it will come rather spasmodically and uncertainly through the process of judicial interpretation, which I think an inferior way of changing our constitution.

I would be prepared to go further and suggest that changes in the Canadian constitution might well be adopted in joint session of the Senate and the House of Commons. I notice that Doctor Skelton mentioned this as a possibility when there is a deadlock between the two. To me it seems highly desirable. It is a method known to the French and South African constitutions. I think the Canadian constitution is weak at the moment in having no means whereby a deadlock between the two houses can be overcome with certainty; the provision in Section 26 of the British North America Act, as amended in 1915, providing for the creation of eight new senators in an emergency, not being any certain guarantee that you could overcome the deadlock. It seems to me that, instead of complicating the machinery by having a double process such as a vote in both houses and then, in the event of a deadlock, calling a joint session, it would be simpler to have the matter settled once and for all in a single vote. Perhaps I might point out that in the French constitution there is first of all a vote in the two houses, the two chambers, as to whether or not some change is necessary. If both chambers adopt that, agree that some change or revision is necessary, then they meet in joint session, at which the 300 senators may, of course, be completely outvoted by the 600 deputies.

Then as regards minority rights, I would entirely agree that any change in minority rights should require unanimity of the provinces and the Dominion parliament. In seeking the opinion of the provinces, I agree with Doctor Skelton that a majority vote in the provincial legislatures appears to be the solution best adapted to Canadian needs. Perhaps I might suggest that, as long as the Quebec legislature consists of two houses, a joint session there might be an appropriate way of securing a vote on the amendment. That is possibly not a matter for me to urge.

To sum up, I would put forward for this committee's serious consideration the following suggestions as to the best method of revision:—

1. The placing of the power of amendment in Canada.
2. Ordinary amendments to be by majority vote of the Dominion parliament assembled in joint session.
3. Amendments affecting minority rights to require, in addition to Dominion approval, the assent of all the provincial legislatures.
4. Any province not dissenting within one year to be presumed to have given its assent.

I would also suggest adding the following clause to the new Act:—

SECTION 148

1. Any provisions of this Act except those enumerated in subsection 2 hereunder may be amended by a majority vote of the members of both houses of the Dominion Parliament assembled in joint session.

2. The following provisions of this Act, namely,
   Section 51,
   Section 51a,
   Section 92, ss. 1,
   Section 92, ss. 12,
   Section 92, ss. 13, except those portions thereof assigned to the Dominion Parliament by section 91 as from time to time amended by the method of subsection 1 above,
   Section 93.

Section 133,
and this section, may be amended by a majority vote of the members of both houses of the Dominion Parliament assembled in joint session, with the subsequent assent of all the provinces.

3. A province shall be deemed to have assented to an amendment unless, within one year from the vote in the joint session of the Dominion Parliament, it has notified the Secretary of State for Canada that a majority of the members of its legislature have voted against such assent being given; provided that so long as the Legislature of Quebec shall consist of two houses the majority vote shall be taken at a joint session of the Legislative Assembly and the Legislative Council.

I notice that Dr. Kennedy suggested that same idea, but with a two-year interval. I do not see any point in keeping the country in suspense for that length of time. In the Australian constitution, six months is the interval within which the proposed amendment must be submitted to the electorate.

By Mr. Cowan:

Q. It would depend somewhat on the date of the summoning of the legislative assembly?—A. Yes; but I think, for instance, if the amendment were adopted by the Dominion parliament towards the end of its session, a year would certainly cover the next session of the provincial legislature. I do not see any reason why it should be longer. If the provinces wish to dissent, they have full opportunity of doing so at their next provincial session.

Mr. COWAN: There might just be a period when it would be impossible.

The CHAIRMAN: Say at the next succeeding session of the provincial legislature.

The WITNESS: Yes.

The CHAIRMAN: It is a matter of detail.

The WITNESS: It would be very unfortunate if a province wanting an amendment felt that another province were merely obstructing by delay. I think that is a thing which it is desirable to avoid.

By the Chairman:

Q. Does that section provide that the amendment would not be subject to amendment by the Canadian parliament?—A. Yes. That would be one of the entrenched clauses. There is just one question that remains to be considered. On this I would like to speak rather emphatically. That question is, what are minority rights? Now, I do not intend to say anything about the more obvious examples, on which I think everyone will agree. For instance, I think sections 51 and 51a of the British North America Act, providing for representation from provinces, section 93 on education, section 133 on the use of the two languages, and section 92, subsection 12 on the solemnization of matrimony, are examples on which nearly everyone will agree. The only difficult matter is the matter of property and civil rights, as I see it. That has been claimed, and has been suggested, as a minority right. In so far as that claim is based on the idea that the province of Quebec is entitled to retain its civil code and its basic French law, I think that claim is one which all Canadians must admit. As one whose profession it is to touch the civil law, I would certainly be the first to maintain the superiority of that system over the—dare I call it, the more "barbarous" system of the common law. There is no question on that idea, that Quebec should maintain its fundamental law.

Hon. Mr. MACKENZIE: It is the same as the Scotch law. It is all right.

Mr. COWAN: It has advantages.

Hon. Mr. LAPOINTE: Prof. Scott was born in Quebec.

The CHAIRMAN: Which makes that word "barbarous" unnecessary.

Hon. Mr. MACKENZIE: It was the common law he was talking about.

The WITNESS: The security of the civil law has been guaranteed ever since the Quebec Act, if not earlier, and it may be considered as the fundamental idea on which confederation is based. At the same time, Mr. Chairman, the term "property and civil rights" has always been subject to qualification. Under the British North America Act not all matters of property and civil rights belong to the provinces. The wording of the Quebec and London Resolutions is clear on that point; they assigned to the provinces control over "property and civil rights, excepting those portions thereof assigned to the general parliament."

By the Chairman:

Q. But the argument is whether or not what was said or what was resolved by the provinces has anything to do with what is now the law with regard to property and civil rights, or even with the interpretation of it?—A. I think it does, Mr. Chairman, because it is quite clear that at the conference they started with the idea that there was a subtraction which was necessary from the generality of this term, in order to allow the Dominion to exercise its various powers; otherwise, since almost everything that you can think of affects property and civil rights in some degree, no Dominion legislation would be possible at all. When the British North America Act was framed, the phrase used in Section 92, sub-section 13, was "property and civil rights in the province." This is not quite so definite as in the resolution, but the same purpose was obtained in the British North America Act by the concluding paragraph of Section 91, which in effect declares that no matter falling within the specified Dominion powers shall be deemed to fall within any provincial power. Thus it is that in legislating on bankruptcy or banking, the Dominion is empowered to interfere to the necessary degree with property and civil rights, and may even make laws conflicting with portions of the Civil Code of Quebec.

By Hon. Mr. Lapointe:

Q. It has been, as a matter of fact, doing that many times?—A. Not only doing that, but the changes made in the Quebec Code have been maintained in numerous Privy Council decisions. That is absolutely necessary in the constitution, because if we are to assign a specified power to the Dominion, then in order to carry out and enforce that power, it must have what are called ancillary powers necessary to allow it to give reasonable scope to the legislation on the specified power.

Now if property and civil rights are simply listed as a minority right requiring unanimous consent of all provinces for any amendment, it will mean that we shall have the most rigid constitution in the world. We may say if we like that we are only making it rigid for certain specific clauses. But if one of those clauses is property and civil right just in that form then the entire constitution to my mind will be rigid. For instance, suppose it was decided to give the Dominion control over insurance at a given time. That would mean carving a slice off section 92, what is now considered property and civil rights and adding it to section 91. It would mean altering property and civil rights so that one province, say Prince Edward Island could hold up the amendment even though the dominion and eight provinces wanted it. I suggest Mr. Chairman, that that conclusion is ridiculous.

How are we to overcome that conflict? Before I make my suggestion, I may say I am naturally speaking as an English Canadian, although I do represent a protected minority in the province of Quebec; that is, protected under

the British North America Act as to education and as to language. I feel some hesitation in putting forward the suggestion I am now going to put forward because I know this question touches so much more closely the French Canadians.

By Mr. Ernst:

Q. May I ask one question? If power were granted to the Dominion parliament would you include specified matters such as insurance under section 91?—A. Well, I would suggest putting it in 91, making it exclusively a dominion power, or putting it in 95 and making it a concurrent dominion power. The dominion might then legislate whenever it wanted to. The use of the concurrent power might be a very desirable method of giving the Dominion control of certain matters, particularly social legislation, where the Dominion might legislate up to a point and the provinces still be free to fill up any areas of the subject not covered by the Dominion act. If the Dominion passes an eight hour day, it will still leave the provinces free to adopt a six hour day.

Mr. KENNEDY: May I ask a question? I know I am not permitted to ask the witness a question, but may I ask you to ask a question, Mr. Chairman?

The CHAIRMAN: Yes.

Mr. KENNEDY: I want to know if the specified power were granted to the Dominion by some process of constitutional change, would it not be wise to include it in section 91 because it would be protected by the "notwithstanding" clause.

The WITNESS: I think if it gets in section 91, most certainly it gets the protection of the "notwithstanding" clause. Mr. Chairman, I have pointed out that while completely supporting the claim of the province of Quebec to its own civil law, and desiring to see it maintained, I do not see how we can put property and civil rights just in those words into an entrenched clause without in effect making the entire constitution rigid.

By Hon. Mr. Lapointe:

Q. Would you suggest a special clause in regard to property and civil rights? —A. Well Mr. Lapointe, I was going to suggest we should leave property and civil rights out of the specified minority rights altogether. That, I quite agree places property and civil rights in the position of what I have defined as a "natural" minority right. Clearly, it would not then have legal protection; but I cannot see how there would be any interest in any other part of Canada attacking the Civil Code, a general basic law which is only applied in the province of Quebec, and therefore I cannot see how there would be any danger to the retention of the civil law even though you did not include property and civil rights in the protected section. As I see it the type of amendments we are going to have in Canada are ones which will simply add from time to time to the specific Dominion powers, an additional specific power. Now, that power when added to the Dominion will carry with it the further power of interfering with property and civil rights to the extent of the other specific Dominion powers. If we add a new power to section 91 to-day it would be as though the fathers of confederation originally put it in the section. It will permit the Dominion to legislate on that, and enable them to interfere with property and civil rights to give effect to legislation enacted. It would not generally confer property and civil rights, but merely confer upon the Dominion power to render uniform throughout the country legislation on some specified subject.

Mr. ERNST: As for instance company law.

The WITNESS: Company law, and insurance.

Hon. Mr. LAPOINTE: And social legislation.

The WITNESS: Social legislation.

Mr. ERNST: I should think that company law should be uniform otherwise you will have bidding amongst the provinces as you had in the pulp and paper industries and many others.

Mr. GAGNON: Are you not afraid of new conflicts of jurisdiction once you transfer property and civil rights under section 91?

The WITNESS: Of course I am not suggesting transferring the whole section. I am mentioning matters like insurance companies, hours of labour, minimum wages, etc.

Mr. ERNST: These must be uniform otherwise you are going to have competition between the provinces.

The WITNESS: Yes.

Mr. ERNST: Competition to get companies established in the province because of cheap labour and long hours?

The WITNESS: Yes.

The CHAIRMAN: Your idea in having insurance transferred to section 91 is that it would interfere with property and civil rights just as banking does?

The WITNESS: Yes; it would give the power of interference to the same extent and no further than is now possible by any specific Dominion power. I would point out again that I am talking only of property and civil rights; the other minority rights could not be touched.

The CHAIRMAN: Although the provinces are sovereign within the ambit of their own legislature jurisdiction and derive that sovereignty from the Imperial act, you would still favour allowing the Dominion power, without reference to the Imperial parliament, to subtract from this authority and add to the Dominion.

The WITNESS: I quite agree that the degree of flexibility which I am urging will be a novel thing in relation to a federal constitution; but I do not see why we should attempt to say now, other federations are like this, therefore we must be like them.

The CHAIRMAN: Equally the dominion can subtract from its own power and add to the provinces.

The WITNESS: Equally. But this is too improbable to fear.

Mr. ERNST: You think the imperial safeguard would be enough to guard against abuse of flexibility?

The WITNESS: I do not see any likelihood of an abuse of flexibility. The other minority rights will be amply protected. We can trust to our common sense.

The CHAIRMAN: Don't you think if power were given to the Dominion of Canada to amend the constitution of its own volition it would leave the Dominion government open to more provincial raids than there are even now? That is, the fact we have to go to the imperial parliament to get an amendment with respect to subsidies would act to some extent as a safeguard against provincial raids on the dominion treasury.

The WITNESS: I don't think so, because the history of the subsidy section shows the raids have continued whether you have an amendment or not.

Mr. ERNST: We have got around that by having grants voted instead of subsidies.

The CHAIRMAN: It is a question of how successful they might be in the future.

The WITNESS: May I point out, Mr. Chairman, that although provinces under my scheme would have the right to hand over more of their jurisdiction, I do not anticipate a rush on their part to do this.

Hon. Mr. VENIOT: Would you suggest the Dominion should have power to transfer its rights to the provinces without the consent of the provinces?

The WITNESS: I have not put any qualification on the dominion's capacity, but there is no reason why this decentralization should ever occur.

Hon. Mr. VENIOT: Would you suggest the Dominion could transfer certain of its authority or rights to certain provinces without the approval of the provinces?

The CHAIRMAN: That is the logical conclusion from what he said.

The WITNESS: Yes, that is the degree of flexibility I suggest, and the reverse would be true.

Hon. Mr. VENIOT: Suppose the provinces would not act.

The WITNESS: Our amendments in the past have not been bi-lateral.

The CHAIRMAN: Is there anything further?

Hon. Mr. LAPOINTE: Let Professor Scott conclude his remarks.

The WITNESS: That is all I have in my prepared statement, Mr. Chairman. I do not know if I might make one suggestion in regard to privy council appeals or not, seeing they have been mentioned.

Mr. LAPOINTE: Let us have them.

The WITNESS: The only idea I shall put forward is this, seeing privy council judgments are already there in the law reports, and seeing that if we abolish the appeals, the Canadian Supreme Court will feel bound by previous judgments of the privy council. If there is going to be a new trend toward a more lenient interpretation of dominion powers I suggest quite seriously it is more likely to come from the privy council than the Canadian supreme court because the previous judgments are binding precedents.

The CHAIRMAN: I think you are right.

Hon. Mr. MACKENZIE: It seems to me there is a change in the attitude of the privy council in that regard.

The WITNESS: There is every indication that there is a change. I think Lord Haldane was the dominating influence in the privy council in regard to provincial rights.

Hon. Mr. LAPOINTE: They may change again.

Mr. GAGNON: Lord Haldane held the view that confederation was a treaty and as somebody has said in the other house, a sacred pact, but I think that now the lords of the privy council have changed their view in regard to the treaty or pact idea.

The WITNESS: I think that is so.

Mr. COWAN: The trend of things is for the dominion parliament to have increased jurisdiction on many of those subjects, social legislation and so on. Do you anticipate the provinces will not object to that?

The WITNESS: I think many provinces will object.

Mr. COWAN: How would you meet their objection having in mind the privy council's decisions?

The WITNESS: I am not sure I understand your question. Under my scheme where the power to amend is in the Dominion alone in all matters outside the minority rights clauses, the party in power will have to consider whether it will remain in power if it goes against the opinions of the provinces.

The CHAIRMAN: Even if the power to amend is given to the Dominion parliament, some of the provinces will state it is not in the interest of the rest of Canada.

Hon. Mr. LAPOINTE: The same objection will occur in every country in the world.

The CHAIRMAN: There is no reason why it should be so in this country.

Hon. Mr. MACKENZIE: We might suffer in the west.

Mr. ERNST: The same objection would apply in reverse; if you cannot get it without the consent of the provinces you will never get it through.

Hon. Mr. LAPOINTE: Yes; that is what the professor wants to overcome by his suggestion.

Mr. ERNST: I think so, personally.

Mr. GAGNON: Don't you believe that if we had a clause whereby the Act could not be amended unless we had the unanimous consent of the provinces, no amendment could ever be brought forward; there would always be one province which would be a stumbling block?

Hon. Mr. LAPOINTE: It would be absurd on ordinary matters; there is no doubt about it.

Hon. Mr. MACKENZIE: May I ask if we have had any word from the provinces?

The CHAIRMAN: Not yet.

Mr. COWAN: I would like to recall Professor Kennedy.

Witness retired.

Professor W. R. M. KENNEDY, recalled.

By Mr. Cowan:

Q. Professor Kennedy, you referred in your previous remarks to the creation of a royal commission; what would follow from that procedure?—A. Well, according to my idea I would like to get the matter away from the realm of theory. It seems to me the approach to changing the British North America Act is shot through with doctrinaire conceptions, and I am a great believer in examining how the law works and how the thing is working to-day. How is the British North America Act actually dealing with these problems which have arisen, such as the social services. Then, under this royal commission, we would secure a body of material which would not—I submit, with great respect—come through parliaments or assemblies; it would be scientific and secured under oath.

