LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON STATUTORY REGULATIONS AND ORDERS
Monday, 8 December, 1980

Time — 2:00 p.m.

CHAIRMAN — Mr. Warren Steen (Crescentwood).

CONSTITUTIONAL REFORM

MR. CHAIRMAN: Can the committee come to order, please? Just before I mention the list of persons that are before us who wish to make representation — why am I making a correction of back in July — but Walter Kucharczyk on Page 114 of a Hansard dated July 17, 1980, asked if his name with the proper spelling could be corrected. I will ask Hansard if they would make the proper correction in their records, but I'm sure that all of us know Walter very well and that we apologize on behalf of Hansard for the misspelling.

MR. ABE KOVNATS (Radisson): How can you misspell "Walter"?

MR. CHAIRMAN: Well, it wasn't "Walter" that was misspelled, it was his surname that was misspelled.

MR. KOVNATS: Oh, I'm sorry.

MR. CHAIRMAN: The Clerk has a set of briefs that the Alberta Committee left behind with him. I've suggested he distribute them to members of the committee.

To all members of the committee, including Mr. Kovnats, we have 43 names on our list of persons that wish to make representation. In the last two days that we met in the City of Winnipeg, we dealt with 11 on one day and 5 on the second day. We made much better time when we were out of the City of Winnipeg, but I would ask all persons that are going to make representation, if they would be kind enough to be aware that there are many others that would like to be heard, and ask members of the committee if they would always be conscious of the fact that there are many persons that wish to be heard. I've had at least half-a-dozen requests just over the noon hour of people wanting to switch places and so on. I have said "no", you can't switch places although Mr. Ross Johnson is present from the Manitoba Chamber and he has a person who wishes to make the presentation on behalf of the Manitoba Chamber that is in from Winkler, Manitoba. That is what, Mr. Brown, about 90 miles away? He can be present for the day.

Tomorrow afternoon, the Winnipeg Chamber wished to make representation in the afternoon, if possible, and their spokesperson is only available tomorrow afternoon; otherwise, he's tied up with court hearings all week. It's been generally agreed by the committee that we will follow the list and I will go through the first half dozen names: Mrs. Friesen from Headingley; Professor Gordon Rothney; Charles E. Lamont; Mrs. Bernice Sisler; C.H. Templeton; Winnipeg Jewish Community Council, who have a spokesperson who has come all the way from New York to be with them today. So there is the first-half dozen. Hopefully, we can do them this afternoon.

Mr. Desjardins.

MR. LAURENT L. DESJARDINS (St. Boniface): Mr. Chairman, for what it's worth, I wonder if the committee would consider, to make sure to give everybody a chance, it might be unusual, but would the committee consider maybe putting a time limit on each presentation including the question period. I have no strong point on that, it's just that there's such a long list.

MR. CHAIRMAN: In answer to you, we tried that a few years ago on the Family Law and what would happen is invariably you'd have someone with a typewritten presentation that would say that I'm only two-thirds or three-quarters through, can I have permission to carry on and they were granted permission at all times.

MR. DESJARDINS: If they have a written brief they could file it with the . . . It's just an idea, you might hear 10 instead of 49, that's my concern.

MR. CHAIRMAN: It's my understanding that the committee does not have sanction to carry on after Thursday once the Legislature goes back in.

MR. DESJARDINS: Well could we . . .

MR. CHAIRMAN: Well that was my understanding, that we were appointed to sit between Sessions. Is that not your understanding? Mr. Uskiw.

MR. SAMUEL USKIW (Lac du Bonnet): Well perhaps someone should clarify for us. As I understand it is this is a Standing Committee and therefore doesn't dissolve when the Session is called, and therefore is entitled to sit during Sessions if it deems it advisable. I don't believe that this committee terminates with the meeting of the Legislature. It's a Standing Committee.

MR. DESJARDINS: Mr. Chairman, I wonder if there is anyone that would care to comment on my suggestion, which was very loose, I don't want to insist. It's just that . . .

MR. CHAIRMAN: Do you want to try and set some guidelines, some rules or should we just all be aware of the fact and do our best? Mr. Brown.

MR. ARNOLD BROWN (Rhineland): Mr. Chairman, I would suggest that we all be aware of the fact that we do have a lot of presentations over here and try to limit them to as short a period of time and also in the questioning — just have an awareness.

MR. CHAIRMAN: I notice that Mrs. Friesen of Headingly has behind her name afternoon of the 9th, that's tomorrow. So the first person on the list would be Professor Gordon Rothney. Mr. Brown.

MR. BROWN: Mr. Chairman, before we have the first presentation, I wonder, could we give the matter of the Chambers an answer. Mr. Gilmore is here

from Winkler and could we let them know whether there is a possibility of them getting on today or whatever the situation is?

MR. CHAIRMAN: They're well down on the list. What is the feeling of the committee. Do you want to put that as a motion, Mr. Brown?

MR. BROWN: Yes, I would make a motion — and I haven't talked to them, that even if it would be after dinner or whatever, but at least let them know that we'd be prepared to give them time sometime today.

MR. CHAIRMAN: Is that agreed by the committee? He is from 90 miles away, as the person representing the Jewish Community Council is from out of town too. Mr. Einarson.

MR. HENRY J. EINARSON (Rock Lake): Yes, Mr. Chairman. I think this is a practice that has been considered in previous committee hearings and I don't see anything wrong with it. If Mr. Gilmore can't get on this afternoon, perhaps as he says, he's prepared to come on this evening, so that it saves him coming all the way back in again another day.

MR. DESJARDINS: I certainly want to facilitate everyone appearing, but let's be fair, there's some people, some faces I recognize as being here for three or four days and if they're continually pushed down, it's not quite fair to them unless we make these rules at our first meeting. So, you know, maybe one or two wouldn't mean that much, but this is in the city and if anybody comes from the rural area — we've been going to Thompson and Brandon, there's been people from Brandon coming here to make presentations — then they should take their chances the same as anybody else. Let's try to make it easy for everybody.

MR. CHAIRMAN: We've got a number at the top of the list that have been attending the meetings fairly regularly. How be it if you accept this as a suggestion, that the Manitoba Chamber be the first party heard this evening at 7:00, and that we deal with the names at the top of the list because they have been on the list for some time. Is that agreeable? (Agreed)

MR. CHAIRMAN: Professor Gordon Rothney is our first person. Professor, do you have copies of a brief?

PROFESSOR GORDON ROTHNEY: Yes, I think Mr. Reeves has copies.

MR. CHAIRMAN: All right. My second question, are you representing yourself as an individual or a group?

PROF. ROTHNEY: Myself.

MR. CHAIRMAN: All right. Carry on, sir.

PROF. ROTHNEY: Copies will be distributed in a minute. I will start reading it and you will be able to find the place I think when you get your copy. Is this working all right?

MR. CHAIRMAN: I am told it is, sir.

PROF. ROTHNEY: Can you hear me now?

MR. CHAIRMAN: Yes.

PROF. ROTHNEY: The federal government's proposed resolution, now under consideration in Parliament for a joint Address of the two Houses to the Queen respecting the Constitution of Canada, would request the Parliament of the United Kingdom to pass a new Canada Act. This Canada Act would become part of the Constitution of Canada and would itself enact a new Constitution Act for Canada.