Q. What could that commission do that this committee could not do?—A. I would have it an itinerant commission similar to the banking commission, which would go through the country and hear evidence. I have done a great deal of work for interprovincial conferences—legal work—and I submit with great diffidence that it seems to me that sort of procedure does not get us anywhere; and I think a royal commission would bring the matter before the public, draw it strongly to the people's attention. This question of changing the constitution is usually a theoretical one with the average man.

Hon. Mr. MACKENZIE: Of course, the west would make another claim for better terms immediately.

The WITNESS: Let them put it before the commission.

Hon. Mr. MACKENZIE: I am all for it.

Hon. Mr. LAPOINTE: What would you say to the proposal of the late Sir Clifford Sifton that a national convention should be called?

The WITNESS: A new Quebec conference?

Hon. Mr. LAPOINTE: Yes, an enlarged one where there would be representatives of the Dominion parliament, both houses, representatives of every legislature and even, I think, representatives from some bodies such as the Trades and Labour Council.

The WITNESS: To draw up a new constitution?

Hon. Mr. LAPOINTE: Yes; to discuss a new constitution.

The WITNESS: I had that in my evidence, and I talked to Sir Clifford Sifton, who discussed that with me many times, and it seems to me to be purely theoretical. My answer, however, would be this: if I thought I could get a constitution out of such a body which was not to be a statute I would agree; that is, a constitution that was not harnessed with the rigidity of statutory interpretation and would be elastic. But you will never get back to that now; the courts are so set on statutory interpretation.

Hon. Mr. LAPOINTE: The law which you suggest would be an Imperial statute, of course?

The WITNESS: Yes.

Hon. Mr. LAPOINTE: Would you suggest making a Canadian statute afterwards like South Africa's?

Professor SCOTT: I would suggest that as a proper idea.

The WITNESS: Then you would get rid of the Privy Council decisions.

Professor SCOTT: South Africa has done that.

Mr. COWAN: Do you suggest, Professor Kennedy, that this committee should not suggest changes and methods until the royal commission had met and discussed the matter and reported?

The WITNESS: That is my approach to law. That is the way I teach law. I am just telling you my honest approach to law. What the law is does not interest me at all. It is quite easy to learn law. The point is: how is the law working? But I began to prepare material for this committee from my own personal occupation which is teaching law, and I thought, in dealing with the fundamental law of the nation, that we ought to go a long way to find out what is best to be done.

Mr. ERNST: As far as the national function is concerned, surely this parliament of Canada fulfils that function. I do not know why Mr. Taschereau is any more entitled to speak for the province of Quebec in federal matters than Mr. Lapointe.

Hon. Mr. MACKENZIE: You are getting in dangerous waters again.

Witness retired.

The CHAIRMAN: Mr. Gagnon, have you decided to call Professor Rogers?

Mr. GAGNON: We have not done anything yet. When will we meet again?

The CHAIRMAN: Next Tuesday would seem to be the most suitable day.

The committee adjourned to meet Tuesday, April 2, 1935.

HOUSE OF COMMONS,
April 2, 1935.

The Special Committee appointed to enquire into the best method by which the British North America Act may be amended, met this day, at 11.05 a.m., Mr. Turnbull the chairman, presiding.

The CHAIRMAN: Gentlemen, kindly come to order. We have a quorum. I understand Mr. Veniot has some corrections to make in the report of his remarks at the last meeting.

Hon. Mr. VENIOT: Mr. Chairman, before proceeding with the hearing of the witness I desire to call the attention of the committee to some of my statements as reported in No. 4 of the proceedings of this committee. The report of my remarks really reverses the statements I made. For instance, on page 78 at the bottom of the page I find the following:—

> Hon. Mr. VENIOT: The word "confederation" was the basis of all resolutions of the Quebec conference.

What I said was: The word "federation"—not "confederation". It makes all the difference in the world. And then the report goes on:—

> Then another conference took place in London and I think it was changed by resolution of the conference to "federation" . . .

It was changed to "confederation". And right after that comes the word "confederation"; and it goes on;—

> On the 11th of December 1866, proposed by Mr. Henry of Nova Scotia, and seconded by Dr. Tupper representing the Nova Scotian government, and adopted by the conference on the 11th of December, 1886.

And then it goes on as follows:—

> The basis of the British North America Act was the London Conference, not the Quebec Conference.

That is correct; but in the paragraph before that there is an error. I am made to say that I wish to touch on it historically, and my remarks continue:—

> Is it not a fact that at the London Conference and the Quebec Conference the word "confederation" was the basis of all the resolutions?

The words: "and the Quebec Conference" should be left out.

The CHAIRMAN: Your corrections will be noted on the record.

Now, following the suggestion that a telegram should be sent to all the attorneys general of the provinces, the following telegram was sent to each of the nine provinces:—

> The select committee of the House of Commons on the British North America Act desire to have the views of your government with respect to methods of securing amendments to said Act stop The resolution referred to the committee follows quote Resolved that in the opinion of this House a special committee should be set up to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of racial and religious minorities and legitimate provincial claims to autonomy the Dominion

government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope unquote While the committee does not object to the personal attendance of a representative of your government it was thought less costly to ask for a written submission stop Copies of proceedings have been sent you stop Please intimate when we may except to receive your submission stop.

With the exception of a telegram from Mr. Taschereau saying that a copy of the proceedings had not yet reached him, we have just the reply from Mr. Pattullo, premier of British Columbia which reads as follows:

Victoria BC Mar 28 1935 4 PM

A. A. FRASER,
Clerk of Committee on the B.N.A. Act Ottawa Ont.

Reference your wire twenty-seventh to Attorney General requesting written submission from the government of this province to your committee. It is the opinion of the government that amendment of the constitution is too important a matter to be dealt with in manner suggested. It is not thought that satisfactory conclusions can be reached either federally or provincially until a conference of the provinces and the Dominion is held when full discussion may be had and matters properly debated. Other than stating that the right should be secured to amend our constitution in Canada this province respectfully declines to make submission to your committee neither will it feel bound by any report which may be made by your committee.

(sgd) T. D. PATTULLO.

Mr. WOODSWORTH: It is not very encouraging.

Mr. STEWART: You are wasting your time.

Mr. WOODSWORTH: British Columbia always is —

Hon. Mr. MACKENZIE: British Columbia always takes the lead.

The CHAIRMAN: Is there any reply, or shall we let it rest where it is?

Hon. Mr. MACKENZIE: I think we should let it rest where it is.

Mr. COWAN: What is the reply from Premier Taschereau?

The CHAIRMAN: The telegram states that our telegram has been received, but that copies of the proceedings have not been received and they await their arrival.

Now, we have Professor Rogers from Queens University with us this morning, and he will give us his views concerning the matter before us.

PROFESSOR NORMAN MCL. ROGERS called.

The CHAIRMAN: Would you mind telling the committee for the purpose of the record who you are, and let us have the statement that you propose to give?

The WITNESS: I am professor of political science at Queens University. I have prepared a statement which might serve as a foundation for questioning by members of the committee:—

The evidence already submitted to this committee by other witnesses has dealt with amendments to the British North America Act which have been effected since 1867 and with the procedure by which these amendments were initiated and given final form as statutes of the Imperial parliament at Westminster. This historical background of the problem of constitutional amendment has also been covered in considerable detail by other witnesses. I assume that you will not wish me to retrace ground already covered. Perhaps it would suit the convenience of the committeee if I made some preliminary observations on

some of the evidence already given and then passed on to consider some specific proposals regarding the method to be used in the future amendment of the British North America Act.

The attention of the committee has been directed to amendments to the British North America Act which have beeen effected at the instance of the Dominion parliament. It may be of interest to observe that on one occasion an attempt was made to secure amendments to the British North America Act without the concurrence of the Dominion parliament. This attempt developed out of the first Inter-Provincial Conference, which was convened at Quebec on October 20, 1887, and continued until the 28th day of the same month. The conference was summoned by Hon. Horore Merciér, Premiér of the province of Quebec, and was presided over by Hon. Oliver Mowat, Premier of the province of Ontario. It was attended by the premiers and supporting ministers of five prqvinces, Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba. Representatives of the Dominion government were also invited to attend, but this invitation was declined by Sir John Macdonald on behalf of the Dominion government.

Hon. Mr. MACKENZIE: Who called the conference?

The WITNESS: It was summoned by Mr. Mercier after consultation with Mr. Mowat, afterwards Sir Oliver Mowat.

Mr. COWAN: It was initiated by the provinces, was it not?

The WITNESS: Yes, it was initiated by the provinces.

The CHAIRMAN: The Dominion government was invited to attend.

The WITNESS: On October 28, this conference adopted unanimously eighteen resolutions proposing amendments to the British North America Act. It was agreed that these proposals should be considered by the governments of the several provinces of the Dominion and, if approved, should be submitted to the provincial legislatures. This approval was given in due course by the legislatures of five provinces. Resolution 18 of the conference was in the following terms:—

> That, in the opinion of the conference, the several provinces of the Dominion, through their respective legislatures, should at the earliest practical moment take steps with a view of securing the enactment by the Imperial parliament of amendments to the British North America Act in accordance with the foregoing resolutions.

It was also resolved by the conference that its resolutions should be communicated formally to the Federal government in order to invite its co-operation in securing the amendments with which the resolutions were concerned. The Dominion government of the day declined to give its support to the proposed amendments to the British North America Act, but the resolutions of the conference were forwarded through the usual channels to the Secretary of State for the Colonies. Their receipt was formally acknowledged by the Colonial Secretary, but no action was taken upon them by the Imperial government. The correspondence makes it clear that the conference was represented to the Secretary of State for the colonies as in the nature of a hostile demonstration against the Dominion government, and it was urged that, since the conference was not fully representative of all provinces of the Dominion and its resolutions did not receive the concurrence of the Dominion parliament, no action could properly be based upon them in the amendment of the British North America Act.

Mr. BOURASSA: Is that contained in the despatch from Ottawa to London?

The WITNESS: I sought some time ago to obtain the correspondence which passed between London and Ottawa with respect to these resolutions. I was not able to secure all the information I had hoped to obtain, but there is a letter from Lord Knutsford to Lord Stanley dated July 8, 1888.

LORD KNUTSFORD TO LORD STANLEY

Confidential,

DOWNING ST.,
8th July, 1888.

MY LORD,—I have the honor to acknowledge receipt of the confidential despatch from the Officer Administering the Government of Canada of the 4th ultimo with its enclosures, respecting the resolutions adopted at the inter-provincial conference held in Quebec last year. I trust that, in the event of other Provincial Parliaments adopting these resolutions, I may, at the same time as such adoption is communicated to me, be made acquainted with the view of the Dominion Government upon them.

KNUTSFORD.

It would appear that the confidential despatch referred to in this communication emphasized the partisan character of this Inter-Provincial conference.

Mr. BOURASSA: That is what you referred to.

The WITNESS: Yes. I think we are quite justified by the evidence in the conclusion that the Dominion government represented the Inter-Provincial Conference of 1887 as being designed to embarrass the federal administration. It so happened that the provincial governments that were represented at Quebec were of a political complexion contrary to that in Ottawa. Mr. Blair, premier of New Brunswick at that time, was regarded as somewhat neutral in his allegience, but the two provinces which declined to accept the invitation—Prince Edward Island and British Columbia—were closer to the federal administration.

Mr. COWAN: Just one question: were those resolutions forwarded directly by the chairman of the Inter-Provincial Conference to the Colonial office or through the Dominion government?

The WITNESS: Through the Dominion government.

Hon. Mr. MACKENZIE: By the provincial secretaries.

The WITNESS: Yes. The resolutions went back to the provincial legislatures for approval. I have it one the authority of Sir Joseph Pope that those resolutions were approved by the five provincial legislatures concerned.

Mr. COWAN: Was there any direct communication between the provincial premiers and the colonial office?

The WITNESS: I have not been able to discover any direct communication. I know the resolutions were formally communicated through the Governor General to the Secretary of State, which would have been the appropriate channel of communication at that time.

Mr. BOURASSA: Does the text of those resolutions appear?

The WITNESS: I have the text here.

Mr. COWAN: What did they discuss in those eighteen resolutions?

The CHAIRMAN: Would it not be advisable to have the text put into the record?

Mr. COWAN: That would be satisfactory.

The CHAIRMAN: It could be made to appear at this point.

INTER-PROVINCIAL CONFERENCE, 1887

The Conference met at eleven o'clock on the 20th October, and sat from day to day to the 28th inclusively.

Prince Edward Island, and British Columbia were not represented at the Conference.

The representatives from Nova Scotia present at this conference desired the following minute to be entered upon the record of the proceedings, and the conference agreed to the entry being made accordingly:—

> In view of recent movements in the province of Nova Scotia, the representatives of that province desire to place on record that they participate in the deliberations of this conference upon the understanding that, while they join the representatives of the sister provinces in seeking reforms in matters which are of common interest, they do so without prejudice to the right of the government, legislature or people of Nova Scotia to take any course that may in future be by them deemed desirable with a view to the separation of the province from the Dominion.

On the 28th October, the following resolutions were unanimously adopted:

Respecting amendments of the British North America Act.

Whereas, in framing the British North America Act, 1867, and defining therein the limits of the legislative and executive powers and functions of the federal and provincial legislatures and governments, the authors of the constitution performed a work, new, complex and difficult, and it was to be anticipated that experience in the working of the new system would suggest many needed changes; that twenty years' practical working of the act has developed much friction between the federal and provincial governments and legislatures, has disclosed grave omissions in the provisions of the act, and has shewn (when the language of the act came to be judicially interpreted) that in many respects what was the common understanding and intention had not been expressed, and that important provisions in the act are obscure as to their true intent and meaning; and whereas the preservation of provincial autonomy is essential to the future well-being of Canada; and if such autonomy is to be maintained, it has become apparent that the constitutional act must be revised and amended; therefore, the representatives and delegates of the provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba, duly accredited by their respective governments, and in conference assembled, believing that they express the views and wishes of the people of Canada, agree upon the following resolutions as the basis upon which the act should be amended; subject to the approval of the several provincial legislatures:

1. That by the B. N. A. Act exclusive authority is expressly given to the provincial legislatures in relation to subjects enumerated in the 92nd section of the act; that a previous section of the act reserves to the federal government the legal power of disallowing at will all acts passed by a provincial legislature; that this power of disallowance may be exercised so as to give to the federal government arbitrary control over legislation of the provinces within their own sphere; and that the act should be amended by taking away this power of disallowing provincial statutes, leaving to the people of each province, through their representatives in the provincial legislature, the free exercise of their exclusive right of legislation on the subjects assigned to them, subject only to disallowance by Her Majesty in Council as before Confederation; the power of disallowance to be exercised in regard to the provinces upon the same principles as the same is exercised in the case of federal acts.

2. That it is important to the just operation of our federal system, as well that the federal parliament should not assume to exercise powers belonging exclusively to the provincial legislatures, as that a provincial legislature should not assume to exercise powers belonging exclusively to the federal parliament; that to prevent any such assumption, there should be equal facilities to the federal and provincial governments for promptly obtaining a judicial determination respecting the validity of statutes of both the federal parliament and

provincial legislatures; that constitutional provision should be made for obtaining such determination before, as well as after, a statute has been acted upon; and that any decision should be subject to appeal as in other cases, in order that the adjudication may be final;

3. That it is in the public interest, with a view to avoiding uncertainty, litigation and expense, that the constitutionality of federal or provincial statutes should not be open to question by private litigants, except within a limited time (say two years) from the passing thereof; that thereafter such constitutionality should only be questioned at the instance of a government, federal or provincial; that any enactment decided, after the lapse of the limited time, to be unconstitutional should, for all purposes other than the mere pronouncing of the decision, be treated as if originally enacted by the legislature or parliament which had jurisdiction to enact the same, and as being subject to repeal or amendment by such legislature or parliament;

4. That a leading purpose of the Senate was to protect the interests of the respective provinces as such; that a Senate to which the appointments are made by the federal government, and for life, affords no adequate security to the provinces; and that, in case no other early remedy is provided, the British North America Act should be so amended as to limit the term for which Senators hold office, and to give the choice, as vacancies occur, to the province to which the vacancy belongs, until, as to any province, one-half of the members of the Senate representing such province are Senators chosen by the provinces; that thereafter the mode of selection be as follows: if the vacancy is occasioned by the death, resignation or otherwise of a Senator chosen by a province, that province to choose his successor; and if the vacancy is occasioned by the death, resignation or otherwise of any other Senator, the vacancy to be filled as now provided by the Act, but only for a limited term of years:

5. That it was the intention of the British North America Act, and of the provinces which were thereby confederated, that in respect of all matters as to which the provincial legislatures have authority, the Lieutenant-Governor of every province, as the representative of the sovereign in provincial affairs, should have the same executive authority as other governors and Lieutenant-Governors of British colonies and provinces; that the Act has practically been so construed and acted upon in all the provinces ever since Confederation; that it is of essential importance to the provinces that this right should be maintained and should be placed beyond doubt or question; that there being no express provision in the Act declaring such right and the right being in consequence occasionally denied and resisted, the Act should be amended by declaring its true construction to be according to the intention and practice as herein mentioned;

6. That the federal authorities construe the British North America Act as giving to the federal parliament the power of withdrawing from provincial jurisdiction local works situated within any province, and though built in part or otherwise with the money of the province or the municipalities thereof, and of so withdrawing such local works (without compensation) by merely declaring the same to be for the general advantage of Canada or for the advantage of two or more provinces, whether that is or is not the true character of such works within the meaning of the act; that it was not the intention that local works should be so withdrawn without the concurrence of the provincial legislature, or that the power of the federal parliament should apply to any other except 'such works as shall, although lying wholly within any province, be specially declared by the act authorizing them, to be for the general advantage' as expressly mentioned in section 29, subsection II, of the Resolutions of the Quebec Conference of 1864; and that the act should be amended according.

7. That there exists in each province the requisite machinery for preparing voters' lists and revising the same for elections to the provincial assembly; that, without any detriment to either federal or provincial interests, the lists so prepared were used for twenty years at all federal elections, under the express terms of the British North America Act and of subsequent statutes of the federal parliament; that the preparation of separate voters' lists for federal elections is cumbrous and confusing and involves great loss of time and needless expense to all concerned therein; and that, in the opinion of this conference, the British North America Act should be so amended as to provide that at all elections to the federal parliament in any province the qualification and lists of electors should be the same as for the legislative assembly of the province.

8. ....that an amendment of the act should be obtained, expressly declaring that the provinces have jurisdiction to appoint all stipendiary, police and other magistrates and all officers who are under the jurisdiction of the provincial legislatures.

9. That, according to the intention of the British North America Act and its promoters, the provinces are entitled to all fees paid or payable on legal proceedings in the provincial courts; that the provinces accordingly have always enjoyed or dealt with the revenue therefrom; that, according to a recent decision of Her Majesty's Privy Council, the provincial legislatures cannot legislate as to such fees or apply the revenue to provincial purposes; and that the act should be so amended as to expressly give this constitutional right.

10. ....That an amendment of the act should expressly declare that the Lieutenant-Governors have power to issue commissions to hold courts of Assize and Nisi Prius, Oyer and Terminer and General Goal Delivery.

11. That is has been found by the experience of all legislature bodies to be necessary that they should possess certain privileges and immunities to enable them effectually to discharge the functions entrusted to them; that for this purpose, acts have been passed by the Parliament of Canada, and confirmed by Imperial legislation, defining the privileges, immunities and powers of the two houses and of the members thereof; that acts in like manner have been passed by several provincial legislatures defining the privileges of their legislative councils and legislative assemblies; that these acts have not yet been confirmed by Imperial legislation; that doubts have been expressed as to the power of the provincial legislatures to pass these laws; that a provincial legislature should have the same power to pass acts defining the privileges of the legislative council and legislative assembly and of the members thereof, as the federal parliament has to pass acts defining the privileges of the Senate and House of Commons and of the members thereof; that the provincial acts should be confirmed as the federal acts were, and that it should be declared by the amending Imperial statute that a provincial legislature has, with respect to itself, the same powers as the federal parliament has with reference to such parliament;

12. That in two of the provinces of the Dominion there is no second chamber; that in five of the provinces there is a second chamber; that in one of these five the legislative council is elective and for a limited term; that in the other four the appointments are by the Lieutenant-Governor and for life; that the experience which has been had since Confederation shows that, under responsible government and with the safeguards provided by the B.N.A. Act, a second provincial chamber is unnecessary, and the expense thereof may in all the provinces be saved with advantage; that under the act a provincial legislature has power to amend the constitution of the province; that this power includes the abolition of the council in some provinces where public opinion is believed to favour such change; and that the act should be so amended as to provide that, upon an address of the House of Assembly, the elected representatives of the people,

Her Majesty the Queen may by proclamation abolish the legislative council, or change the constitution thereof, provided that the address is concurred in by at least two-thirds of the members of such House of Assembly.

13. That by the British North America Act it is provided that all lands belonging to the several provinces of Canada shall belong to the provinces respectively in which they are situate; that the claim recently made by the federal government to all crown lands as to which there was no treaty with the Indians before confederation, is contrary to the intention of the act and of the provinces confederated, is unjust, and is opposed to the construction which until a recent period, the act received from the federal authorities, as well as from the legislatures and governments of the provinces; and that the act should be amended so as to make clear and indisputable in its technical effect, as well as its actual intention, that all such lands belong to the province in which they are situate, and not to the Dominion.

14. That by the British North America Act the jurisdiction with respect to Bankruptcy and Insolvency is assigned to the federal parliament; that there is no federal law on that subject now in force; that, in the absence of a law for the whole dominion, it is in the public interest that each province should be at liberty to deal with the matter, subject to any federal law which may thereafter be passed; that it is doubtful how far, under the present provisions of the act, the provincial legislatures can deal with the subject; and it is desirable that the act be amended by expressly giving to the provinces the necessary jurisdiction, in the absence of and subject to any federal law.

15. That it was provided by the 44th resolution of the Quebec Conference of 1864, that " the power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting sentences in whole or in part, which belongs of right to the Crown, should be administered by the Lieutenant-Governor of each province in council " subject as in the said resolution set forth; that all provision relating to this power was omitted from the British North America Act; that by the royal instructions given to the Governor General subsequently to the passing of the act, His Excellency is (among other things) " authorized and empowered, to grant any offender convicted of crime in any court or before any judge, justice or magistrate within the dominion, a pardon "; that by reason of this language and otherwise, doubts have arisen as to the power of a Lieutenant-Governor of a province to respite, reprieve or pardon prisoners convicted of an offence against the laws of the province, or of commuting and remitting, in whole or in part, any sentence, fine, forfeiture, penalty or punishment in respect of any such offence; that it is presumed this was not the purpose of the instructions; that the power of dealing with all matters relating to the execution of provincial laws should belong to the Lieutenant-Governor in Council of each province, leaving (if deemed desirable) the power of the federal government to apply to other cases; and that the act should be amended accordingly;

16. That the provinces represented at this conference recognize the propriety of all questions as to the boundaries of the provinces being settled and placed beyond dispute; that the boundaries between Ontario, Manitoba and the Dominion, so far as the same have been determined by Her Majesty in Privy Council, should be established by Imperial statute, as recommended by the order of Her Majesty; and that the whole northern boundaries of Ontario and Quebec should be determined and established without further delay.

17. (1) That by the British North America Act all the Customs and Excise duties, as well as certain other revenues of the provinces, were transferred from

the provinces to the dominion, and it was provided that the following sums should be paid yearly by the dominion to the several provinces for the support of their governments and legislatures:—

Ontario	$ 80,000
Quebec	70,000
Nova Scotia	50,000
New Brunswick	50,000

And that an annual grant in aid of each province should be made, equal to 80 cents per head of the population as ascertained by the census of 1861; with a special provision in the cases of Nova Scotia and New Brunswick;

(2) That the revenue of the Dominion, at the inception of confederation, was $13,716,786, or which 20 per cent or $2,753,906 went to the provinces for provincial purposes, eighty per cent, or $10,962,880, going to the dominion; that by increased taxation, on an increased population, the Dominion revenue has been raised from $13,716,786 to $33,177,000; that, while this increased taxation is paid by the people of the provinces, and the increase of population imposes upon the provinces largely increased burdens, no corresponding increase of subsidy has been granted to the, 13 only, instead of 20 per cent, of the increased revenue of the dominion, or $4,182,525, being now allowed to the provinces, while instead of 80, 87 per cent, or $28,994,475, is retained by the dominion;

(3) That the yearly payments heretofore made by the dominion to the seven provinces under the British North America Act have proved totally inadequate for the purposes thereby intended;

(4) That the actual expenses of civil government and legislation in the several provinces greatly exceed the amount provided therefor by the Act; and that the other expenditure necessary for those local purposes which before confederation were provided for out of provincial funds, has largely increased since;

(5) That the several of the provinces are not in a condition to provide, by direct taxation or otherwise, for the additional expenditure needed, and in consequence have from time to time applied to the federal parliament and government for increased annual allowances;

That this conference is of opinion that a basis for a final and unalterable settlement of the amount to be yearly paid by the dominion to the several provinces for their local purposes and the support of their governments and legislatures, may be found in the proposal following, that is to say:—

(*a*) Instead of the amounts now paid, the sums hereafter payable yearly by Canada to the several provinces for the support of their governments and legislatures, to be according to population as ascertained by the last decennial census and as follows:

(*a*) Where the population is under 150,000	$100,000
(*b*) Where the population is 150,000, but does not exceed 200,000	150,000
(*c*) 200,000-400,000	180,000
(*d*) 400,000-800,000	190,000
(*e*) 800,000-1,500,000	220,000
(*f*) Where the population exceeds 1,500,000	240,000

(*b*) Instead of an annual grant per head of population now allowed, the annual payment hereafter to be at the same rate of eighty cents per head, but on the population of each province as ascertained from time to time by the last decennial census, until such population exceeds 2,500,000; and at the rate of sixty cents per head for so much of said population as may exceed 2,500,000.

(*c*) The population, as ascertained by the last decennial census to govern except as to British Columbia and Manitoba, and as to these two provinces, the population to be taken to be that upon which, under the respective statutes in that behalf, the annual payments now made to them respectively by the dominion are fixed, until the actual population is by the census ascertained to be greater; and thereafter the actual population, to govern:

(*d*) The amounts so to be paid and granted yearly by the dominion to the provinces respectively to be declared by imperial enactment to be final and absolute, and not within the power of the federal parliament to alter, add to or vary;

(6) That the following table shows the amounts which, instead of those now payable for government and legislation and per capita allowances, would hereafter be annually payable by the dominion to the several provinces (the same being calculated according to the last decennial census for the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Prince Edward Island and according to the limit of population now fixed by statute for the provinces of British Columbia and Manitoba;

(7) That this conference deems it desirable that the proposal above set forth should be considered by the governments of the several provinces of the dominion; and, if approved of, should be submitted to the provincial legislatures:—

18. That, in the opinion of the conference, the several provinces of the dominion, through their respective legislatures, should at the earliest practicable moment take steps with the view of securing the enactment by the imperial parliament of amendments to the British North America Act in accordance with the foregoining resolutions.

Resolved,—that copies of the foregoing resolutions be formally communicated by the President on behalf of this conference to the federal government, and that the conference do cordially invite the co-operation of the federal government in carrying into effect the resolutions.

Resolved,—that copies of the foregoing resolutions be also transmitted by the president of this conference, to the respective governments of the provinces, not represented at this conference, namely Prince Edward Island and British Columbia, with a view to their concurrence in and support of the conclusions arrived at by this conference.

The following resolution was also adopted.

That, having reference to the agitation on the subject of the trade relations between the dominion and the United States, this inter-provincial conference, consisting of representatives of all political parties, desires to record its opinion that unrestricted reciprocity would be of advantage to all the provinces of the dominion; that this conference and the people it represents cherish fervent loyalty to Her Majesty the Queen and warm attachment to British connection; that this conference is of opinion that a fair measure, providing, under proper conditions, for unrestricted reciprocal trade relations between the Dominion and the United States, would not lessen these sentiments on the part of our people; and on the contrary may even serve to increase them and would at the same time, in connection with an adjustment of the fishery dispute, tend to happily settle grave difficulties which have from time to time arisen between the mother country and the United States.

Hon. Mr. RALSTON: Do any of these resolutions deal with the procedure on amendment?

The WITNESS: No; but there is an inference that the amendment of the British North America Act might properly be based upon these resolutions.

Mr. BOURASSA: Of course, that was their object.

The WITNESS: Yes; but they hoped in the beginning to obtain the concurrence of the Dominion government.

Hon. Mr. RALSTON: Do any of them propose to amend the British North America Act, and is there specific procedure for amendment?

The WITNESS: There is no proposal for the procedure of amendment.

The CHAIRMAN: They propose amendment on their initiative.

The WITNESS: Yes.

By Hon. Mr. Ralston:

Q. And the communication from the Governor General to the Secretary of State for the Colonies is apparently purely by way of communicating a news item?—A. I think that would be a fair statement of its content.

Q. That is what had taken place?—A. Yes, that is what had taken place. I think the context also suggests that in the original confidential despatch it was pointed out that the resolutions of the conference were not entitled to the consideration of the Imperial government.

By the Chairman:

Q. Is that in the document which you have read?—A. It is not in the document.

Q. If you have a document of that type it would be advisable to put it in the record?—A. Yes. I might say that I sought further information on this point in the office of the Governor General some time ago, and the only communication which I could find, apart from that which accompanied the resolutions to London, was one which suggested that the Dominion government had represented this conference as being a hostile political demonstration and not, therefore, entitled to the serious consideration of the Imperial government.

Q. I presume that the Imperial government did not consider it might be sufficient evidence; that they did not consider it as sufficiently representative of the views of the provinces to warrant any action on their part?—A. This is the only occasion since 1867 when the provinces of Canada have sought to initiate amendments to the British North America Act. It may be cited to establish the point that the Imperial government was unwilling at this date to entertain amendment proposals which did not receive the approval of the Dominion parliament. It is also to be noticed, that although the amendment proposals received the support of five provincial legislatures including the original provinces of confederation, the two remaining provinces of the Dominion were not represented at the conference and did not give subsequent approval to its resolutions.

With the permission of the committee, I wish also to make an observation upon a discussion which occurred on February 26, during the evidence submitted by Mr. Stewart Edwards. At page 13 of the minutes of evidence the following discussion is reported:

> The CHAIRMAN: There were some very important alterations in the Quebec resolutions.
>
> Hon. Mr. VENIOT: Certainly there were. Let me go further; it is a matter of history, and perhaps you know it, that the proceedings of the London Conference were never revealed to the public. They were kept secret, and with correspondence to show why they were kept secret. There was correspondence on record to show that an order was given to keep them a secret; that is the reason why the Maritime provinces, especially Nova Scotia and New Brunswick were so bitter in the fight against confederation at the time, while they drifted into it afterwards. The report of the proceedings of the London Conference was only made public in 1927 when it was discovered in the archives of the old parliament buildings in the province of New Brunswick and authority was then given by the Dominion government to have it made public. That is the only time it was ever made public.

With deference, I should like to offer a correction of that statement in the interest of historical accuracy. It is a matter of some importance because similar statements have been made quite frequently in the province of New Brunswick and if they are allowed to pass unchallenged an error may soon be converted into a legend. It is quite true that the resolutions of the London conference were not published until the British North America Act was passed. It is equally true that correspondence is on record which indicates that their publication was withheld deliberately at the time. This correspondence is included in Appendix VI of Pope's Confederation Documents on pages 306 and 307 of this volume. It is not correct to say, however, that the report of the proceedings of the London Conference was only made public in 1927 and had been deliberately withheld until that date. The resolutions are given in full in Pope's Confederation Documents which was published in 1895. They were available in this volume to anyone who cared to read them. They were also published in the Journals of the Legislatures of provinces which were represented at the London Conference. It is incorrect therefore, to suggest—

Hon. Mr. RALSTON: When?

The WITNESS: In 1867.

By Hon. Mr. Veniot:

Q. In 1867?—A. Yes. I sought to confirm this before coming down. I found a copy of the journals of the legislative assembly of the province of Nova Scotia and the London resolutions are given in full.

Q. Did you find that in the journals of the province of New Brunswick?—A. Unfortunately we do not have the New Brunswick journals in the Queen's Library, but I do not see why the London resolutions would be published in one journal and not in another.

Q. May I say here that at that time when they were supposed to be published in New Brunswick the resolutions were taken and put up in an attic and they were never discovered in that attic until 1927 when I had them published.

Mr. COWAN: Are those original documents?

Hon. Mr. VENIOT: Yes. We sent them to London to have them verified before the Dominion government published them.

The WITNESS: Am I not right in saying that the document published by the province of New Brunswick was a copy of the resolutions of the London Conference?

Hon. Mr. VENIOT: I do not think you are. At least, we have no knowledge of it down there.

The WITNESS: That is certainly my impression.

Hon. Mr. VENIOT: Well, you are not right.