This Constitution Act 1980,would in fact be only Schedule B of the new Canada Act of the British Parliament. It could just as well have been the schedule of The British North America Act.

Through this complicated procedure the United Kingdom Parliament would in reality be asked to take two important steps: (1) to make major changes in the existing Constitution of British North America, notably through the addition of a Canadian Charter of Rights and Freedoms which would apply to both Canada and the provinces, though agreed to by the Parliament of Canada only; and (2) to insert an amending formula which would replace the present procedure whereby certain parts of The British North America Act are amended through an Act of the Parliament of the United Kingdom.

Both of these proposed steps, the unilateral federal proposal for entrenching changes in the existing Constitution and the unilateral federal proposal for changes in the existing constitutional amending procedure, would have a major effect upon the legal position of Manitoba and of the other provinces. This brief, therefore, deals in turn with these two issues, which I think are much more fundamental than arguing about the contents of the Bill of Rights.

1. Unilateral Entrenchment, that is, entrenchment of constitutional changes which are being presented as a Charter of Rights. The first question is, "What is the best way to guarantee civil liberties in Canada and particularly in Manitoba?" Part of the deceit in the way that this is being presented, the federal case is being presented, is to give the impression that the issues for or against rights and freedoms; this is a sophism, it's a false argument. The issue is not that, the issue is how best to guarantee rights and freedoms.

The preamble of the proposed Address to the Queen states that it is "desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms". The list of fundamental rights and freedoms, mostly very vague, is one drawn up by the federal government, which happens to hold office in Ottawa at the moment. The purpose is not only to impose this list on the provinces, but furthermore to make it difficult for subsequent federal Parliaments or provincial Legislatures to make any changes. Logically if the present parliament is so sure that its wisdom in these matters is greater than will be that of its successors or of the Legislatures, it should not make any provision for amendment at all. If it is not sure, as it should not be, then it should leave subsequent Parliaments and Legislatures free as they always have been in the past, to provide for rights and freedoms by normal legislative methods as new conditions may require. The proposed entrenched

Charter would result from an assumption of unconstitutional power by the present Liberal Parliament, not exercised by previous Parliaments and denied to subsequent Parliaments.

A written Constitution, which cannot be changed either by Parliament alone or by a Legislature alone, is needed under the British system which we have inherited, only in order to define and separate the powers of Parliament and those of provincial Legislatures. In other words, to describe the structure of our federal system. A Charter of Rights and Freedoms has no place in a document whose purpose is to describe the distribution of legislative powers. Civil liberties in Canada and Manitoba rest on other procedures and traditions which have developed from the experience of more than a century. A State makes a sudden radical change in its constitutional conventions at its peril.

Canadians would be badly served by a new entrenched Constitution which must be taken to the courts day after day because precedents would be set aside and a whole new set of precedents would be required.

Those who assert that entrenchment of rights and freedoms involves a substitution of the courts for the legislators are not talking nonsense, as I've heard it said. The entrenchment of such vaguely defined and abstract matters in a Constitution beyond the reach of Parliament or the Legislatures would elevate the Supreme Court to a position of supremacy in determining the law. Under our present system, if the Supreme Court misinterprets a piece of civil liberties legislation, the Parliament or the Legislature as the case may be, can quickly amend that legislation so as to remove any possibility of misinterpretation, but under the proposed new Constitution Act any misinterpretation of its lists of rights and freedoms by the Supreme Court would stand as law. Since the court decides by simple majority vote, the opinion of a single justice could determine what is law for about 24 million people. As the interpreter of the proposed entrenched Charter, the Supreme Court would have the final say.

The process of constitutional amendment, if entrenchment is to serve any purpose at all, would of necessity be very difficult. A famous example in the USA of the danger of such a situation was their Supreme Court's ruling in 1857, that because of the entrenched Bill of Rights in their Constitution no person could be deprived of property, and that therefore the constitutional guarantee of liberty did not apply to a white man's negro slave. An entrenched Constitution changes the courts into lawmakers. You get the Supreme Court deciding one day that capital punishment is contrary to the Constitution because of the guarantee of the right of life, and then a few months later they'll decide it's not contrary to the Constitution, depending who's on the court.

After President Reagan has been in power for a while, we'll have a court in the United States which will be changing again the meaning of the Constitution. Under ordinary legislation the courts interpret, but they do not make the law.

There is no appeal from a Supreme Court. A federal system inevitably elevates the court to a position of supremacy where federal or provincial powers are in dispute. But it is not desirable that it should be made supreme in other matters, including those relating to rights and freedoms. If the federal Parliament were seriously concerned about civil liberties in this country, it would begin by repealing The War Measures Act. They could do that right now.

Skipping a line or two — Much of the most important part of our present Consititution in unwritten. No official document, for example, describes our system of government by a Prime Minister and a Cabinet — that's not in any written Constitution — responsible to the majority in an elected House. That system has simply evolved in Britain, Canada and Manitoba on the basis of practical common sense as conditions required. This would have been impossible if we had been bound, like the USA, by a rigid 18th Century written Constitution.

Any attempt to put more than is absolutely necessary into an entrenched Constitution is essentially undemocratic and eventually reactionary. It is an attempt to prevent people in the future from governing themselves as they see fit. We should be clear about which is the reactionary side in this debate. There is, of course, no problem about the important unwritten part of the Constitution. It usually works smoothly and nobody outside of Canada has any control over it. It's only the entrenched part which creates problems.

The need for an entrenched part of the Constitution arises only when a new state is created suddenly. The American Revolution, for example, destroyed the authority of the British Government in 13 colonies. As a result, at Philadelphia in 1787, the representatives of those colonies faced the task of creating a new central authority while retaining the support and relative independence of the State Legislatures. The result was the American Constitution and the federal system, but Canada's development has proceeded from precedent to precedent and we've had no revolution and no defeat in war and, therefore, no need for a new entrenched Constitution.

In 1791, a Bill of Rights was added to the American Constitution reflecting the spirit of the 18th Century. The virtue of such a written Constitution became the unquestioned faith of contemporary political theorists, particularly in France, as it appears to be with Pierre Trudeau even today. But it made difficult any new interpretation of rights and freedoms by the people's representatives in later years. It reflects an essentially static view of society. It presumes to state the rights of man — or as we would say now, human rights — once and for all, as if society would just stay that way and that's it, but the rights and freedoms that people need do change as society evolves.

Those North American provinces which had not joined the United States neded no such written document in order to achieve in the 19th century full self-government and rights and freedoms greater than those enjoyed at the same time in the USA with its entrenched Constitution. By 1867, however, as a result of the coming of the railway, some of these North American provinces decided to unite in an American-type federal system. To do this they drafted The British North America Act, which at their request was passed by the British Parliament and

which has since been readily amended whenever the Canadian Houses of Parliament have so requested. Since a federal system was being created, this indirect procedure, symbolically at lease, served to remind the new Dominion that the provinces were autonomous in their own spheres. Britain symbolized neutrality between the Central Government and the provinces. It was the procedure which Canadians desired. It was a real "made in Canada Constitution". When I hear people come to this microphone and say we need a "made in Canada Constitution", that's what we have now, completely made in Canada.