The WITNESS: And the resolutions of the London Conference were published in full in Pope's Confederation Documents in 1895, and, at least, in some of the journals of the provincial legislatures at that time.

The CHAIRMAN: I think that if they appeared in the journals of provincial legislatures the chances are that they were made known in New Brunswick, although in New Brunswick, having no journals, they could not appear there.

Hon. Mr. VENIOT: They were never published in New Brunswick.

The WITNESS: It is incorrect, therefore, to suggest that the report of the proceedings of the London Conference was only made public in 1927.

If I may revert now to the main question in the terms of reference issued to this committee, I should like to submit a number of propositions in relation to the method of amendment which should be employed in future amendments to the British North America Act.

(1) The union of the provinces of British North America was only made possible by the adoption of a federal constitution. Although some of the leaders of the movement expressed a strong preference for a legislative union, it was recognized at the Quebec Conference that union could only be accomplished with the framework of a federal constitution. This involved the continuance of the provinces as distinct communities possessing autonomy within a circumscribed but definite area of jurisdiction. It also involved, as a result of reconciling the interests and ideals of the two dominant racial elements and religions of the population, the inclusion of specific guarantees for the rights of racial and religious minorities. The history of the confederation movement together with the Quebec resoltions and the London resolutions indicate clearly that the provinces of British North America could not have been united in 1867 except on the basis of a federal constitution and also on the basis of effective guarantees for the special interest of the French minority in respect of language, civil law and religion.

By Mr. Bourassa:

Q. You used the word "continued," the provinces were continued?—A. Yes.

Q. Do you think it is the proper word? Take the case of Ontario and Quebec; they were not continued. It was the province of United Canada which adopted the resolution?—A. Yes.

Q. And Quebec and Ontario were created?—A. Yes.

Q. By the B.N.A. Act. Therefore they are not a continuation of the United provinces of Canada previously.

The CHAIRMAN: They are not parties to that contract.

WITNESS: I realise of course that the B.N.A. Act did itself provide for a separation of the province of Canada into the provinces of Ontario and Quebec; but at both the Quebec conference and the London conference Lower Canada and Upper Canada had separate delegations, and I think one is justified in saying that in a political sense they were regarded as distinct communities.

Hon. Mr. VENOIT: They each had to sign.

WITNESS: Certainly, the Maritime Provinces continued as distinct communities and I find it difficult to distinguish between the position of Quebec and Ontario and that of the Maritime Provinces in that respect.

(2) Under ordinary circumstances the British North America Act, as a written constitution and a federal constitution, would have included in its provisions a procedure for its own amendment. This was not done. It is of little advantage to speculate as to the reasons for this omission. It could not have been due to oversight, for members of the Quebec conference were familiar with the discussions which preceded the adoption of the United States constitution and they must have been aware of the importance which was attached to the procedure of amendment in that constitution. Whatever may be the explanation of the failure to incorporate an amendment procedure in the British North America Act of 1867, we are now confronted with the necessity of repairing and supplying that omission.

(3) Having regard to the historical setting of the British North America Act, it is reasonable to ask what provision would have been made for its amendment if those who drafted the Quebec and London resolutions had accepted the formulation of an amendment procedure as a portion of their task. In the light of our knowledge of the prolonged negotiations which preceded Confederation, I think we are justified in concluding that any amendment procedure which could have been adopted at this time would have involved the rejection of the two extreme proposals for this purpose which have been advanced in later years. The first extreme proposal which would have been rejected is that which declares

that all amendments to the British North America Act should be effected solely at the instance of the Dominion parliament. Such a proposal is irreconcilable with the insistance of the smaller provinces upon a federal as distinguished from a legislative union. It is equally irreconcilable with the emphasis placed by the delegates from Lower Canada upon the security of guarantees to racial and religious minorities. An amendment procedure which would give power to the Dominion parliament to encroach by its own will upon the legislative jurisdiction of the provinces would have deprived the provinces of any real autonomy and would have been inconsistent with the purpose of a federal constitution. Such an amendment procedure would also imperil the special guarantees to racial and religious minorities which were a condition precedent to union in Lower Canada. It is also evident, I think, that the conditions under which federation was accomplished would have prevented the adoption of an amendment procedure which would require the unanimous consent of the provincial legislatures for any amendment of the British North America Act. Nova Scotia and New Brunswick entered Confederation with misgivings as to its effect upon their economic welfare. They hoped for a revision of the terms of the constitution. The Quebec resolutions were altered in their favour at the London conference, but further changes were desired. It is self-evident that these provinces would not have consented deliberately to an amendment procedure which would have called for the unanimous consent of all the provinces of the federation. Such a formula would have placed it in the power of the legislature of Upper Canada, for example, to prevent any change desired in the original terms of the British North America Act.

A consideration of the history of the federation movement leads away from these two extreme proposals with respect to an amendment procedure. It will also be seen that the rejection of these proposals is supported even more strongly in the light of the admission of new provinces and the subsequent history of the Dominion. On grounds of historical propriety, precedent and federal theory, we are compelled to seek for an amendment procedure which will avoid, on the one hand, the extreme of unilateral action by the Dominion parliament and on the other hand the doctrine of unanimous consent of the provincial legislatures. A reasonable view of the problem in its historical setting leads inevitably to the conclusion that an amendment procedure for the British North America Act should represent a compromise between these extreme positions. Generally speaking, and apart from special security for the rights of racial and religious minorities, that amendment procedure should call for the co-operation of the Dominion parliament and the provincial legislatures in the alteration of every section of the British North America Act which involves federal relationships.

Mr. WOODSWORTH: Would you define a little more closely what you mean by "federal relationship."

The WITNESS: I have in mind that there are sections of the B.N.A. Act which deal solely with the mechanical structure of government. For example, there are some sections which deal with the structure of the dominion parliament. I am not suggesting that even all of those sections do not involve federal relationships; some of them obviously do. I believe Dr. Skelton in his evidence before this committee mentioned that. One section if the British North America Act provides for the quorum of the House of Commons. That obviously does not involve federal relationships. There are a number of other sections which should belong in the same category. I think that federal relationships would certainly cover all of those sections of the B.N.A. Act which deal with the distribution of powers, and they must also be held to include those sections of the B.N.A. Act which deal with representation in the Canadian Senate, possibly also those sections of the B.N.A. Act which deal with the membership of the House of Commons and the method by which it may be altered.

(4) The case for co-operation between the Dominion parliament and the provincial legislatures in the amendment of the British North America Act is strengthened by the evolution of our constitution since Confederation. I think it can be argued that the London resolutions of 1866 emphasized the federal character of the proposed constitution more strongly than the Quebec resolutions of 1864. It is equally true, I believe, that the federal character of our constitution has been accentuated in the intervening years by the growth of conventions and the process of judicial interpretation.

I mean that convention and judicial interpretation have emphasized the federal character of the constitution as distinguished from its unitarian aspect.

The operation of convention in this direction may be illustrated by the usage which has developed with respect to the exercise by the Dominion government of its power of disallowance of provincial legislation. It is also illustrated by the usage which has made the Dominion cabinet representative of the provinces and also to some extent of racial and religious minorities. These conventions have their foundation in political experience. They have developed because it was discovered in the practice of government that national unity could only develop on the basis of harmonious relationships between the Dominion and the provinces within the framework of a federal constitution. Judicial interpretation as applied to the constitution during the early period of its development has fulfilled a similar function. Some sections of the British North America Act were open to a construction which would have placed the provinces in a position of subordination with a status not greatly superior to that of municipal corporations. The decisions of the judicial committee of the privy council in the early years of confederation led to the rejection of this view. The decision of Lord Watson in the Maritime Bank Case has already been submitted to this committee. In that decision it was declared that:—

> The object of the act was neither to weld the provinces into one nor to subordinate provincial governments to a central authority but to create a federal government in which they should all be represented and entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

Edward Blake, by the way, put it in somewhat different terms. He said that the provinces should not be regarded as fractions of a unit, but as units of a multiple.

The proposition of Lord Watson may be regarded as the culmination of a trend of judicial decisions in the same direction during the previous years. It cannot be disputed that the effect of convention and of judicial interpretation has been to fortify the federal character of the Canadian constitution. If a study of the historical setting of the British North America Act recommends the adoption of a federal procedure of amendment, it is equally true that such a process of amendment is supported by a consideration of the present constitution in the light of its judicial interpretation and the conventions which have been adopted as a result of experience in the operation of our governmental institutions.

(5) Since we are obliged to adopt a procedure of amendment appropriate to a federal constitution, it would appear to be desirable that the consideration of an amendment precedure should be referred to a conference in which the Dominion and the provinces are represented. If it is conceded that an appropriate amendment procedure will require the joint action of the Dominion parliament and the provincial legislatures, it would seem to follow that the formulation of this amendment procedure is equally the concern of the Dominion and the provinces.

By the Chairman:

Q. Is your premise conceded?—A. It really is conceded, I think, if we regard our constitution as being federal in character.

Q. The provinces have never been required by the imperial parliament——A. It must be remembered that the amendments which have taken place up to the present time have not, except incidentally, raised questions in which the provinces felt they had a vital interest.

Q. Did not British Columbia oppose the subsidy amendments in 1907?—A. British Columbia did in 1907 take exception to the subsidies which were agreed to by the Dominion-Provincial Conference of 1906; and Mr. McBride made his objections to the Secretary of State for the Colonies in London. It is equally true that the British government declined to insert in the enacting portions of the B.N.A. Act, 1907, the phrase as proposed by the Dominion that this settlement should be final and unalterable. But I believe the reason for the omission of that phrase from the enacting portions of the Act was not to be construed as a deference to the objection raised by British Columbia, but rather as an expression of the view always strongly held by constitutional lawyers in Great Britain that no parliament can bind its successors. In other words it would be superfluous to insert the phrase "this shall be final and unatlerable."

Q. If it is conceded that the concurrence of the provinces is necessary for an amendment or for any method of amendment, are not we putting more rigidity in our present structure?—A. I am far from suggesting that the concurrence of the provincial legislatures should be required unanimously.

Q. Let me put it this way: suppose that the interprovincial and dominion conferences you suggest were held?—A. Yes.

Q. And suppose a majority of the provinces at that conference were to express the view that no method of procedure for amendment should be adopted, would we be bound to leave matters as they are just because of the fact that a majority of the provinces said, "Leave them"?—A. In this case it would rest with the dominion government of the day to determine how far it would accept responsibility for carrying the matter further.

Q. In other words the legal right to go further would lie in the dominion government but probably the practical view of the thing would lead the government to say, "We won't fly in the face of the opinion expressed by a majority of the provinces"?—A. Precisely.

Mr. WOODSWORTH: Then your proposal is dictated by political expediency rather than by the merits of the case and the result would be that governments would postpone action indefinitely?

The CHAIRMAN: Unless the majority of the provinces would agree.

The WITNESS: I am not convinced it would postpone action indefinitely. We have not made a serious attempt to explore that way out of the present predicament.

Mr. WOODSWORTH: Without entering into any discussion, I suggest the response from Mr. Pattulo might indicate that ultimately the dominion government would have to take a line of its own.

The WITNESS: Perhaps I misunderstood the communication. I understood it to suggest that this was a matter which would be proper for discussion by a dominion-provincial conference.

Mr. WOODSWORTH: Quite so.

The CHAIRMAN: It does not express very much sympathy with the idea of our investigation.

The WITNESS: My own view would be that the publicity which is being given to this question by this committee will be immensely valuable in opening

up the question for further consideration. But I feel that if we are going to accept our constitution as federal in character—and I see no way of avoiding that conclusion—then we must regard the provinces as being involved in any amendment procedure which will be practicable in this country. If they are to be participants in the amendment procedure it seems also to follow that they ought to be participants in the conference which will formulate the amendment procedure.

The CHAIRMAN: The dominion parliament represents all the people of Canada; the provincial legislatures represent the people within their borders; the three of these provinces, Ontario, Quebec and Saskatchewan contain the majority of the inhabitants of this country. If the majority of the inhabitants represented by these three provinces agree upon the method would you say the other six who are less in population than these three, should be able by majority to control the three?

The WITNESS: My answer is in the affirmative if you regard the provinces as distinct communities, which I think you are bound to do. If our constitution is regarded as a federal constitution, then you must have the concurrence of the dominion parliament, which represents the population of the nation as a whole, and the approval of a majority, either bare or fixed, of the provincial legislatures, because a federal constitution is not merely a union of individuals, it is a union of distinct communities which are continued in existence.

The CHAIRMAN: So that the province of Prince Edward Island, with 80,000 people, would carry as much weight in connection with the amendment of our constitution as the province of Ontario with over 3,000,000 people.

Mr. BOURASSA: Of course you have the same discrepancy in every federal union. You have it in the American Senate, as pointed out, Rhode Island, with a few hundred thousand people is represented by the same number of senators as the state of New York.

The WITNESS: It is suggested, therefore, that the question of devising an amendment procedure for incorporation in the British North America Act should be referred in the first instance to a dominion-provincial conference or to a convention of delegates summoned expressly for this purpose. If the present problem is to be solved in the spirit of federal institutions, it is of vital importance that the dominion and the provinces should co-operate for the realization of this national purpose. I do not suggest that a dominion-provincial conference or a constitutional convention would find an immediate solution for the present difficulties. It would doubtless be necessary for such a conference or convention to consider and discuss the larger aspects of the problem and perhaps to indicate the broad principles to be kept in view in the formulation of an amendment procedure. A committee might then be set up to give further study to the question and to make definite proposals for submission to the conference or convention at a later date. Upon the acceptance of these proposals by the conference or convention, they would be referred to the dominion parliament and provincial legislatures for approval and then be transmitted to Westminster for formal enactment as an amendment to the Canadian institution.

(6) Apart from the necessity of devision a method of amendment for the British North America Act, there is also an imperative need for a consolidation and restatement of the constitution. I am not certain how far this proposal comes within the terms of reference of this committee but I observe that a suggestion was made by Mr. Ollivier that a commission should be appointed to draft a new constitution upon the basis of the British North America Act. This proposal will be found on page 61 of The Minutes of Proceedings of Evidence of this committee, March 21st, 1935. It is quite possible that this task of redrafting and consolidation could be entrusted in the first instance to a committee of the dominion-provincial conference or convention referred to above. Owing to

the technical nature of the task it would be necessary to supply this committee with a special secretariat to deal with the legal questions involved in a redrafting of the constitution. The personnel of this secretariat could be drawn from the Department of Justice of the dominion government and from the law officers of the crown in the various provinces.

From the viewpoint of clarification and simplicity of arrangement the case for consolidation of the British North America Act and its amendments stands on its own merits. It is desirable also from another point of view to carry out this project of consolidation. In text books of American history and government used in the schools and universities of the United States it is customary to include the constitution as an appendix for the information of both teachers and students. In some text books of Canadian history and government a similar practice has been followed and the British North America Act, 1867, has been added as an appendix. In its present form the British North America Act is unsuitable for this purpose. One may read it from beginning to end without finding any reference to the inclusion of Prince Edward Island, Manitoba, Alberta, Saskatchewan, and British Columbia in the federation. The sections on the Senate and those which deal with the provinces are either incomplete or wholly misleading. In respect of these and other sections, the British North America Act, 1867, is little more than an historical exhibit. It speaks to the dead and not to the living. This reason for the consolidation and restatement of the British North America Act, 1867, and its amendments may be of secondary importance but from the standpoint of education in Canadian history and government, it is deserving of serious consideration.

As in the case of the committee on amendment procedure, this proposed committee on the consolidation and restatement of the B.N.A. Act, 1867, and its amendments, should report back to the dominion-provincial conference or constitutional convention for the approval of its recommendations Having received approval from this body the new draft of the constitution would then be referred to the dominion parliament and provincial legislatures for ratification and in due course would receive formal enactment by the parliament at Westminster replacing the B.N.A. Act, 1867, and its subsequent amendments.

The CHAIRMAN: If ratified.

The WITNESS: If ratified. It is submitted that the title of the new constitution should be the Canada Act or The Canadian Constitutional Act in preference to the present title.

That completes my statement.

By the Chairman:

Q. Are you aware that the question of the methods of amending the B.N.A. Act was the subject of a dominion-provincial conference in 1927?—A. Yes.

Q. May I read this to you from the Conference report:—

> Representatives of all the provinces were heard during the discussion, and every conceivable phase of the subject was dealt with. The conference divided sharply on the proposal, a portion of the members being entirely opposed to any change in the present procedure. While others either approved of the opinion expressed by the minister in its entirety or with minor modifications. On the question of the rights of minorities and of other rights specifically laid down in the B.N.A. Act there was no divergence of opinion whatsoever. Several of the opponents of the proposal feared that such rights might be in danger by the change, while those who supported the proposal pledged their own provinces to the maintenance and continuance of every right at present enjoyed.

Do you think that an interprovincial conference with the dominion held at the present moment would come to any other conclusion than the one that was held

in 1927, or would they divide just as sharply?—A. I was present at the dominion-provincial conference in 1927 as an observer. I do not think it would be reasonable to expect that a conference summoned to meet here for a few days could deal with the situation finally.

Q. This conference sat seven days.—A. But it was not seven days on this subject. There was quite a formiable agenda as I recall it. I feel that this is a matter of such importance that it may require much time and perseverance. We cannot think of formulating an amendment procedure or of bringing about a satisfactory revision of the B.N.A. Act in terms of days or weeks. It may involve months of careful study; it may extend over a year. I think I am correct when I say that the present Australian constitution is the result of labours extending over months and years. That is why I suggest that if we are going to deal with this problem satisfactorily and definitively, we must be prepared to give time to it.

By Mr. Cowan:

Q. A previous witness suggested a form of royal commission which would have the power to go to every province and discuss the local situation there. Have you any comment to make on that suggestion?—A. I can see no necessity for a royal commission to deal with a question of this character. It seems to me that the evidence which might be given by the provincial governments concerned could be given equally well at an interprovincial conference or to a committee of such a conference.

By the Chairman:

Q. Is there any record of any request having been made by the authorities in the United Kingdom for concurrence of any provinces before enacting any amendment, or any suggestion that the provinces had the right to be consulted? —A. I think not. Mr. Winston Churchill made a statement in the House of Commons, I believe, which has been interpreted in that light.

Q. Is this the statement? (Passing document to witness.)—A. That is the statement, yes.

> He would be very sorry if it were thought that the action which His Majesty's government had decided to take meant that they had decided to establish as a precedent that, whenever there was a difference on the constitutional question between the federal government and one of the provinces, the Imperial government would always be prepared to accept the federal point of view, as against the provincial. In deference to the representations of British Columbia, the words "final and unalterable" applying to the revised scale, have been omitted from the bill.

The significance of this statement turns upon whether it was given in deference to the representations of British Columbia, there is an alternative explanation that no British parliament can by statute bind its successors.

Q. The dominion parliament, of course, has now power to amend its own constitution to the extent or organizing new provinces?—A. Yes.

Q. And it has exercised that power?—A. Yes, under the terms of the constitution.

Q. And did the imperial parliament or the dominion parliament in granting power or exercising it, as the case may be, consider that the consent of the inhabitants of those territories should be obtained before those territories were formed into new provinces?—A. My recollection is that the power was exercised under the authority of the B.N.A. Act and without obtaining the approval of the populations in the areas concerned.

Hon. Mr. VENIOT: Under what section, section 146, making provision—

The WITNESS: Section 146 deals with the admission of certain designated provinces. I think Mr. Chairman, you have reference to the B.N.A. Act, 1871.

By the Chairman:

Q. Respecting the admission of provinces into the Dominion of Canada?—A. Yes.

Q. As a matter of fact, those provinces of Alberta and Saskatchewan were established with constitutions which were opposed by the representatives of their inhabitants before the passages of the bill?—A. I understand that the inhabitants wanted one province instead of two.

Q. Yes, there were certain matters which they opposed. Would it be possible to have those sections which deal with minority rights, such as language, religion, education and civil law segregated, and to provide for their amendment only by the Imperial parliament as they are now and leave the rest of the Act open to amendment by the Dominion parliament?—A. That, again, would involve the federal character of the constitution, and I believe that these sections of the British North America Act dealing with the rights of racial and religious minorities must be given maximum degree of security; these sections of the B.N.A. Act present a clear case in which the unanimous consent of the provincial legislatures should be required before anything could be altered; but as regards other sections of the British North America Act dealing with federal relationships—such, for example, as the distribution of powers—I do not think these could be left to the discretion of the Dominion parliament because it would destroy utterly the federal character of the constitution.

By Mr. Cowan:

Q. Would you care to venture any opinion on the question of whether there should be fewer provincial legislatures?—A. It would be desirable from the standpoint of economy if there were, but this is something we can do very little about apart from the consent of the provinces themselves.

Q. That is why I asked you if you cared to venture an opinion?—A. I have known very strong local feeling to arise from the suggestion to merge school sections.

Q. As the chairman intimated a moment ago, if at an inter-provincial conference the provinces were rather insistent upon their present rights and not insistent upon an amendment, what would you do?—A. In the first place, I would approach a new conference in the faith that something could be accomplished, particularly in view of the present state of public opinion in this country. I do believe that the people of this country are more alive to the importance of this problem to-day than ever before. I do not think because consideration of the matter by a previous conference failed that we are compelled to accept failure as the lot of another conference called in the near future.

Mr. WOODSWORTH: Does not your procedure create failure?

The WITNESS: I am not prepared to admit that. I would say that the proper procedure has not yet been tried.

By the Chairman:

Q. Of course, with regard to Mr. Cowan's question, in the event your case was found to be resting on a rather unsound foundation and was not borne out by the conference do you think any action is available to us to get the constitution amended?—A. Then the responsibility comes back to the Dominion government of the day to determine how far it is prepared to go irrespective of opposition from the provinces.

Q. The question of consulting the provinces is not a matter of legal right but a question of political expediency?—A. Yes.

By Mr. Cowan:

Q. You do not subscribe to the belief that this was a pact or contract?—A. I am thoroughly convinced it is not, either in the historical or the legal sense.

Q. What do you suggest might be the action of the Imperial authorities if the provinces raised any objection?—A. That is an extremely interesting point just now because, as members of the committee are doubtless aware, the state of Western Australia desires to secede from the Commonwealth, and it is presenting its case in the form of a petition to the Lords and Commons of the parliament at Westminster.

Q. That is the provincial legislature, or the state legislature?—A. The state of Western Australia.

The CHAIRMAN: If the gentlemen wish to get Professor Roger's views on the compact theory they will find a very admirable treatise on it in the report of the Canadian Political Science Association from the conference held in Ottawa in 1931.

Mr. COWAN: Where is that report to be found?

Hon. Mr. LAPOINTE: In the library.

Mr. COWAN: Is it under your name, Professor Rogers?

The WITNESS: Yes.

The CHAIRMAN: I do not think the professor has changed his mind with regard to it.

By Mr. Cowan:

Q. Let us finish up with your suggestion as to what the Imperial authorities would do?—A. The Imperial government and parliament are faced with an extremely difficult question regarding the application from Western Australia, because whatever the legal position may be since the Statute of Westminster was passed the conventional position would seem to be that the Imperial parliament will not interfere in a question which is related solely to the Dominion concerned.

The CHAIRMAN: We have heard some talk in various outlying provinces, probably largely for political purposes—I do not mean party politics, but as part of the desire of those provinces to improve their position under confederation—we have heard some threats of secession unless certain things were done. Do you know of any step whereby secession could be constitutionally accomplished?

The WITNESS: I know of no way except by consent. But that is the problem which has been raised in Australia. Western Australia has made its application to the Commonwealth and its application has been rejected; it is now appealing to the parliament which passed the Commonwealth of Australia Act in order to give effect to its desire for secession. The committee of the Lords and Commons has not reported. I think it was at least arguable before the Imperial Conference of 1926 that it was open to a province in this country to object to the Imperial government if it was dissatisfied with the terms of an amendment proposed by the Dominion Parliament.

Hon. Mr. MACKENZIE: Is it not the belief of certain provinces that came into confederation after the proposed treaty was drawn up that they have the right to address the Imperial parliament with respect to any grievances which they may have either properly or of their imagination with regard to secession? I think one of the previous witnesses said that, if my memory serves me.

Mr. WOODSWORTH: Yes, I think so.

The WITNESS: It has long been held in Nova Scotia that there was an ultimate appeal to the foot of the throne for the redress of grievances under the terms of the British North America Act.

Hon. Mr. MACKENZIE: We have the foot of the throne right here in Canada now.

The WITNESS: Yes.

Hon. Mr. MACKENZIE: The king is king of Canada as well as Great Britain.

Mr. COWAN: Would it not be a monstrous thing to suggest that one province could hold up any amendment of the constitution.

The WITNESS: I think such a theory is wholly untenable.

Mr. COWAN: That is, of course, excluding the question of minority rights.

Hon. Mr. LAPOINTE: There are some questions about which any one province might feel very strongly, and I do not think they would accept the theory that the other provinces could force those things on them, however monstrous you may think it is.

Mr. COWAN: I said excluding the question of minority rights.

The WITNESS: It was understood, of course, that this did not apply to sections of the constitution dealing with the rights of racial and religious minorities. Those sections should receive the greatest possible safeguard, even extending to unanimous consent of the provinces.

Mr. COWAN: You are making the same reservation that I do?

The WITNESS: Yes. On that first point regarding the position which the Imperial parliament might take if an objection were raised by a province to an amendment proposed by the Dominion parliament, I should like to point out that actually the Imperial government was a party to the drafting of the British North America Act, and if you examine the resolutions which provided for the delegations to the London Conference from Nova Scotia and New Brunswick it is very plain from the wording of those resolutions that those provinces were, so to speak, putting their faith in the arbitrament of the Imperial government; it may be argued that this historical situation affords some warrant for the view that if a province felt it was being prejudiced there was an ultimate appeal to the Imperial parliament.

Hon. Mr. VENIOT: I always felt that was the case in the Maritime provinces.

Hon. Mr. MACKENZIE: And that is why Premier MacBride went over in 1907; he said he had the ultimate appeal, and he went over.

The CHAIRMAN: That view constitutes a rather serious objection to the power of amendment being placed in the Imperial parliament, does it not?

The WITNESS: Yes. But I am not satisfied as to what the position is since 1926, and particularly since the passage of the Statute of Westminster. The conventional position would appear to be that henceforth the British government would not intervene as between the Dominion and the provinces. It would seem to me that if the provinces had been concerned at that time with the maintenance of that reserve right of appeal some protection should have been afforded to them, either in 1926 or subsequently in the Statute.

The CHAIRMAN: They did make reservation with regard to the amendment of the constitution.

The WITNESS: Yes, I recall that.

By Mr. Cowan:

Q. You get back to this: your start is another interprovincial conference? —A. I am afraid it is. I see no feasible alternative.

Hon. Mr. LAPOINTE: There is no doubt about it.

Mr. COWAN: Do you think public opinion has changed since the last inter-provincial conference?

The WITNESS: I believe the people of this country are better informed upon this subject now than at any other time. There is a growing feeling that changes are desirable and that a way must be found to give effect to those changes.

Hon. Mr. RALSTON: That is right.

The WITNESS: I believe that if a conference met in that atmosphere now it would have a far better chance of success.

Hon. Mr. VENIOT: To deal only with that question?

The WITNESS: Yes. No matter how long it took to deal with it.

Mr. COWAN: Could you suggest anything further in the way of education which would result in a well informed public opinion?

Hon. Mr. RALSTON: I suggest that a mission be sent to the various provinces, a preliminary mission. As this conference would be in the open, you would have to do something ahead of time.

The WITNESS: I think that is desirable.

Hon. Mr. LAPOINTE: The work of this committee is of assistance in that regard.

Hon. Mr. MACKENZIE: It has been a clearing house of ideas.

By the Chairman:

Q. Do you think another conference would have a very much better chance of agreeing on some amendment than it would have of agreeing on the method of amendment; there might be a certain amount of rigidity?—A. I think that is possible; but I know that the more important question now is to secure a method of amendment which can be incorporated in this constitution. That will open the door to future amendments as they are required.

Mr. COWAN: Under the chairman's suggestion you would have to appeal to the Imperial authorities for every amendment.

Hon. Mr. RALSTON: The chairman means to evolve an amendment which provides for a method of an amendment and at the same time to discuss specific amendments to the Act.

The CHAIRMAN: That might be taken in an interprovincial conference with the Dominion to discuss specific amendments as well as method, or a separate conference.

Hon. Mr. RALSTON: I am doubtful as to the advisability of that. If you could keep the conference as a conference distinctly to discuss the method of amendment it would avoid a lot of questions that would arise the minute specific amendments come to be discussed, because then they would think they saw dangers in the method.

The WITNESS: How far would that apply to a consolidation and restatement of the British North America Act?

Hon. Mr. RALSTON: I am not for that at the moment at all. I am afraid we are biting off too much. I think if we could do just one thing at first, and that is find a method of amending the British North America Act, and then have the conference or commission consider what amendments are desirable we will get further along.

By the Chairman:

Q. In your view is this a correct statement of the principle now: that the Imperial parliament has the sole right of amendment, and that legally that right can be exercised at the request of the Dominion parliament without the consent of the provinces, leaving aside the question of political expediency? —A. Yes.

Hon. Mr. RALSTON: What do you mean? What is your idea when you say "legally"?

The CHAIRMAN: Because the Imperial parliament has always acted upon the request of the Dominion parliament without consultation.

Hon. Mr. RALSTON: Legally they do not have to act on the request of the Dominion.

The CHAIRMAN: They do not have to.

Hon. Mr. RALSTON: Legally they could amend without being requested by the Dominion parliament.

The WITNESS: Yes. The legal power is there to do that, but not the constitutional right.

The CHAIRMAN: If that is the legal position and the constitutional position, then the concurrence of the provinces is not necessary for amendment. Are we not giving away the Dominion government constitutional position by calling the provinces together and consulting them with regard to this matter?

Hon. Mr. LAPOINTE: I do not think so. I do not think that legally we have more legal right to insist upon an amendment of the British North America Act by the Imperial parliament. There is nothing to give that legal right. We do it by way of petition. But consulting the provinces I do not think would take away from us what we do not possess except by practice.

The CHAIRMAN: Are there any more questions?

Hon. Mr. LAPOINTE: I am sorry I was not here when Mr. Rogers made his statement with regard to those matters of possible conflict between the Dominion parliament and the provinces as to amendment of the B.N.A. Act under the present system. Do you know if the Imperial statesmen are at all anxious to retain this power of arbitration as between the Dominion parliament and the provinces? At the conference in 1926, as well as in 1930, their representatives said that the sooner they were rid of this possible cause of friction, the better it would be for them. That right was retained there because this country had not yet reached the stage where it wanted the free power of amendment.

The WITNESS: I suppose the reserve of authority to deal with a question of that kind can only be determined following the result of this application of Western Australia to the British government and the British parliament for secession from the Commonwealth. That is now pending.

By Mr. Cowan:

Q. Is there anything in the constitution of Australia that allows a state to appeal directly to the Imperial authorities?—A. No. There is nothing in the constitution which provides for that. As a matter of fact, the constitution begins with the statement that the federation is indissoluble. When Western Australia entered the Commonwealth, Joseph Chamberlain was Secretary of State for the Colonies and officially encouraged the entrance of Western Australia into the Commonwealth. Western Australia has felt that the British government had some measure of responsibility in the matter.

By Hon. Mr. Veniot:

Q. Would you explain your idea of section 145 and the Inter-Colonial railway? You said there was no agreement or anything of that kind. What about section 145?—A. Of the British North America Act?

Q. Yes.—A. If I may say so, I did not say there was no agreement of any kind.

Q. You said that the act of Confederation was not a pact nor an agreement, legally or historically. What have you got to say about section 145

when the Maritime Provinces entered into Confederation under the distinct understanding that the Inter-Colonial railway would be constructed?—A. I said the legal authority depends upon its inclusion in the statute.

Q. I am not touching on the legal end of it; I am representing the historical end of it?—A. The validity of section 145 depends upon its inclusion in the statute. It does not depend upon its origin in the resolutions which were agreed to by the various provinces.

The CHAIRMAN: And the agreement in this section was executed by performance—the railroad was built.

Hon. Mr. VENIOT: Yes. There is another question arises if the railroad was built. The question which now arises down in the Maritime Provinces is: it was built, but was it held as under the agreement by which clause 145—

Hon. Mr. LAPOINTE: You may appoint a commission.

The CHAIRMAN: It is a large question.

Hon. Mr. VENIOT: We have heard that neither historically nor legally was it a pact. I am coming back to that question. We in the Maritime Provinces claim that agreement was never maintained.

The WITNESS: The agreement was carried out.

Hon. Mr. VENIOT: The agreement to construct was carried out, but the Maritime Provinces claim that its maintenance was never carried out as far as the Inter-Colonial railway was concerned. Therefore we claim that the agreement under which we came into Confederation has not been maintained.