It was not the intention in 1867 to produce a Canadian Constitution in the sense that there was an American Constitution. The BNA Act states that the uniting provinces desired to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom. The Constitution of the United Kingdom, of course, is unwritten except for ordinary laws. The Act refers also to the Constitution of the Senate and to Provincial Constitutions. In each province the Legislature could exclusively from the beginning make laws in relation to the amendment of the Constitution of the province, so that in this respect no reference to the British Parliament has ever been required. Eventually in 1949 the exclusive Legislative Authority of the Parliament of Canada was likewise extended to the amendment of the Constitution of Canada, a phrase which means the Constitution of the federal government as distinct from the provincial governments, as the Supreme Court pointed out last December. Canada technically in The BNA Act means the federal government, as distinct from the provinces.

The BNA Act was and is a straightforward businesslike document. It contains no grandiose 18th Century proclamation of eternal verities. Apart from confirming already existing denominational privileges with regard to education, it was not cluttered up with a list of rights and freedoms so dear to the new 20th Century republics, almost in inverse proportion to their actual practice. Abstract words tend to be substituted for concrete reality. India is one example, they put every conceivable right or freedom anybody could think of into their Constitution, yet nobody would argue that their freedoms are anything like as great as those in Canada.

When it came to local or cultural matters, Confederation meant for the majority of the people of Canada not greater union but greater division than had existed before 1867. There had been a united province of Canada but it was split in two in 1867. The BNA Act created the new Dominion, it's true, but it also created the new Provinces of Ontario and Quebec. Similarly in 1870 when Rupert's Land was united with the Dominion, Manitoba was created and separated off from what are now Saskatchewan and Alberta. Apart from the federal government, language requirements reflecting the conditions of the time were entrenched for Quebec and Manitoba only because of course only those provinces had francophone majorities at that time. Otherwise it was assumed that Canada would be held together, not by language or by culture but by economics. It was recognized that only the rights and freedoms which are supported by the people through their elected representatives could be enforced and certainly there is no power in The BNA Act for the federal Parliament to interfere with the provinces in these cultural and linguistic matters.

The second part of the Trudeau proposal, unilateral patriation. To quote from Mr. Trudeau in announcing his resolution respecting the Constitution of Canada, he said, "Our duty is to complete the foundations of our independence". A new word, "patriate" has been coined to describe the process, but all that it means is provision for amending The BNA Act in Canada in those few areas in which we still have to go to Britain. It is nothing more or less than that. The fine phraseology about bringing home the Constitution and all that is mostly sophistry.

Thanks to the fact that the British Empire had no written Constitution, Canada long ago moved smoothly from the status of a self-governing colony to that of an independent nation. This was recognized without reservation when Canada became a founding member of the League of Nations in 1920. In 1926 a British Imperial Conference proclaimed clearly that Great Britain and the Dominions were "in no way subordinate one to another in any aspect of their domestic or external affairs".

Then in 1931, to quote the Toronto political scientist, R.M. Dawson, the British Parliament passed the Statute of Westminster "chiefly to satisfy those sensitive dominions and fussy persons who were not content with constitutional practice as enunciated in 1926 but who demanded legal as well as practical equality. It necessarily failed in its main purpose", I'm still quoting from Dawson. "The awkward fact remained and must remain, that if the Imperial Parliament could grant complete legal powers to the Dominion it could at any time withdraw them by the same method, and to argue that the British Parliament would never repeal the Statute of Westminster is simply to admit that dominion powers depend now, as they depended before, upon constitutional usage".

At Canada's request, a special section was placed in the Statute of Westminster making it clear that within their own spheres the provinces, like the Dominion, would continue to be completely independent. That's specifically stated in the Statute of Westminster, that the provinces in their own spheres are independent. Thus the British Parliament remained the symbol of the need for agreement between Canada and the provinces in matters involving federal-provincial relationships. Canadians wanted it that way.

In 1949, again at Canada's request, an amendment to The BNA Act listed four specific matters with regard to which the Parliament of Canada could not exclusively amend the Constitution of Canada, that is, to amend the Constitution of the federal government:

(1) matters coming within the classes of subjects assigned exclusively to the provinces;

(2) rights granted to a province or to any class of persons with respect to schools;

(3) the use of the English or the French language;

(4) the requirements that there should be a Session of Parliament at least once a year, and that no House of Commons shall continue for more than five years.

The present situation, therefore, is that action by the British Parliament is required only as regards amendments to The BNA Act which fall within these four categories, or which affect federal-provincial relations in general. These matters could be "brought home" by simple amendment to The BNA Act if Canada and the provinces so desired, or even without the consent of the provinces if the federal government is correct in believing that the Parliament of the United Kingdom would always act on a simple address from the Senate and House of Commons. The elaborate and complicated proposal now being considered obscures the fact that Mr. Trudeau is attempting to do much more than merely patriate the present Constitution.

In 1965 the federal government itself published a White Paper, as I'm sure many of you know, on "The amendment of the Constitution of Canada", which stated as a general principle that "the Canadian Parliament will not request an amendment direcly affecting federal-provincial relationships without prior consultation and agreement with the provinces". It is because he proposes that precisely such a request should be made that Mr. Trudeau's Resolution would violate the unwritten part of Canada's Constitution.

While the principle in question is not an actual law, it was cited by the Supreme Court last December as a basis for determining that the abolition of the Senate would not be constitutional without the consent of the provinces. Legally of course, the British Parliament could override Canadian usage, but to ask it to do so, as Mr. Trudeau proposes, would be an incredible return to colonialism. In place of our present "made in Canada" Constitution, we really would then get a "made in Britain" Constitution.

The irony of this proposed violation of the Canadian Constitution, is that it would not even achieve the avowed objective of legal independence. The British Parliament would be asked to pass yet another Act to amend the Constitution of Canada, this one to be known as The Canada Act, and as if to obscure our history, as if there was something to be ashamed of in our history, the old BNA Act while remaining as always a British Act would henceforth be known in Canada as The Constitution Act, 1867.

Like the Statute of Westminster, The new Canada Act would be intended to satisfy those who demand legal as well as practical independence. But once again the awkward fact would remain that if the British Parliament could grant a new Constitution Act to Canada, it could at any time withdraw it by the same method; and to argue that the British Parliament would never repeal the proposed Canada Act is simply once again to admit that Canadian independence would still depend, as it depends now, upon constitutional usage.

What then would be changed? Substantial alterations in the Constitution, including a complicated procedure for the adoption in Canada of a new amending formula, would be imposed on the provinces. It would be done unilaterally under neither the existing procedure for amendment nor the proposed new ones. The proposal is vigorously opposed by Claude Ryan. It was he, and not Mr. Trudeau, who was the official leader of the federalist campaign in Quebec last May, and who is best qualified to say what was meant by "No" to sovereignty-association, and it is opposed by most of the provinces. This is not the way to promote Canadian unity and Canadian independence.

One is forced to conclude that the myth of patriation is being used by Mr. Trudeau to obtain constitutional amendments which he cannot achieve by legitimate means. A Constitution achieved by such controversial methods would not be likely to last very long. It would solve no crisis nor any of the problems with which this country is now faced. Canadian independence might be much better served by rapid patriation of our ownership of the oil and gas of our country. I say that because the Alberta representatives have gone away, or are they still here?