By Hon. Mr. Ralston:

Q. Just to be clear in reference to the mechanics of going about to secure some method of amendment, would you think that this provincial conference you spoke of might have its attention directed not to an amendment of the British North America Act in order to provide a method of amendment for it but to the enactment of a separate Act entirely providing for amendment to the British North America Act, or the incorporation in the Statute of Westminster of a section prescribing procedure for the amendment of the British North America Act. This would keep the discussion out of the realm of various possible amendments to the British North America Act—that is various possible specific amendments—and tie it down entirely to the matter of mechanics of procedure in connection with amendments?—A. I would prefer that an amendment procedure be incorporated in the Canadian Constitution as an integral part of the British North America Act. I think it would be a mistake to simply enact it as an amendment to the Statute of Westminster.

Q. It seems to me that comes quite properly within the spirit of the Statute of Westminster which is an endeavour to assert more positively the autonomy of the Dominion, and its constitutional right to legislate. It would simply include in that right the right to amend its constitution. After all, the Statute of Westminster does confer power on the Dominion parliament to amend Imperial Acts, and why could we not go a step further in the Statute and confer power to amend the Imperial Act known as the British North America Act?—A. That was expressly reserved.

Q. Wipe out the exception and provide for procedure. It seems to me it very properly belongs in the Statute of Westminster since it has gone so far as to give the Dominion parliament power to amend an Imperial Act?—A. I think it would be preferable to incorporate the amendment procedure in the B.N.A. Act. It would be more appropriate from an historical standpoint and more convenient for students.

Q. You could not publish it in the school books as succinctly as if it were all in one Act, I agree?—A. I am not over-stressing the importance of that.

Hon. Mr. LAPOINTE: If you would wipe out the exceptions in the Westminster Statute then we could pass our own act and provide for procedure here.

The WITNESS: By legislation of the dominion parliament?

Hon. Mr. LAPOINTE: Yes.

The CHAIRMAN: Without consultation with anybody.

Hon. Mr. RALSTON: The statute would then empower you to amend the act and the way in which you would amend it would be to substitute your own statute.

The WITNESS: Would not the question arise there as it arose in Great Britain with respect to the subsidy question in 1907 and the propriety of the words "this settlement is final and unalterable." What the dominion parliament enacts this year may be repealed next year. How far would the provinces be satisfied to have the Canadian constitution expressed merely in terms of an act of the dominion parliament?

The CHAIRMAN: That goes to the question of putting the power in the hands of the dominion parliament.

Hon. Mr. RALSTON: I would do more than wipe out the exceptions. I would wipe out the exceptions and provide terms under which the dominion could pass an act amending the B.N.A. Act, some formula arising out of those conferences which might involve some of the principles you spoke of, namely concurrence of a certain proportion of the provincial legislatures or as Mr. Ollivier mentioned certain proportions of the inhabitants of the dominion or certain provinces.

The CHAIRMAN: Might not this happen: as soon as you wipe out the exceptions in the Statute of Westminster and have the dominion government provide a certain method of procedure requiring the concurrence of provinces or somebody else in the course of two or three years the dominion government decides it wants to change that method of procedure, would it not be in a position to change it?

Hon. Mr. RALSTON: I would do more. I would wipe out the exceptions and additionally provide, however, that with respect to amendments to the constitution the dominion parliament may legislate with concurrence of the provinces or a certain number of them or a certain proportion of the inhabitants or under whatever conditions might be agreed on by the conference.

The CHAIRMAN: That would be only the act of a dominion government.

Hon. Mr. RALSTON: No, the Statute of Westminster empowering the dominion parliament to pass legislation amending the constitution would prescribe certain limitations or restrictions.

Hon. Mr. LAPOINTE: If you wanted later on to change that method of procedure, you would have to go back—

Hon. Mr. RALSTON: That is right.

Hon. Mr. LAPOINTE: And amend the act again.

The WITNESS: I had in mind this as an alternative.

Hon. Mr. RALSTON: We would have to go back again.

The WITNESS: The procedure I had in mind was first the determination of the amendment procedure and then passage of that amendment procedure, as, shall I say, the B.N.A. Act 1936. That would remove the necessity of any further recourse to the imperial parliament for future amendments to the B.N.A. Act.

Hon. Mr. RALSTON: No, because if I may suggest, the B.N.A. Act of 1936, as I understand it, would lay down that the dominion parliament may amend the

B.N.A. Act subject to certain sanctions, and therefore you would have to go back to the British parliament again to get that amendment before you could change the section.

The WITNESS: You could say it shall be amended when the amending proposal has received a majority vote in both houses of parliament and has been approved by the provincial legislatures or a majority of the provincial legislatures.

Hon. Mr. RALSTON: I agree with that, but if you wanted a change or wanted to amend and instead of a majority vote you were to substitute two-thirds, you would then have to go back to the Imperial parliament?

The WITNESS: That is right, unless you used your amendment procedure to effect the same purpose.

The CHAIRMAN: That would not be true if the Canadian constitution was a Canadian act instead of the B.N.A. Act as it it to-day. That will be all, thank you, Professor. Does any member of the committee think there is a necessity to call any further witnesses?

Hon. Mr. RALSTON: Were any others suggested?

The CHAIRMAN: None, with the exception of Mr. St. Laurent. Do you think there would be any advantage in calling him?

Hon. Mr. LAPOINTE: It might be a good thing.

Hon. Mr. RALSTON: He has been a great student of constitutional history and occupied the very prominent position of president of the Canadian Bar Association.

The CHAIRMAN: Will you move that he be called?

Hon. Mr. LAPOINTE: Yes.

Carried.

The CHAIRMAN: I do not know when we shall meet again, because it will be a question of getting this gentleman here to give evidence, and also hearing from the provincial premiers, so there does not seem to be any particular rush until we have obtained that information.

Mr. WOODSWORTH: If we do not hear from them, we will present our report anyway.

The CHAIRMAN: Yes. Would it be satisfactory to meet at the call of the Chair?

Hon. MEMBERS: Yes.

The committee adjourned at 12.45, to meet again at the call of the Chair.

HOUSE OF COMMONS,

April 16, 1935.

The special committee appointed to enquire into the best method by which the British North America Act may be amended, met this day at 11 a.m., Mr. Turnbull, the chairman, presiding.

The CHAIRMAN: Order, gentlemen; we have a quorum present. Several telegrams have been received from the provincial authorities which I propose reading into the record if the committee has no objection; these are in response to the telegram which we sent out some time ago and which is on the record now. The reply from British Columbia is already on record. The replies are as follows:—

HALIFAX, N.S., Apr. 3, 1935.

A. A. FRASER,
Clerk of Committee on B.N.A. Act, Ottawa, Ont.

Our legislature now in session and most difficult to attend to matter of this kind now in way you suggest. We feel matter should be approached by conferences between representatives of provinces and Dominion where each would have the views of the other and ample time to discuss the matter.

(Sgd.) J. H. MACQUARRIE,
Attorney-General of Nova Scotia.

QUEBEC, Que., Apr. 3.

A. A. FRASER,
Clerk of Committee on B.N.A. Act,
House of Commons, Ottawa.

Your telegram received. Surely the committee cannot expect that the views of the province of Quebec will be discussed by an exchange of telegrams or letters. In a matter of such importance I suggest that a conference of the Dominion and the provinces should be held.

(Sgd.) L. A. TASCHEREAU.

REGINA, Sask., Apr. 3, 1935.

Chairman of the Committee of Amendments, to the B.N.A. Act,
House of Commons, Ottawa, Ont.

Referring to your telegram of the twenty-seventh day of March wherein you request the government of the province to make representations either orally or by written moranda as to the methods of procedure which this province would suggest in connection with amendments to the Canadian Constitution I would say that I have been following with intense interest the proceedings of your committee. The question of what if any provision is to be made for amendment of the Canadian Constitution from time to time is a question which ultimately must be decided by conferences between the governments of the provinces and the government of Canada with the possibility of a previous preliminary inter

provincial conference. In view of this fact it would appear to be unwise for the provinces to be giving their views before a committee of the House of Commons. With due deference might I be permitted to suggest that the proper procedure is for your committee to pursue its present enquiry and to make a report to the House of Commons which I presume will either be accepted or amended or merely received without binding the government to accept the proposals of the committee and with this report available the provinces could then give consideration as to what attitude they desired to take and perhaps discuss the matter amongst themselves and thereafter join with the federal government in a general conference. The report of your committee would serve as the basis of discussion around which would take place the ultimate solution of this problem. We realize that the question is one of great national importance and should be decided in the welfare of Canada free of all political considerations and we are certainly prepared to do our share towards the facilitating of a solution but we feel that we must look after the interests of the province and I think that the procedure I have outlined would be the proper course for us to adopt at this time.

(Sgd.) T. C. DAVIS,
Attorney-General.

CHARLOTTETOWN, P.E.I., Apr. 4, 1935.

A. A. FRASER,
Clerk of Committee British North America Act,
House of Commons, Ottawa, Ont.

Your wire March twenty-seventh. Government of Prince Edward Island is of opinion that Dominion government should formulate its plan and policy for the purposes intended and that this should be submitted to the provincial governments and afterwards discussed at a conference of representatives of the provinces and the Dominion.

(Sgd.) H. F. MACPHEE,
Attorney-General.

WINNIPEG, Man., Apr. 5, 1935.

A. A. FRASER,
Clerk of Committee on the B.N.A. Act, Ottawa.

Your wire twenty-seventh March re method of amending British North America Act received. Our legislature now in session. Will give consideration to request and submit recommendations after prorogation.

S. J. MAJOR,
Attorney-General for Manitoba.

ST. JOHN, N.B., Apr. 10, 1935.

A. A. FRASER,
Clerk Committee on B.N.A. Act, Ottawa, Ont.

Will forward written submission when House resumed after adjournment.

W. H. HARRISON,
Attorney-General for New Brunswick

The province of Ontario has not replied so far.

I might say that we telegraphed Mr. St. Laurent to appear to-day, and at first he accepted but afterwards found that he had an appointment which prevented him from attending. It may be that he will be able to come and address us after the adjournment if it is found desirable.

We have with us this morning Dr. Beauchesne, Clerk of the House of Commons, who has some information he desires to give us on the subject of our reference.

Dr. Arthur BEAUCHESNE, C.M.G., LL.D., K.C., Clerk of the House of Commons.

Dr. BEAUCHESNE: Mr. Chairman and gentlemen: it is quite true that if we apply to the British North America Act the principles followed in the interpretation of statutes, it is not a compact between provinces; it is an Act of Parliament which does not even embody all the resolutions passed in Canada and in London prior to its passage in the British parliament where certain clauses that had not been recommended by the Canadian provinces were added. The resolutions of the Quebec conference were not passed by the legislatures of Nova Scotia and New Brunswick. As to this, I would refer you to the able papers read before the Canadian Political Science Association in 1931 by Mr. N. McLeod Rogers and the late Mr. J. S. Ewart. Nevertheless, the British North America Act has created a situation tantamount to a compact between our provinces which may differ in certain particulars, but, as far as legislative powers are concerned, are on equal footing.

Mr. BOURASSA: You mean between the provinces prior to confederation.

Dr. BEAUCHESNE: No, no, between all the provinces.

Mr. BOURASSA: Yes, but the compact was made before confederation.

Dr. BEAUCHESNE: Yes, there was a compact before confederation. It was embodied in the Act, and that Act has created a situation between all the provinces.

As they all contribute to the federal revenue, they are in partnership for the management of Dominion affairs and the four original provinces do not enjoy any special privilege over the other five. As a matter of fact, they are made equal by section 146 of the British North America Act which provides that new provinces may be admitted "subject to the provisions of this Act". These words are carefully repeated in section 2 of the Manitoba Act, in the preamble of the order-in-council admitting British Columbia to the Union, in the preamble of the order-in-council admitting Prince Edward Island, in section 3 of the Alberta Act and in section 3 of the Saskatchewan Act.

It follows that the British North America Act, as it stands to-day, after having been in force for many years, may be compared to the charter of a society in which the Dominion and the provinces are members and none of them should be listened to by the British parliament if it tried to alter that charter without the consent of the others. The fact that the Dominion of Canada did not exist before, but was created by, the British North America Act does not place it in an inferior position. The same thing happened to Ontario, Quebec, Alberta, and Saskatchewan which had no separate legal status before they were constituted into Canadian provinces. As the legislative powers of the nine provinces are defined in section 92, and the residuary powers are granted to the Dominion in section 91, it seems that neither the provinces nor the Dominion are free to ask that the British parliament either expand or contract those powers without the concurrence of the others.

When the British North America Act was passed, the population of the four provinces which formed the Dominion of Canada aggregated 3,070,601, or less than the present population of Ontario or Quebec. The total revenue of the Dominion in 1868 was $13,687,928.00 and the total expenditure $14,071,689.00. The net debt of the country was $75,757,135. Our railway mileage was 2,278

Motor vehicles were not known; aviation was a dream. The west was uninhabited except by Indians, half-breeds, fur dealers and roaming buffaloes. The population of British Columbia was very small since it was put down in 1871 to 45,000 of which number only about 9,000 were whites. Prince Edward Island had a population in 1861 of 80,857.

The Act was passed mainly as a compromise because the legislature was so deadlocked that nobody could form a government. We were then a colony with a governor who still received elaborate instructions from the colonial office. There was no question of our representation in foreign countries; we were not even allowed to negotiate our own treaties; there were British garrisons in our country; social reform was looked upon as the last word of dangerous radicalism.

We have since progressed very materially; our industries have been multiplied; our urban population has exceeded our rural population; the war and its dire consequences have appeared; Imperial Conferences have taken place; the British Commonwealth of Nations has been formed; the Statute of Westminster has altered our status. Most of the provinces have lived beyond their means, but they have let up on the autonomy principle in later years. Nobody will doubt that economic legislation in Canada is more difficult of introduction than in any other country in the world, on account of our dual system of government. The time has come, in my humble opinion, when the British North America Act, except as to minority rights, should be transformed and a new constitution more in conformity with present conditions should be adopted. Amendments here and there would be mere patchwork which could not last. The people of 1935 are different from those of 1867. What we want is a new constitution.

By what procedure should it be adopted?

Drafting a constitution is a serious matter, particularly in a federated country like Canada, Suggestions have to be weighed with calm deliberation and reconciled with the needs of the nation. Some plan embracing the whole life of the nation has to be accepted. Geography, natural resources, avenues of trade, transportation, social legislation and racial harmony have to be considered. It is idle to think that this can be done in the same formal way as an amendment to a public statute. The new constitution must leave nobody with a grievance. A spirit of conciliation should predominate. For these reasons, the task must be intrusted to an independent body in which all the elements of the country will be represented. I, therefore, beg to suggest an imposing Constituent Assembly formed of eminent men coming from all parts of Canada. Provincial conferences, attended by a few ministers meeeting behind closed doors, would hardly satisfy public opinion. The debate should be public. I submit that a Constituent Assembly, chosen by the provincial legislatures and by the House of Commons, representing the main political parties and groups in proportion to the votes given at the last general elections, should meet in session at Winnipeg and discuss the constitution from all its angles.

I am not stressing Winnipeg. I want the assembly to sit in a city in the west. It would not be necessary for a delegate to be a member of parliament, or of a provincial legislature.

Constituent Assemblies have been resorted to for framing constitutions in many countries. One of the best known in history was the Assemblée Constituante which sat in Paris from 1789 to 1791 and drew up a new constitution for France. It consisted of 1,200 members. The population of France was then 24,800,000. The chairman was only elected for two weeks, as the assembly did not want to give too much authority to any of its members. The debate lasted from August 4, 1789, to September, 1791.

In 1848, a Constituent Assembly, consisting of 880 members, was elected by universal suffrage in France for the purpose of drawing up a new constitution. 7,835,327 electors, or 84 per cent of the population, voted. The assembly opened on the 4th of May and was only through with its constitution on the 4th of November.

When in 1787 the United States agreed to consider a change of constitution, each state, with the exception of Rhode Island, sent delegates who assembled at Philadelphia on May 14. The convention consisted of fifty delegates, and the population of the thirteen states was then 3,500,000 people, i.e., about the population of Ontario to-day. George Ticknor Curtis, commenting on this convention in "The Constitution of the United States and its History," says:—

> This body of men, assembled for the unprecedented purpose of thoroughly reforming the system of government with the authority of the national will, comprised a representation of the chief ability, moral and intellectual, of the country; and in the great task assigned to them they exhibited a wisdom, a courage and a capacity which had been surpassed by no similar body of law givers ever previously assembled. The world had then seen little of real liberty united with personal safety and public security; and it was an entirely novel undertaking to form a complete system of government, wholly independent of tradition, exactly defined in a written constitution, to be created at once, and at once set in motion, for the accomplishment of the great objects of human liberty and social progress. Their chief source of wisdom was necessarily to be found in seeking to avoid the errors which experience had shown to exist in the Articles of Confederation. Naturally, the individual members of the convention were men of widely different views; the debates extended over four months' time; but the counsels of the leading spirits at last prevailed—of such men as Hamilton, Madison, Franklin, Gouverneur Morris, Edmund Randolph and Rufus King. Washington was the presiding officer.

There were 1,200 delegates in the Constituent Assembly of France when its population was 24,800,000 and 880 when it was 35,400,000. There were fifty delegates at the Philadelphia convention when the population of the United States was one-third of Canada's present population. Considering, therefore, the vastness of our country, the conditions in the west and in the east, and our bi-lingual character, we would make no mistake if we formed a constituent assembly of 223 delegates.

The number of members representing the Dominion and each province would be equal to one-fourth of the membership in the Senate, the House of Commons and in the legislatures, including the Quebec Legislative Council, which membership is now as follows:

Senate	96
House of Commons	245
Alberta	63
British Columbia	48
Manitoba	55
New Brunswick	48
Nova Scotia	30
Ontario	90
Prince Edward Island	30
Quebec Legislative Council	24
Quebec Legislature	90
Saskatchewan	63
Total	882

The representation would be as follows:—

Senate	24
House of Commons	61
Alberta	16
British Columbia	12
Manitoba	14
New Brunswick	12
Nova Scotia	8
Ontario	23
Prince Edward Island	8
Quebec	23
Saskatchewan	16
Total	223

I submit that the British government should be asked to send a delegation. My suggestion is that if the constitution is passed, the British North America Act should be repealed. I would imagine it would be a very serious matter for the British government to abolish or renounce its authority over Canada which was given to it by the British North America Act. Besides that, there are many other things to be taken into consideration as to why, if we pass this constitution, we should not ignore Great Britain. There is, for instance, the question of defence, the question of Great Britain's interest in America on the Pacific and on the Canadian coast.

By Hon. Mr. Mackenzie:

Q. Who will confer the authority upon this Constituent Assembly?—A. I am just coming to that.

The assembly should be convened by provincial proclamations issued in each province and by a Dominion proclamation in which it would be clearly stated that the minority rights now guaranteed by the British North America Act should not even be discussed.

In choosing the delegates to this Constituent Assembly, due regard should be given to the representation of all classes. Business men, farmers, professional men, scholars and labour men should be represented. Although the Dominion would send an important delegation, the assembly should not be a Dominion assembly, but rather an assembly of the provinces' representatives in consultation with the Dominion.

There ought to be no government side and no official opposition in such a body, which should work on the lines of coalition. A committee consisting of the premiers and leaders of the opposition in the House of Commons and legislative assemblies would have charge of the agenda and daily order of business which, under ordinary rules, could be adjusted daily by experienced parliamentary clerks. Speeches ought to be recorded by Hansard.

I would suggest that the assembly do not sit in Ottawa, in order that it may not have the appearance of being dominated, or even influenced, by the Dominion power; and, as the western provinces are of such paramount importance in the country, I suggest the best city for the representatives to gather in would be Winnipeg.

The first days of the Constituent Assembly should be devoted to debating the following motion:—

> That, in the opinion of this assembly, it is expedient that the British North America Act should be amended so as to meet the requirements of present conditions while preserving the minority rights guaranteed by the said act.

By Mr. Bourassa:

Q. Did you not suggest "repeal" of the British North America Act? You say "amended" there.—A. Oh, yes.

The CHAIRMAN: It should be repealed and a new act substituted, he says.

Dr. BEAUCHESNE: Yes. That escaped me. It should read:—

> That, in the opinion of this assembly, it is expedient that the British North America Act should be transformed into a constitution that would meet the requirements of present conditions while preserving the minority rights guaranteed by the said act.

The Assembly would first meet at 11 o'clock a.m. and sit until one, and then from 3 to 6. After a full discussion on the general principles had taken place, several committees would be formed. Then the Assembly would adjourn until the committees reported. A draft constitution would afterwards be submitted to the assembly.

At the first meeting of the Assembly, each province would present its case, as would the Dominion and the British delegation.

The committees would deal with every chapter of the British North America Act, and more particularly with sections 91 and 92.

A Constituent Assembly could take up every question that has been mooted in the past twenty years with regard to the constitution. For instance, the questions of reducing the number of provinces, the electing of senators, the question of fisheries, the Companies' Act, insurance law, the radio, etc., could all then be considered. Conditions with regard to all these matters are so different from what they were in 1867 that they should be carefully surveyed. Whether our country should be changed from Dominion to Kingdom is also a subject which might then be discussed. I would suggest that the country could be called "The Federated States of Canada."

Once a constitution has been passed by the Constituent Assembly—

By Hon. Mr. Mackenzie:

Q. How passed, by pure majority or a majority from every province?—A. Pure majority.

Q. Of the entire assembly?—A. I suggest a majority, for the Constituent Assembly would be one body.

Once a constitution has been passed by the Constituent Assembly, it should be adopted by each province and by the Dominion, but before coming into force it should receive the assent of His Majesty the King of Great Britain, who is also the King of Canada.

By Mr. Bourassa:

Q. As King of Canada?—A. As King of Canada.

By Mr. Veniot:

Q. Suppose some of the provinces refused to adopt it, what then?—A. I think then it would fall through.

Q. What is your opinion there?—A. I think it would fall through. I think we would have to return to the British North America Act.

The CHAIRMAN: It would have to be assented to by the King as the King of England, on account of the present British North America Act being now an act of the Imperial parliament.

Mr. BOURASSA: Repeal would have to be given by the King as King of Great Britain, but the new constitution would have to be assented to by the King as King of Canada.

Dr. BEAUCHESNE: He is the King of both countries.

The CHAIRMAN: I was just covering the point of the Imperial Act.

Mr. BOURASSA: Quite so.

Dr. BEAUCHESNE: A special clause should provide for His Majesty's assent. Without the King's signature, the constitution would not be valid. This provision ought also to apply to subsequent amendments. Such a provision, while preserving our autonomy, would show that we belong to the British Commonwealth of Nations and are still within the ambit of the Empire. I fail to see the necessity of making our constitution an act of the British parliament, because it deals with Canadian affairs only, but there may be certain clauses affecting Great Britain which the Westminster parliament might have to approve.

After our constitution is in force, how should we amend it?

Mr. BOURASSA: On that point, why not follow the Irish method as to these conditions between Great Britain and Canada, make them the object of a treaty? As you know, that was the way they dealt with it in Ireland. They made a treaty, and then the constitution was made a part.

The CHAIRMAN: Treaties and contracts are so easily broken in these days.

Mr. BOURASSA: Oh, yes.

The CHAIRMAN: Constitutions are not so easily broken.

Mr. LAPOINTE: I would not admit that.

Dr. BEAUCHESNE: After our constitution is in force, how should we amend it? I do not think it would be advisable again to call a Constituent Assembly such as I have suggested above. This procedure may be resorted to when a new constitution has been drawn up, but it does seem a little absurd to adopt it every time the country feels that some amendment ought to be made. The right of each province to amend its own constitution as provided in Section 1 of Section 91 of the British North America Act should be preserved, but whenever any material amendment to the Dominion or provincial powers might be needed, a vote of two-thirds of the Dominion parliament and of the legislatures should be required.

Speaking about questions that may be debated at the Constituent Assembly may I suggest that subsidies should be taken up. They should not be paid to the provinces. Those subsidies infer a certain idea of subservience which is not in keeping with real autonomy. I would rather have taxation readjusted so that each province would have sufficient revenue to manage its own affairs without begging support from the federal treasury. It may be that certain services are too expensive for local governments, and they should be transferred to the Dominion.

Each province should pay the salary of its Lieutenant-Governor, although he would be appointed by the federal authority, in the same way as the Dominion remunerates the Governor-General who receives his appointment from the King.

I also think that each province should appoint and pay the judges of its Superior, Supreme or High Courts of Justice who administer justice within its boundaries. True, these judges adjudicate on federal laws, but the same may be said of the stipendiary magistrates and justices of peace who administer part of the Criminal Code.

By Hon. Mr. Lapointe:

Q. Then if they pay for the judges, they would appoint them. The man who pays the piper calls the tune.—A. There is no objection to that. I think the less the Dominion would have to do with the provinces, the better it would be for the Dominion.

Hon. Mr. VENIOT: That is one thing you will never get the provinces to consent to.

Hon. Mr. LAPOINTE: Never get them to consent to what?

Hon. Mr. VENIOT: Paying for the judges themselves and paying for the Lieutenant-Governor, and having them appointed by the federal government.

Hon. Mr. LAPOINTE: Oh, no, of course not.

Dr. BEAUCHESNE: It must be remembered that confederation was organized by a man, Sir John A. Macdonald, who believed in legislative union. Now and then in the British North America Act we stumble on clauses which show clearly that an attempt is made to bring as much power as possible within federal authority. Whenever he can, Sir John A. Macdonald refers to the federation as the *Union*, with a capital "U". He does so in the preamble. The heading of the second chapter is called the "Union". The same word appears in Sections 4, 19 and 25 where he states that the name of the first senators shall be inserted in the *Queen's Proclamation of Union*; in sections 42, 65, 81, 84, 88, 102, 107, 111, 115, 116, 121, 123, 124, 126, and 137 the word "Union" is mentioned. The word "Confederation" does not appear once.

If you had a copy of the Act here, Section 139 is very interesting. It shows a deliberate attempt to make a union. It reads:—

> Any Proclamation under the Great Seal of the province of Canada issued before the *Union* to take effect at a time which is subsequent to the *Union*, whether relating to that province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed shall be and continue of like force and effect *as if the Union had not been made.*

Section 145 states that the construction of the Inter-Colonial Railway is essential to the consolidation of the Union (with a capital "U") of British North America; and Section 146 provides for the admission of colonies or provinces into the Union (Again with a capital "U").

Sir John Macdonald, who was a great statesman and a great politician, realized as early as 1861 that legislative union would not go, but he said then on the floor of the legislative assembly that "The true principle of a confederation lies in giving to the general government all the principles and powers of sovereignty." As Sir Joseph Pope says, at page 11 of the "Correspondence of Sir John Macdonald", "He laboured for the creation of a strong central government".

There have been many disputes about provincial rights since 1867 and it seems certain that when a new constitution is drawn up the distribution of federal and provincial powers will have to be modified.

I submit that appeals to the Privy Council should be dealt with by our constitution. Some arrangements should first be made with the British Privy Council that a Canadian judicial committee, consisting of Canadians only, be appointed to sit in Ottawa where they would hear Canadian cases. This method would preserve the principle of taking our cases to the highest tribunal without going out of our own country. We have in Canada very distinguished jurists on the bench and at the bar who could fill these positions very acceptably.

By Mr. Bourassa:

Q. Would that not curtail the jurisdiction of the Supreme Court?—A. They have the High Court of Judicature in England the same as we have; still they have the judicial committee of the Privy Council.

Mr. ERNST: We have in the provinces intermediary stages which they have not in England before they reach the Supreme Court.

Mr. BOURASSA: Inferior jurisdictions, then.

Mr. ERNST: We have a Trial Court, an Appeal Court, and then a Supreme Court; whatever the system in the various provinces, they go through the three stages.

Dr. BEAUCHESNE: My suggestion would not increase the number of appeal courts. It would leave it the same as it is to-day.

Hon. Mr. LAPOINTE: There is no Privy Council appeal in England.

Mr. ERNST: The House of Lords.

Hon. Mr. LAPOINTE: Yes, it is the House of Lords.

Dr. BEAUCHESNE: It is the House of Lords.

Mr. ERNST: The foot of the Throne.

Dr. BEAUCHESNE: I do not say "the foot of the Throne." I say "the highest tribunal." We have laws which state what cases shall be taken to the Privy Council; but I say that those cases should be taken to a Canadian Privy Council. The members of the Canadian Judicial Committee of the Privy Council could be chosen by our own government and appointed by the King. The Dominion would give them adequate remuneration. They would sit four times a year. I should not suggest that they take the place of the Supreme Court, which would continue to exist here in the same way as the Supreme Court of Judicature of Great Britain. I would leave the jurisdiction of the Judicial Court Committee for Canadian cases the same as it is to-day.

Mr. BOURASSA: Before leaving that subject, let me say the Judicial Committee, as you know, is considered in England as being partly a political body. That is one of the anomalies. It is presided over by the High Chancellor, who is a member of the government. The late Lord Haldane told me what a difficult position it was at times for the High Chancellor to act in purely a judicial capacity, but at the same time acting as a member of the cabinet, dealing with the same question.

Hon Mr. LAPOINTE: He still does that.

Mr. BOURASSA: Of course; I know, but I am thinking of the difference in tradition and political spirit of Canada and Great Britain. If we created a judicial committee of the Privy Council, I am afraid that would tend to the introduction of politics into the judiciary.

Dr. BEAUCHESNE: As it is to-day, our appearance before the Judicial Committee is an act of subservience on our part; and if this country is in favour of taking its appeals to the Privy Council, why do not we organize a judicial committee in our own country?

Mr. BOURASSA: Why not widen the jurisdiction of the Supreme Court.

Dr. BEAUCHESNE: Well, this is a question to be considered.

Mr. ERNST: It is wide enough.

The CHAIRMAN: After all, the discussion is interesting, but we are getting away from the matter of amending the British North America Act.

Mr. BOURASSA: The paper is so interesting it is difficult to resist the temptation.

The CHAIRMAN: I did not stop it, but I do not think we ought to go into that broad inquiry.

Dr. BEAUCHESNE: If you will allow me, Mr. Chairman, I will just make another suggestion: if we have a constituent assembly and if we discuss the making of a new constitution, I think it should provide for a federal district. I think it is an anomaly that Dominion affairs should, to a certain extent, be subject to provincial authority. I would suggest that we have a federal district taking in about 25 square miles on each side of the Ottawa river.

Mr. BOURASSA: You don't advocate transferring it to Winnipeg?

Dr. BEAUCHESNE: Winnipeg would be for the discussion of the assembly in order to make sure that the Constitution was not a federal affair.

Dr. BEAUCHESNE: Take the question of education. If the Dominion to-day wants to organize a research institution such as Scientific Research Council or any technical institution, it is always met with the B.N.A. Act. It is said the Act encroaches on provincial authority. If we had a large federal district this could not happen. We might even have under the federal government a very large national university, and I think if each province gave a certain number of scholarships, say 10, 15, or 20, the university would turn out each year and supply to the country a large number of educated men with the proper Canadian spirit. These young men would come from all parts of the Dominion.

Mr. COWAN: This university would be supported by the Dominion treasury?

Dr. BEAUCHESNE: Supported by the Dominion treasury. If there was a federal district, in order to make that federal district attractive in a big country like Canada, I would suggest the creation by the government of a national park of 75,000 to 100,000 acres to the north and northwest of the city. I would suggest that as much as possible of the country round about the Laurentian hills be included in order to make the park beautiful and attractive. Mr. Chairman, that is all I have prepared.

Mr. BOURASSA: On the question of a federal district, would you suggest the example of Washington and disfranchise all the voters?

Dr. BEAUCHESNE: No; I do not think because a man is a civil servant he ceases to be a citizen.

Hon. Mr. MACKENZIE: In the matter of the Constituent Assembly, would you not require a preliminary conference to agree to the set up of such a body?

Dr. BEAUCHESNE: I would suggest that each province be asked for its opinion. I think if there is a preliminary meeting it should be representative of all provinces in the Dominion.

Hon. Mr. LAPOINTE: Sir Clifford Sifton advocated a matter of this kind, and he suggested that resolutions should be first adopted by the legislatures of every province, favouring the idea of calling a national constitutional convention, and that would give the authority for summoning the convention. I think it was along pretty much the same lines as you suggest.

Dr. BEAUCHESNE: I did not see it; but of course this committee could make suggestions as to the preliminary meeting to be held.

Mr. BOURASSA: And besides, the fact that you suggest fixed representations of each province carries, then, as a consequence, that the constituent assembly could not meet without consent of all provinces; because each province would have to appoint its delegates to the convention. Therefore you acknowledge to each province the liberty to agree or disagree.

Mr. COWAN: Was it your idea, Dr. Beauchesne that the constituent assembly would be given power to make an inquiry and bring in a report?

Dr. BEAUCHESNE: It would draft a constitution, one of the clauses of which would be to ask for the repeal of the B.N.A. Act.

Hon. Mr. MACKENZIE: Except minority rights.

Dr. BEAUCHESNE: Minority rights would not be discussed at all. I would include in the constitution, the same clause as now exists in the B.N.A. Act with regard to minority rights.

Hon. Mr. VENIOT: That refers only to two provinces.

Mr. ERNST: No.

Hon. Mr. VENIOT: In certain respects it is only in effect in two provinces.

Mr. ERNST: You cannot tell as to the future.

Dr. BEAUCHESNE: They affect the Dominion parliament, in section 133.