Conclusion:

1. The best way to guarantee civil liberties in Canada and in Manitoba is through legislation passed by Parliament and by the Legislature. This legislation should provide the same freedoms for all individuals. It should not attempt to provide special privileges for classes of persons, those classes of persons who happen to have the most lobbying power at the moment. This danger of only the strongest and best lobbyers being listed would be even greater in an entrenched Charter, placed beyond the reach of the people's elected representatives. Rights and freedoms are not the sort of matter that should be specified in the Constitution required only to define the federal system of government.

2. With regard to patriation — patriation in fact means only the adoption of a new amending formula in those cases where amendment still requires an Act of the United Kingdom Parliament. There is no objection in principle to this objective, although it is not a matter of any urgency. What is most objectionable is the proposed violation of our conventional Constitution through the imposition of amendments without the consent of the provinces. These conventions of the Constitution are the product of many years of experience. Nobody sat down and thought them out in advance. They're what's evolved through practise. If the federal government has constitutional amendments in mind other than the entrenched Charter of Rights and a new amending formula, and which would affect federal-provincial relationships, it should say what they are in order that the provinces may discuss them. All that we're getting is the discussion of how to amend the Constitution, we're not being told what kind of amendments the federal government is going to want if it gets this. If it has anything in mind it should say what it is and we can discuss that. Otherwise the government and Legislature of Manitoba should resist by all legal means, in my opinion, the proposed federal attempt to return once more to colonial status for that is what asking the British Parliament to impose changes which cannot be obtained by an established Canadian constitutional procedure would amount to.

I think, if I may add one more comment, that this should be not a party issue but an issue in which we could all unite because it's the rights of Manitoba, in fact, the rights of all Canadians, that are in danger as a result of this proposed resolution.

MR. CHAIRMAN: Professor Rothney, will you permit questions from members of the committee?

PROF. ROTHNEY: Yes, certainly.

MR. CHAIRMAN: Mrs. Westbury.

MRS. JUNE WESTBURY (Fort Rouge): Thank you, Mr. Chairperson. Professor Rothney, I wonder if you would tell us whether you feel that up to the present time all Manitobans have had their rights adequately presented by their elected representatives.

PROF. ROTHNEY: All Manitobans?

MRS. WESTBURY: All Manitobans.

PROF. ROTHNEY: Are you referring to the 1890 affair?

MRS. WESTBURY: I beg your pardon.

PROF. ROTHNEY: Are you referring especially to the 1890 legislation about official language?

MRS. WESTBURY: You are suggesting that the present system should be perpetuated. I'm asking if you feel that under the present system the rights of Manitobans have been protected?

PROF. ROTHNEY: Well, they mostly have. As Sid Green eloquently pointed out the other day here, the British common law assumes that everybody is free to do anything at all unless his freedom has been restricted by some Act of the Legislature or Parliament. We've had these freedoms. There are a few freedoms that have been under attack at times, but not mostly from the provincial government but from the federal government. The worst violations of civil rights have come from Ottawa. The War Measures Act being the most prominent example right now, but there are other examples too, such as military conscription, for example, they would say in Quebec.

MRS. WESTBURY: Do you feel that native people and women have been treated equally with men under the present system for the past 100 years?

PROF. ROTHNEY: Probably not, but the way to improve this is to get the Provincial Legislature to do something about it. Make it clear to the Provincial Legislature, because women now have a majority of the votes and they can use their voting power to get changes if they're not satisfied.

MRS. WESTBURY: Do you really feel that answers all of women's concerns, that they should, by using their voting power and voting as a block, change the representation of the Legislatures? Do you think that's the answer to . . .

PROF. ROTHNEY: If that's the way women feel, they can vote together for representatives that will do what they want. They can always bring pressure to bear on members of the Legislature, but every time you write down rights for some group, you tend to take away rights from other group. If you write down, for example, that there must be one women appointed to the Appeal Court of Manitoba. this could be argued as being discrimination against men. It's not the kind of principle that should be followed in making appointments to the courts. For a long time women didn't have the vote, but in Manitoba, I might remind you, in 1915, the vote was given to the women before it was given to any other province or any other part of the Dominion. This was the first province to have . . .

MRS. WESTBURY: But behind some other countries.

PROF. ROTHNEY: Yes, but not too many. Australia, I'm not sure.

MRS. WESTBURY: You referred to the intention in 1867, this is on Page 5 of your brief: "It was not the intention to produce a Canadian Constitution in the sense that there was an American Constitution." Were all Canadian citizens involved in the drafting of the intentions in 1867, or do you feel that there was a certain privileged group of Canadians that was expressing that intention and developing The BNA Act?

PROF. ROTHNEY: All Canadians were involved through their elected representatives through the Legislature?

MRS. WESTBURY: Even those natives and women who had no votes?

PROF. ROTHNEY: No, in that sense, I suppose the women were not represented except through the votes of their husbands but . . .

MRS. WESTBURY: And neither were the natives.

PROF. ROTHNEY: . . . but had they had a convention or constitutional gathering of some sort, women still wouldn't have been allowed to vote at that stage. That's a good example though of the way in which our ideas of rights evolve. It wasn't assumed in 1867 by hardly anybody in this country that women or natives needed the right to vote. Natives were thought of as being on reserves and there were treaties with them and I'm no expert in this field.

MRS. WESTBURY: Or even a long time after 1867.

PROF. ROTHNEY: Right.

MRS. WESTBURY: I'm trying to be fast and not to argue, Mr. Chairperson. It's a very provocative brief and it's very hard not to argue.

Professor Rothney, can you tell us what other members of the British Commonwealth have to go to the U.K. to have their unwritten Constitutions changed?

PROF. ROTHNEY: Unwritten, we don't have to go to get our unwritten Constitution changed, it is just our written Constitution.

MRS. WESTBURY: All right, what other British . . .

PROF. ROTHNEY: Probably none, but I haven't studied the Statute of Westminster with great care, but there is a paragraph about New Zealand; there is a paragraph about Australia, but probably Canada is the only one that has to go to the British Parliament but that's again because we wanted it that way. It's because Canadians wanted it that way.

MRS. WESTBURY: Canadian people who had the vote at that time wanted it that way.

PROF. ROTHNEY: Yes, that's right.

MRS. WESTBURY: Thank you.

You feel, I gather from some of your statements, that the provinces should "continue to be completely independent." Do you feel that they are completely independent as long as most of their money comes from Ottawa?

PROF. ROTHNEY: Well, legally they are completely independent in their own spheres. This has been laid down many times by the Imperial Privy Council's Judicial Committee and by the Supreme Court.

MRS. WESTBURY: Would you agree that — I'm sorry, did I interrupt you?

PROF. ROTHNEY: But you're asking about the economic side of it. Of course, you can argue that Canada is not an independent country at all on the economic side. The real problem about Canadian unity, in my opinion, is that our economics are standard not in Canada but in the United States. We have legal independence but we don't have economic independence and that's the real problem.

MRS. WESTBURY: I think that's a matter for another brief. Because we are short of time I don't think I should try to get into that discussion.

Would you agree that with some Premiers that provinces should have the right to prevent people, other Canadians, from going there to find employment?