The CHAIRMAN: We have education and minority rights in Saskatchewan.

Mr. GAGNON: It seems to me we ought to define what we mean by "minority rights." Since we have been sitting in this committee we have used that expression as a sacrosanct expression; nobody dares to touch it. It seems to me it is very important.

Hon. Mr. VENIOT: Since the adoption of the B.N.A. Act there have been minorities created in the different provinces. Do you suggest in the conference that their claims to rights and privileges should be discussed?

Dr. BEAUCHESNE: I would not have any minority rights discussed. There is nothing more dangerous in Canada than a discussion of minority rights. A discussion of them would wreck the whole Constituent Assembly.

Hon. Mr. VENIOT: That is quite true, but where the minorities feel that they are labouring under conditions which should not exist, it leaves an ill feeling. If this conference you suggest is to be called and has not got pluck enough to deal with the question that is causing a great deal of uneasiness in the country, then I do not think it should exist at all.

Hon. Mr. MACKENZIE: You said in your paper, Dr. Beauchesne that subsidies to the provinces should be discontinued, but before that could be done we would need to get a final accounting of the various provinces making claims.

Dr. BEAUCHESNE: Yes, we would need that.

Hon. Mr. LAPOINTE: And a new basis of taxation.

Dr. BEAUCHESNE: A new basis of taxation; increase provincial taxation, perhaps change the power. I do not see any absolute necessity of all provinces having the same legislative powers or executive powers. I do not see any necessity of having it as it is to-day. Take the question of fisheries. The province of Quebec has more power in regard to fisheries than the province of Manitoba, where there are fisheries, or the Maritime Provinces. It is not absolutely necessary to have the same power.

Hon. Mr. LAPOINTE: Does it not depend on the constitution, because under the civil laws of the province of Quebec the bed of the rivers, even the St. Lawrence river, belongs to the Crown.

Dr. BEAUCHESNE: Yes, Mr. Lapointe.

Hon. Mr. LAPOINTE: That depends on the constitution.

Dr. BEAUCHESNE: My point is, it is not absolutely necessary that the same powers be given to each province. Suppose you have a province, for instance, in the west, which claims that it cannot afford to manage all its social legislation. What prevents it from giving part of it to the Dominion, provided there is some compensation being given for it. If the Dominion manages some of the province's affairs, it should get revenue, or should be compensated for it. But I think these things should be settled by each province, and each province should be an independent country with power to do whatever it pleases. And I would have a wall between the provinces and the Dominion, and I would have no appeal, no veto, and no remedial appeal, none of all that misery we have had here since Confederation; and each province would own its own courts.

Mr. COWAN: You say, Dr. Beauchesne, that the Constituent Assembly would provide a constitution, and you would submit that to the federal parliament and the provincial legislatures.

Dr. BEAUCHESNE: Yes; and when they all agree to it, I would submit it to His Majesty.

Mr. COWAN: Would you make it unanimous?

Dr. BEAUCHESNE: No; I would make it the ordinary majority.

Mr. COWAN: Would you make it unanimous in the provinces?

Dr. BEAUCHESNE: No.

Hon. Mr. VENIOT: Unanimity of provinces?

Dr. BEAUCHESNE: No.

Hon. Mr. VENIOT: What would happen if one province would not adopt it?

Dr. BEAUCHESNE: You ask if I would demand that all provinces agree to it?

Hon. Mr. VENIOT: Yes.

Dr. BEAUCHESNE: Certainly; it would not be a constitution for Canada if they did not agree to it.

Mr. ERNST: I do not think we will ever get one on that basis.

Hon. Mr. LAPOINTE: It would be very difficult.

Dr. BEAUCHESNE: I say it is impossible to ask that each legislature give a unanimous vote. I think surely a country like Canada with 10,000,000 people ought to be able to agree on a constitution.

Mr. COWAN: Other witnesses spoke of some method of education. What do you say as to the state of public opinion to-day? Would it justify a change in the constitution?

Dr. BEAUCHESNE: I think so; I think the time is ripe for a change in the constitution. I do not think you would need much publicity in order to draw to the attention of the people of this country that the B.N.A. Act is inadequate.

Mr. ERNST: I would agree so far as the atmosphere around the parliament buildings is concerned that that is true. I doubt whether I could go back and convince my electors of the same thing, though. Frankly, I do not think four out of five—I would put it higher than that—99 out of 100 know a thing about the division of power. When they come and ask me for money for highways, I am perfectly convinced they do not.

The CHAIRMAN: The average citizen has not the slightest idea of the division between provincial power and dominion power.

Mr. COWAN: How are you going to educate public opinion?

Dr. BEAUCHESNE: By the press. I think most of the people realize that, but the representatives would have to give the lead.

Hon. Mr. MACKENZIE: Other witnesses have recommended a provincial conference and an itinerant royal commission. What in a word, do you claim are the advantages of a constituent assembly?

Dr. BEAUCHESNE: It is more public; it is more in contact with the ordinary man in the street. Its deliberations should be published.

The CHAIRMAN: It is more than that.

Dr. BEAUCHESNE: There would be no suspicion that anything was going on behind the curtain.

The CHAIRMAN: There would be a meeting of minds in a constituent assembly that would not meet at a royal commission.

Hon. Mr. LAPOINTE: It would appear more national in every way.

Dr. BEAUCHESNE: In France in 1848 they had a regular election on the principle of universal suffrage, and they elected the assembly and when—

Mr. BOURASSA: In what year?

Dr. BEAUCHESNE: 1848.

Mr. BOURASSA: It did not last long.

Dr. BEAUCHESNE: No. When the constitution was passed, the assembly was dispersed. You could in this country first resort to a referendum.

Mr. COWAN: Would you submit to a referendum the question of whether the new constitution should be adopted?

Dr. BEAUCHESNE: I think it would be a very good way, provided—

Hon. Mr. LAPOINTE: For the final sanction.

Dr. BEAUCHESNE: Provided it does not become a political football.

Hon. Mr. LAPOINTE: I find one of your suggestions very hard to entertain, and that is, in a national convention, the British parliament should be represented. I cannot see on what basis you arrive at that conclusion?

Mr. BOURASSA: You do not suggest that exactly?

Hon. Mr. LAPOINTE: The Canadian National convention.

Dr. BEAUCHESNE: We cannot ignore Great Britain.

Hon. Mr. LAPOINTE: No. The King, of course, would have to assent. He is the King of Canada.

Dr. BEAUCHESNE: Yes.

Hon. Mr. LAPOINTE: That representation from the British parliament should come and discuss with Canadians what the constitution of Canada should be will never be accepted by me.

Dr. BEAUCHESNE: No, I do not suggest that. I suggest that representation from Great Britain come here and look after the interests of Great Britain. To-day Great Britain has the B.N.A. Act, and if, at any time, Canada did anything detrimental to the interests of Great Britain, Great Britain could amend the act to switch that.

Mr. LAPOINTE: True. They keep it and have the power to amend the act because we have not asked that it be transferred to us. They have told us that many times. It is rather a source of worry to them. Under certain circumstances the provinces might disagree with the federal parliament on some amendment and they would be placed in a very disagreeable position. They do not want it; we forced it on them.

Dr. BEAUCHESNE: Well, can you not foresee a situation where there would be so much hostility between Canada and Great Britain, that Great Britain would say, " I have the power to amend the B.N.A. Act and I am going to do it."

Mr. BOURASSA: Do you think that would assuage the hostility?

Mr. ERNST: We would make our own constitution.

Mr. GAGNON: Britain would never attempt that to-day.

By Mr. Cowan:

Q. I would like to have your view clarified in regard to the Imperial parliament. I think in your paper you said you did not think we should have an imperial Act.—A. No.

Q. What do you mean?—A. I mean that we should have a constitution which would be a convention between all the provinces, a treaty between all provinces, assented to by the King of England that would do away with being governed by statute of the parliament of Westminster.

Q. Did you say that such a constitution would not have to be passed by the Imperial parliament?—A. Yes, I have said that.

By the Chairman:

Q. And it would have to be ratified by each parliament, just as a treaty is ratified?—A. As soon as it is ratified the B. N. A. Act would be repealed.

By Mr. Cowan:

Q. Well, the Imperial parliament passed the B. N. A. Act; how are you going to get away from that?—A. We would ask the British parliament to repeal it. We now get them to amend it.

Q. And you would ask them to repeal it?—A. Yes. Because we would have another constitution signed by the King.

Q. Was that the idea you had in mind in regard to Mr. Lapointe's question; that it would facilitate the repeal of the British North America Act it British representatives were here?—A. No, it is not for that reason that I would have British representatives. One of the reasons is, I think, the matter of courtesy; the passing of a constitution like that would look very much like an act of secession, it would to my mind go very much further than the Statute of Westminster. The Statute of Westminster has made the connection closer between Canada and the British Empire; as a matter of fact, I think it had made us jointly responsible with all the other Dominions.

By the Chairman:

Q. I think Dr. Beauchesne mentioned during his main address that there was the question of Imperial defence?—A. Yes.

Q. That might be subject to discussion?—A. You remember Sir John Macdonald said that the question of Canada's participation in the wars of Great Britain should be the subject of a treaty; why could this not be stated in the constitution? I do not ask that the British parliament send delegates here, but that the British government be asked to send its representatives to come here and watch for their own interests.

Hon. Mr. VENIOT: To come as observers.

Mr. COWAN: You have elaborated a very very interesting opinion, that the Statute of Westminster has reinforced imperial bonds or ties; I would like to know what Mr. Lapointe thinks about it.

Hon. Mr. LAPOINTE: What?

Mr. COWAN: About the opinion Dr. Beauchesne, has given, that the Statute of Westminster has reinforced imperial bonds.

Hon. Mr. LAPOINTE: I am glad of that, because after I had taken part in the two conferences which led up to it I was charged in this parliament with having done something to cut the painter adrift from the little Island of England. I see it is quite different.

The CHAIRMAN: Is that all, gentlemen?

By Mr. Cowan:

Q. Your historical analysis was very interesting and complete, Doctor; what I wanted to know was, what further questions the constituent assembly of France dealt with? After it produced the constitution you say it was adopted by the governing body?—A. It was adopted by that assembly right there.

Q. Without amendment or change?—A. France only had one government; we have nine provinces, which makes it quite different with respect to forming a constituent assembly with power to pass a constitution.

Q. And that Constituent Assembly was dissolved?—A. Yes.

Hon. Mr. LAPOINTE: Even since if there is an amendment proposed to the constitution—as M. Doumergue did a few months ago, which led to the disruption of the government there—the two houses of parliament go to Versailles and there sit as a constituent assembly, a joint body, to pass on these amendments.

Mr. BOURASSA: Exactly.

Mr. LAPOINTE: That assembly is still there.

By Mr. Cowan:

Q. I wanted to know whether Dr. Beauchesne thought the constituent assembly should be a continuing body?—A. I said no; it should be dissolved after the constitution had been signed by the King, and then it would not meet again for amendments. I suggest that amendments should be passed by the legislatures and by the Dominion.

By Mr. Bourassa:

Q. But do you not suggest that some clauses in the constitution adopted by that assembly should provide the procedure and method by which further amendments could be enacted?—A. Yes.

Mr. COWAN: And, without consulting the Imperial parliament.

Mr. BOURASSA: Oh yes, yes.

By Mr. Bourassa:

Q. To make one point clear before you leave, Doctor, because there were several questions up and it might be a little confusing; I understand you to suggest that the constitution should be voted by a clear majority of the constituent assembly without any consideration of provinces or Dominion representation, but simply a majority of the 223 delegates?—A. Yes.

Q. Second that it should be ratified by a majority in the Senate and the House of Commons of Canada?—A. Yes.

Q. And by a majority in each of the provinces?—A. Yes, in each of the provinces

Q. A simple majority?—A. Yes.

Q. Of the membership of this body, federal and provincial?—A. Yes; but you must remember that there would be no minority rights included in the constitution.

Mr. BOURASSA: Quite so.

By Mr. Cowan:

Q. Well, suppose one of the provinces should fail to adhere?—A. I think some arrangement might be made after full discussion.

By Mr. Bourassa:

Q. There might be some that would not adhere at the outset. In the United States you know how long it took before the constitution was adopted—I think it was a small state, Rhode Island, which delayed adoption of the constitution for—how many years was it?—A. Twelve years.

The CHAIRMAN: Do you think that is a good precedent to follow?

Mr. BOURASSA: No, but it shows that with patience all things can be accomplished.

The CHAIRMAN: Shall we meet again at the call of the Chair?

Hon. Mr. LAPOINTE: After the adjournment, all right.

The CHAIRMAN: Then, we will meet again at the call of the Chair.

The Committee adjourned at 12.05 p.m., to meet again at the call of the Chair.

SUBMISSIONS FILED BY PROVINCIAL GOVERNMENTS

PRINCE EDWARD ISLAND

Government of Prince Edward Island is of opinion that Dominion Government should formulate its plan and policy for the purposes intended and that this should be submitted to the Provincial Governments and afterwards discussed at a conference of representatives of the Provinces and the Dominion.

H. F. MacPHEE,
Attorney-General.

NOVA SCOTIA

Our Legislation now in Session and most difficult to attend to matter of this kind now in way you suggest. We feel matter should be approached by conferences between representatives of Provinces and Dominion where each would have the views of the other and ample time to discuss the matter.

J. H. MacQUARRIE,
Attorney-General of Nova Scotia.

NEW BRUNSWICK

"Will wire views as soon as available. Delay unavoidable. Signed by W. H. Harrison, Attorney-General." (New Brunswick views not yet received.)

QUEBEC

Surely the Committee cannot expect that the views of the Province of Quebec will be discussed by an exchange of telegrams or letters. In a matter of such importance I suggest that a conference of the Dominion and the Provinces should be held.

L. A. TASCHEREAU,

ONTARIO

Province of Ontario does not desire to make any representation before your Committee *re* British North America Act Amendment as no good purpose will be served by attempting to advise Dominion Government at this time.

A. W. ROEBUCK,
Attorney-General for Ontario.

MANITOBA

With further reference to your telegram of the 27th of March to the Attorney-General and to his reply of the 5th instant, the Government have now had an opportunity of giving consideration to the suggestion that it should make a written submission regarding the subject matter that is before your Committee.

The Government of Manitoba is of the opinion that the subject matter referred to in the resolution is one of such importance that no written submission, setting out our views in reference to it, should be made without a Conference with the other Provinces and the Dominion Government. We would be willing to attend such a Conference at any time, with a view to arriving at a definite method of procedure for making amendments to the British North America Act.

Yours very truly,

JOHN BRACKEN.

SASKATCHEWAN

Referring to your telegram of the twenty-seventh day of March wherein you request the Government of the Province to make representations either orally or by written memoranda as to the methods of procedure which this Province would suggest in connection with amendments to the Canadian Constitutent I would say that I have been following with intense interest the proceedings of your Committee. The question of what if any provision is to be made for amendment of the Canadian Constitutent from time to time is a question which ultimately must be decided by conferences between the Governments of the Provinces and the Government of Canada with the possibility of a previous preliminary inter Provincial conference. In view of this fact it would appear to be unwise for the Provinces to be giving their views before a Committee of the House of Commons. With due deference might I be permitted to suggest that the proper procedure is for your Committee to pursue its present enquiry and to make a report to the House of Commons which I presume will either be accepted or amended or merely received without binding the Government to accept the proposals of the Committee and with this Report available the Provinces could then give consideration as to what attitude they desired to take and perhaps discuss the matter amongst themselves and thereafter join with the Federal Government in a general conference. The Report of your Committee would serve as the basis of discussion around which would take place the ultimate solution of this problem. We realize that the question is one of great national importance and should be decided in the welfare of Canada free of all political considerations and we are certainly prepared to do our share towards the facilitating of a solution but we feel that we must look after the interests of the Province and think that the procedure I have outlined would be the proper course for us to adopt at this time.

T. C. DAVIS,
Attorney-General.

ALBERTA

Re amendment B.N.A. Act Alberta Government appreciate desire of Committee to have views of all Provinces before it on this very vital question but considers approach to question should be through interchange of views at Interprovincial Conference.

LYMBURN.

BRITISH COLUMBIA

Reference your wire Twenty-seventh to Attorney-General requesting written submission from the Government of this Province to your Committee. It is the opinion of the Government that amendment of the Constitution is too important a matter to be dealt with in manner suggested. It is not thought that satisfactory conclusions can be reached either Federally or Provincially until a conference of the Provinces and the Dominion is held when full discussion may be had and matters properly debated. Other than stating that the right should be secured to amend our Constitution in Canada this Province respectfully declines to make submission to your Committee neither will it feel bound by any report which may be made by your Committee.

T. D. PATTULLO.