PROF. ROTHNEY: That's a complicated question. If you've got it in the community where some development is taking place, it can certainly be argued that the people in that area have the right to first choice in the work. Well, you think of Newfoundland. Those Newfoundlanders with their high high rate of unemployment surely got some right to preference when it comes to employment, or natives and others in northern Manitoba, it's the same situation.

MRS. WESTBURY: So you feel that the Premier should have the right to stop — you used the example, Newfoundland — that the Premier of Newfoundland should have the right to stop Manitobans from going to Newfoundland to look for work.

PROF. ROTHNEY: If there are Newfoundlanders in the area who need work and vice versa. The Government of Manitoba should surely have the right to give preference at The Pas or Lynn Lake or some place like that to natives and others there if there are employment opportunities, or in the Province of Quebec, where a development is going to take place in some community, should they allow a mass of anglophones to come in and take all the jobs and change the character completely of the community. Yes, my answer to your question is yes. The governments of the provinces should have that right; that's a right that they should have. Somebody is going to put it in the Constitution that others should have the right for them not to do that. Another example of how people disagree as to which is the right. Rights are only what are in the law. Rights don't come down from heaven; rights are what are in the law.

MRS. WESTBURY: I think after our discussion I can go back to my first question, do you feel that all Manitobans have had their rights protected under the law as it presently exists?

PROF. ROTHNEY: As you have pressed the question, no, they haven't had but their chances of getting their rights protected I think depend mainly upon whether the Legislature of the Province of Manitoba grants them these rights and certainly more and more rights are being given, we are moving in that direction. It will not come through a federal entrenched Bill of Rights because you cannot in practice enforce these kind of things against the wishes of the majority of the local people. You can write it down in principle but it won't be enforced.

MRS. WESTBURY: Thank you.

MR. CHAIRMAN: Mr. Schroeder.

MR. VIC SCHROEDER (Rossmere): Thank you, Mr. Chairman. Professor Rothney, I certainly agree with you with respect to the patriation of our oil and gas reserves, but in other areas I do have some questions.

First of all, with respect to the matter of entrenched language rights. Do you support the continued entrenchment of language rights in the fashion in which they are currently entrenched in The British North America Act and in The Manitoba Act?

PROF. ROTHNEY: No, I do not. I think, if I may put in just another sentence here, that the opposition members at Ottawa have been sort of maneuvered by the federal government into discussing what should be in the Charter of Rights and what shouldn't be, rather than discussing whether this unilateral procedure is constitutional and whether it should be allowed. I have been trying to keep away from saying what I think should or should not be in the Bill of Rights, and sticking to the principle of whether we should have these kinds of procedures of getting the British Parliament to do something which this Parliament of Canada wants but which previous Parliaments and subsequent Parliaments will not have the right to interfere with. But if you wish me to make a comment on that . . .

MR. SCHROEDER: Please.

PROFESSOR ROTHNEY: What was it again?

MR. SCHROEDER: The question is, do you support continued entrenchment of language rights in the fashion in which they are currently entrenched?

PROF. ROTHNEY: Not really, because again the situation gets out of date. How ridiculous it would be if this proposal went through which would impose upon Quebec and Manitoba certain rules with regard to language of the minorities, and would not impose it on Ontario and New Brunswick, which have much larger minorities of those languages. I think the best

thing in that sphere, as in other spheres, is to do what they did in 1867 and 1870 except in Quebec and Manitoba, leave it to the provinces, leave it to the provincial governments to decide for themselves what is best in terms of their situation and the people in their provinces.

MR. CHAIRMAN: Mr. Schroeder.

MR. SCHROEDER: Yes, thank you, Mr. Chairman. You mentioned, Professor Rothney, that at common law people have those rights which have been taken away from them by statute. Which statute took the right to vote away from women, native Indian Canadians and Japanese Canadians?

PROF. ROTHNEY: I was quoting from Sid Green when I said that.

MR. SCHRODER: I'm curious because we have heard this several times and I really would like to track down the basis of that statement, when in fact we've had Canadian Indians not voting until the late 1950s; we've had Japanese Canadians who were born in this country not voting until 1949; we've had women not voting until various years in this country; I'm just wondering where these rights were taken away.

PROF. ROTHNEY: I'm not a lawyer but I am sure that it's in some Election Act passed by the Federal Parliament that took away these rights. At some point, it must have been very early, it must have been in 1867 or even before, an Elections Act was passed saying who could vote and who couldn't and that would be the Act which took away those rights, if you want to put negatively, or gave these rights to certain groups which therefore by implication took it away from others. We're living in an age when the whole outlook and spirit is different from 1867.

MR. CHAIRMAN: Mr. Schroeder.

MR. SCHROEDER: Yes, Mr. Chairman. I would suggest, Professor Rothney, that in fact those rights at least for women were taken away by judges, by common law judges interpreting what was the common law in the United Kingdom over the centuries and that law was transferred into Canada.

PROF. ROTHNEY: You may be right, I don't know, but as a historian and as far as Canadian history is concerned, I can only go by Canadian Acts. It was Canadian Acts which decided who could vote and who couldn't in Canada. Votes were given to women of course in stages; first in Manitoba, then in a few other provinces, then to the women who were relatives of soldiers at the Front in 1917 and then only in 1921 to all women, but in Quebec, women didn't get the vote until 1944.

MR. SCHROEDER: Professor Rothney, you indicated that women, being a majority in Manitoba, could obviously elect the kind of government which would give them the kinds of rights they require and in that fashion, they in fact are able to remedy the wrongs through the Legislature which have been done to them in the past and that is a perfectly valid point for women.

I would ask though how that would be achieved by a group such as the Jehovah's Witnesses in Quebec who were padlocked out of churches, and where the public opinion certainly never turned around and knocked that government out of power as a result, because they supported it. Public opinion supported the government taking those rights away from the minority. I would suggest the same thing happened with the disenfranchisement of the Japanese, the taking of Japanese Canadians, people who were born in Canada and transferring them to Japan. That didn't happen in the United States where they had a Bill of Rights. There were many things happening in the United States but that was not one of them because of the Bill of Rights, because of the right to litigate.

I would ask you to comment on how the democratic system in a country where we don't have just one group, an Anglo-Saxon Protestant group or a French Catholic group, where we are multicultural, how does it protect those who are weak and small and different from the majority? Can you give me one example of where a government has been defeated as a result of its being unfair to one of those defenseless minorities?

PROF. ROTHNEY: One can't say precisely why governments are defeated. This question of the Japanese in the United States is very debatable, that fact, the fact that it was demonstrated on TV last night as a matter of fact that when Pearl Harbour occurred, immediately the Japanese were rounded up in the United States, Constitution or no Constitution, and put behind barbed wires and held there although no such move was taken against Germans or Italians. The Constitution of the United States was of no use in that respect. I am ashamed that Canada did what Canada did with regard to the Japanese. I couldn't prevent it; we can't. There are many things that I would like to see in Canada that aren't done, but I am sure that they wouldn't be done any sooner because of a written Constitution. There is just too much evidence that we've always been better off in terms of freedoms here than they are in the United States, and they are better off still in Britain.

MR. SCHROEDER: Professor Rothney, I would suggest to you that you were factually wrong on that matter with the Japanese, although they wound up being treated very unfairly in the United States, they were not deported back to Japan as they were from Canada. I have before me the Issue No. 13 of the Senate House of Commons Committee on the Constitution of Canada, and I am referring specifically to Page 24 of that document where Mr. Friesen, who is a Member of Parliament from British Columbia, is asking questions of the Japanese Canadian Association, and he says as follows: "I was looking at your brief and at the end of it is a copy of a letter from the Assistant Secretary of the United States and I would like to read just a short part of that particular letter. It is dated December 17th, 1943, where he, the Assistant Secretary said," and he is now quoting from that letter of 1943, this American letter, "I think the far larger part of official sentiment is to do something so we can get rid of these people when the war is over. Obviously we cannot while the war continues, but sentiment is

liable to wane if the authorization measure is adopted before the war ends. We have 110,000 of them in confinement here now and that is a lot of Japs to contend with in post-war days, particularly if the west coast localities where they once lived do not desire their return."

That's the end of the quote from the letter and Mr. Friesen continues, "and so on. When I listened to that language and to the attitude that they had to you, I wonder how you can say that you had better protection under the Bill of Rights in the United States than you had in Canada".

And Mr. Shamizu of the Japanese Canadian delegation says, "We do not wish to give you the impression that we in any way support the wrongdoings that were committed upon the Japanese Americans. We said that we certainly do not subscribe to that. However, I was using this as an example of the fact that when they were conspiring to do this, to send people back to Japan and send them to other parts of the country, they recognized the fact that the entrenchment was an obstacle that they had to get around, and this is a rare view of the discriminators' minds, and in retrospect, though it may be, this is the view of the people that were planning these things. Now they were trying to get around it and the major obstacle was entrenchment of the Bill of Rights and the amendments thereto and the amendments to the Constitution of the United States."

The document goes on and they outline specifically what happened to Japanese Canadians. There is the Alberta delegation here, I am sure they are well aware of the many thousands of Japanese Canadians from British Columbia who were kicked out of their houses on four hours notice. They saw their neighbours taking their furniture away from them. They came to Alberta.

Now I would like to have you explain how it is that in Canada those people had more rights than the people in the United States, who at least were not deported, who many have been put into prison camps like they were in Canada, but certainly they were not ever put into the same kind of situation as they were in Canada.

PROF. ROTHNEY: I must admit that I don't know anything about which Japanese were deported and which weren't. I just know that many many Japanese stayed in Canada. They were certainly not all deported. We have them in Manitoba, in Montreal, they weren't all deported. But you are getting me into the argument that I didn't want to get into about what should be in the Bill of Rights. I'm not against the Bill of Rights being guaranteed. I'm not against the Bill of Rights; I'm against an entrenched Bill of Rights.

If this Federal Parliament is so sure about everything, and I hope it would agree that Japanese affair was a bad one, it's free right now to add to the existing Diefenbaker Bill of Rights, if that's necessary, a clause that would say this can't happen again.

You say that if it's in an entrenched Constitution, it can't be changed. I can assure you that in the atmosphere of wartime, they don't let Constitutions stand in their way. The wording of this Constitution makes it wide open. You can deport Japanese, you can impose The War Measures Act, you can do anything under the proposed Bill here, but the basic point is that through an entrenched Constitution that will supposedly bind the hands of future governments, you are not going to do it as well as if the Federal Parliament, if that's its view, would just pass an Act now to make it impossible for that to happen without some major upheaval. I'm not opposed to a Bill of Rights if it's a provincial one or a federal one.

MR. CHAIRMAN: Just before I recognize you again, Mr. Schroeder, I have a number of other persons who have signified by a showing of their hands that they obviously want to question Professor Rothney and we have now been dealing with him for 55 minutes. You as well as other members of the committee know the lengthy list we have, so if we could have shorter questions, I would appreciate it.

MR. SCHROEDER: Yes, Mr. Chairman, I would like to ask a whole bunch of questions but I will keep it short.

I would like to refer you, Professor, to the Sandra Lovelace case, that is the case of the Indian woman who is currently before the United Nations in Geneva asking for her human rights. She is a Canadian Indian person who was treated differently than an Indian man under our Indian Act. That is, she married a white man. After her separation or divorce she was held to be not an Indian under our Act and of course if she was an Indian man and had married a white woman, that individual would still be classified as an Indian.

Now we have ratified our federal government as well as each provincial government back in 1976, The International Covenant on Civil and Political Rights of 1966, and therefore our citizens who have no remedy in this country to remedy their wrongs are being required to go to Geneva before the world court to obtain remedies which we are saying that we are not prepared to give our judges the right to give. Our judges are not smart enough to give these kinds of rights to our citizens? Why is it that the international court can provide justice to Canadians but not the Canadian court?

PROF. ROTHNEY: If that's the case, it is a scandalous case, but there is nothing to prevent . . . the way to deal with it if you want to do something about it in Canada is get the Federal Parliament to change The Indian Act. You don't need all this highfalutin paraphernalia of a brand new Constitution in order to do it. You just change The Indian Act. If you trust the Canadian Parliament to lay down the Charter of Human Rights for all time to come, you can surely trust them to do something about The Indian Act to meet an immediate case right now. It's your Federal Government that is to blame for that situation.

MR. SCHROEDER: Of course it's the Federal Government and there is no mechanism in this country without this type of entrenched Bill of Rights, I would suggest to you, because we have already had the Diefenbaker Bill of Rights litigated right out of existence basically in terms of any use and that's unfortunate. I am sure Mr. Diefenbaker didn't intend that but it's been litigated right out of any basic use for protection of human rights in this country and if

we don't entrench those kinds of rights, then the citizen will not have recourse to the courts in Canada and will be required to go before the international courts.

I would just make one further comment and ask for your comments on it and that is, in the United Kingdom, the House of Lords Select Committee on a Bill of Rights for Great Britain decided several years ago, three or four years ago, I'm sorry, 1978, in May of 1978, to support a Bill of Rights for Great Britain and the House of Lords in Great Britain voted by something like a 2 to 1 majority in support of that proposition, an entrenched Bill of Rights which would be similar to the European Convention on Human Rights. Do you have any comments on those things?

PROF. ROTHNEY: They have joined the European Common Market and they are under pressure to conform to what they do in the European Common Market. The Lords are the type of element in society that you would expect to go for a thing like this, but I can't understand why you would want this Parliament, not any other Parliament, just this once, this Parliament to lay down what are rights and what aren't and not have any confidence in the likelihood of this Parliament amending The Indian Act to deal with the situation that you suggested. I can't understand that.

MR. SCHROEDER: Professor Rothney, I'm not sure I have much more confidence in that particular Parliament than you do and I haven't been suggesting that this particular Charter of Human Rights is the one that I would wish to see entrenched. Nevertheless, dealing with entrenchments, you had referred in your brief to the slavery case in the United States and, of course, I have referred to other areas in Canada. I think both of us would agree that the law does improve both in those areas where there is a Bill of Rights and those areas where there is not. I am just wondering whether you could tell the committee how many countries in the world do not have a Charter of Human Rights?

PROF. ROTHNEY: No, I can't tell you that, but I've heard you asking other people here about Sweden, so I went and looked up what happened in Sweden. They have a Constitution but their Constitution is an Act of their Parliament, which is the kind of Constitution I don't object to. Their Constitution, the Act of their Parliament, I think it was in 1809 they adopted it as a result of a revolution in which there was an armed arrest of the king, overthrow the king, a new king brought in, in the middle of the Napoleonic Wars, but you don't have even that kind of a Constitution which is simply an Act of the Parliament. It's not necessary where there has been no interruption to the law and process of precedent. If the courts have been misinterpreting the Diefenbaker Bill of Rights, as maybe you suggested, and I don't know about that at all, then it's up to Parliament to amend the Diefenbaker Bill of Rights. They've got the power to do it. They shouldn't be allowing the courts to make the law.

MR. SCHROEDER: Thank you.

MR. CHAIRMAN: Mr. Desjardins.

MR. DESJARDINS: Mr. Chairman, thank you. Professor Rothney, on Page 9 of your brief, you state that the best way to guarantee civil liberties in Canada and in Manitoba is through legislation passed by parliament and by the Legislature. Then you go on to say, "This legislation should provide the same freedoms for all individuals. It should not attempt to provide special privileges for those classes of persons which happen to have the most lobbying power at the moment." While you were being questioned by Mrs. Westbury, you then suggested that if the women were not happy they should get together and vote as a very strong lobbying group. You also stated, to my surprise, that no rights came from heaven. There was no such thing as a God-given right or an actual right and the only rights, your statement was that rights given by the provinces. I don't know if you can reconcile those two statements.

Also, if you think that it was fair when you were asked the question that wasn't answered, if all Manitobans were protected, were given their rights, amd you, yourself, talked about the language rights. Do you feel that the Act of government of the legislation in 1890 that made English the only official language was correct? Later on, you said, well, it's a changing world. It is a changing world and it was because of that Act, that wasn't legal, that was allowed to stand for maybe 90 years — now there has been quite a bit of assimilation and the provinces change because of this unfair Act. I wonder if you feel . . . another statement, another observation, is you felt that you would have more faith in the courts, but then you state in that same statement on Page 9 that they shouldn't act upon the lobbying pressure. Do you think there is less of a chance that the legislation, who are looking at votes to be elected, will worry less about the strong lobby group than the courts?

PROF. ROTHNEY: To take that 1890 question first, don't forget that you had an entrenched Constitution. The official languages section of The Manitoba Act was equivalent of an entrenched Constitution. It was beyond the power of the Manitoba Legislature to touch it. In spite of having that entrenched Constitution, look what happened.

MR. DESJARDINS: Are you suggesting that because it was entrenched that this was allowed? Is it the court that decided or is it the legislation that decided?

PROF. ROTHNEY: I'm using that as an example of how writing it down in some sort of an entrenched document doesn't guarantee anything much.

MR. DESJARDINS: It doesn't take anything away.

PROF. ROTHNEY: No, it doesn't take anything away, but it doesn't help either.

MR. DESJARDINS: Mr. Chairman, I don't want an argument with Mr. Rothney . . .

MR. CHAIRMAN: Just stick to the questions, please.

MR. DESJARDINS: . . . but the point is that it took 90 years because of the majority and because the

situation was reversed in Quebec or we never would have corrected this in Manitoba, but it isn't because anything was enshrined. I think the statement was made many times. You know, you've given an example and others have given an example, they have a Bill of Rights, it hasn't protected them. If a government want to call the army and so on, they can change any Bill of Rights. We know that, but it's not because there's a Bill of Rights that they lose these rights.

PROF. ROTHNEY: No, I'm just using that to show that the argument in 1890 is not whether it's a good thing to have an entrenched bill or not to have an entrenched bill because you had the entrenched bill and it didn't make any difference.

MR. DESJARDINS: Yes, it did. It did this year, or last year.

PROF. ROTHNEY: This year.

MR. DESJARDINS: It took a long time but it did.

PROF. ROTHNEY: Why did it not for 90 years?

MR. DESJARDINS: Because nobody went to the courts.

PROF. ROTHNEY: Right, well, they didn't go to the Supreme Court. They went to local courts, I guess, a couple of times.

MR. DESJARDINS: That's right.

PROF. ROTHNEY: But why did 90 years pass? It passed because in 1890 you had reached a point which was so different from 1870, when there was a francophone majority and when the province was in such financial difficulties, that it became too expensive in the opinion of the majority to keep on publishing all the records, laws and so on of the courts and of the Legislature in both languages.

MR. DESJARDINS: Do you agree with that?

PROF. ROTHNEY: I'm not saying I agree with it, I'm just acting as a historian at this point. The fact that it was recognized that it was unconstitutional is pretty obvious from the wording of The Official Languages Act which actually has at the end a clause which says this only applies as far as the Constitution of the province permits. In other words, they knew perfectly well then that if anybody took action, the way Mr. Forest took action, that law would be declared unconstitutional.

MR. DESJARDINS: And you have confidence in a Parliament or a Legislature that knowingly pass a law that should not be valid? You are advocating this today.

PROF. ROTHNEY: No, you asked me if I have confidence in the Legislature?

MR. DESJARDINS: Well, you're advocating that this is better than having it enshrined.

PROF. ROTHNEY: It is better than having it frozen into a document which neither Parliament nor the Legislature can touch, because you're stuck then with legislation that suited 1870 but doesn't suit today. As you said yourself a moment ago and I completely agree, the reason why things changed last year is because of what's been going on in Quebec.

MR. DESJARDINS: Right.

PROF. ROTHNEY: The best thing for francophones in Manitoba is a strong French Quebec, but if you start putting all kinds of restrictions on what Quebec can do to protect the language of their own majority, you are going to weaken the French fact. Even in Quebec, you are going to take away from them the power to defend their own language, and if you do that in Quebec, if you weaken Quebec, you are going to weaken the position of the Franco-Manitobans too.

MR. DESJARDINS: Mr. Chairman, I wonder if Professor Rothney can reconcile his last statement then. If there is a strong Quebec; in other words, if they can legislate themselves and protect their majority, it is better for Manitoba. Can you tell us then that in all the days where Quebec really treated the minority English people, given all the rights possible, why this wasn't done in Manitoba? If you say that the guarantee for a strong Franco-Manitoba is a strong French Quebec, it doesn't seem to be the case at all.

PROF. ROTHNEY: Quebec wasn't causing much trouble until the last 15 years or so, until the separatist movement got going strong and that's what excited the Franco-Manitobans here and encouraged them to go to the courts. The problem in Manitoba, and we might as well face the problem, as compared to Quebec, without any reference as to whether it's right or wrong, was that you developed a situation in Manitoba where there were more people who spoke Ukrainian and more people who spoke German than there were who spoke French. How do you answer the argument that French should be given special treatment as compared to the Ukrainians and the Germans, who are more numerous?

MR. DESJARDINS: So you go by population then, you don't go by any other rights, and you don't accept then that assimilation because of that 1890 Act caused much of that?

PROF. ROTHNEY: It may have caused much of that, and I'm not saying either whether I . . .

MR. DESJARDINS: That's the best way to get rid of somebody that bothers you then, just pass unfair laws, assimilate them, and then they don't exist.

MR. CHAIRMAN: Mr. Desjardins, if you could permit the Professor to answer to your questions. Carry on Professor.

PROF. ROTHNEY: I forget which question I was answering.

MR. CHAIRMAN: Mr. Walding.

MR. D. JAMES WALDING (St. Vital): Professor Rothney, I'd like to be sure that I understand your

second point on patriation. I've heard a number of statements that The BNA Act is to be sent to Canada and would then belong to Canada. Are you suggesting in here that what is to happen is that the Parliament at Westminster would not put The BNA Act into an envelope and mail it to Canada when this resolution is completed.

PROF. ROTHNEY: Am I suggesting that? No, it won't, this is one of the myths. The British North America Act will be what it's always been, it won't change at all, it will be an Act of the British Parliament. All that this proposed Constitution Act says is that in Canada we will refer to The British North America Act in the future as The Constitution Act 1867.

MR. WALDING: If The BNA Act is to remain a statute of the UK and it's not to be sent to Canada, can you explain to me how then future amendments to that Act will come about any differently from the amendments in the past?

PROF. ROTHNEY: Well, the proposed Constitution Act 1980, which is a schedule of the proposed Canada Act, has as one of its clauses the statement that any amendments to The British North America Act in the future will be made in Canada. Amendments will be made in Canada, but it's still a British Act.

MR. WALDING: Are you then telling me that the Parliament of Canada can still pass amendments to The Constitution Act, or whatever the new name will be, which will be binding on a statute passed by Westminster?

PROF. ROTHNEY: Binding on a statute? Just on that statute or any other statute that's listed in the appendix in the schedule to the proposed Constitution Act. There's a list of British Acts and the schedule and the proposed Constitution Act says that in the future these Acts may be changed by the Canadian amending formula, whatever formula gets adopted. But of course in law, theoretically in law, the British Parliament itself could change that; it won't but it could legally and could make an amendment if it wanted to itself. As I said in the brief, it's the Convention of the Constitution that will continue to govern us with regard to The BNA Act.

MR. WALDING: I'm still not clear how the mechanics of this process will work. If The BNA Act is to remain in London and it's a Statute of Westminster, how will a Canadian Parliament amend that Act somehow in Ottawa without reference to that BNA Act in London?

PROF. ROTHNEY: Because The Canada Act amends in a way The BNA Act by saying that in the future amendments to The BNA Act may be made in Canada by the processes described here. You see the BNA Act already had a clause which said that the provinces may amend the provincial constitutions which form part of The BNA Act, "may amend The BNA Act as far as it affects the provincial constitution". There's already a clause there which says that the Parliament of Canada may amend The BNA Act as far as the federal Constitution is concerned. Now there'll be a clause in this new Canada Act which says that the Canadians through their new amending formula, yet to be adopted, may amend whatever is left of The British North America Act that couldn't be amended in Canada before. It's Britain giving that power, theoretically Britain could take the power back, but of course Britain will not.

MR. WALDING: We've heard statements made of Westminster interfering in Canadian affairs and Ottawa interfering in UK affairs. Since The BNA Act is still a Statute of Westminster, would it be possible for the British Government or the House of Commons there to simply throw up its hands and repeal The BNA Act in the Statute of Westminster?

PROF. ROTHNEY: That has been suggested. It's also been suggested that would be irresponsible. Theoretically they could do that. I suppose another thing that might be done would be a unilateral declaration of independence by Canada as was done in the case of Rhodesia. But the British Parliament wants to keep out of Canadian affairs, wants to do what the Canadians decide internally they want to do. It doesn't want to be put in the position of having to decide in a dispute between the central government and the provinces.

MR. WALDING: Isn't that exactly what it's being asked to do now?

PROF. ROTHNEY: That's exactly what it's being asked to do now. It's being asked now to impose on the provinces something which the Federal Government and Parliament wants, which is contrary as I said to constitutional procedure in Canada as recognized by the Supreme Court.

MR. WALDING: Thank you.

MR. CHAIRMAN: Any further questions? Seeing none, thank you very kindly Professor.

To the members of the committee, as my friend, Mr. Desjardins, just pointed out, it's taken us an hour and about fifteen minutes for the first person today. He says now maybe I should have invoked the time rule that he suggested, but hopefully we'll get more than three or four done today. Mr. Charles Lamont.

MR. CHARLES E. LAMONT: I don't have a brief, I've just got a few notes, and before I get on to the details of the proposed constitutional changes, I think that we're beginning to lose sight in Canada really of where we came from and I'd like to review some of these areas briefly.

I think we would agree that the constituency system is the foundation of our democracy and without it all the MPs would come from Ontario and Quebec. If we allocated them to the various provinces by province, then Manitoba for instance would have all its MP's from the City of Winnipeg, so the constituency system to me is the foundation of our democracy. The right to nominate is the cornerstone of that foundation. Each constituency can nominate those people whom they want to run and they can establish rules as to who is qualified to run in the constituency through the various constituency associations. That right to nominate

was removed in The Election Financing Act of 1971, and it was given to the party leaders and it has been used, I believe, at least four times and I think it's somewhat questionable that when we have had removed from us the sole fundamental difference between Canadians and Russians on the federal level, they have the right to vote. We had the right to nominate, the party leaders now have the right to nominate. I don't agree in any way shape or form with financing of political parties. If you want to finance anything, you finance candidates and the basis should be some very minimal percentage of the vote allowing you to get funding as a personal candidate. Parties are a fiction; candidates are real people, are real things.

In addition to the proposed changes that we've got coming now, I would like to quote two things from the Globe and Mail, November 5th: "Sinclair Stevens, former Treasury Board President, reminded Mr. Trudeau of a speech the Prime Minister gave in Montreal shortly after announcing his resignation as Liberal Leader. Mr. Trudeau had stated that he believed Canada should adopt a presidential system of government." Further down, Mr. Trudeau also said, "He hopes opposition MPs will be willing some time before the next election to study the possibility of introducing a system of proportioned representation in the Commons, a system allowing parties to appoint some MPs from regions where they fared badly." I can't imagine anything as totally undemocratic as that. Why would you allow people to be nominated from Swift Current or Ponoka or Dauphin to go down there and purportedly discuss legislation and vote on legislation when their views are not sufficiently in tune with the people in their own areas if they can get elected? Totally undemocratic.

The reason I raise these things is, we don't seem to recognize what our foundations are.

Another thing that I think it is time we took cognizance of is that the Commonwealth Co-operative Federation was founded in 1933. Somewhere in the Thirties the Social Credit Party was brought into life. We now have the wonderful Rhinocerous Party. I would suggest that it is time that we took cognizance that we now longer have a two-party system. Frequently, almost invariably, the MP who is selected to represent a constituency in Ottawa gets there with somewhere around 40 percent of the vote. That means that 60 percent of the ballots were tossed in the garbage. Occasionally we get people elected as MPs with 30 percent of the vote; 70 percent of the ballots go into the waste basket, and it's technically possible with the five parties for somebody to get elected as an MP with 21 percent of the vote and go down there and enact legislation, purportedly on behalf of his constituency.

In the case of the Constitution and in particular the proposal to enshrine human rights in the Constitution, I don't agree. What we are talking about in a society is a balance between tyrannies, the obvious tyranny of a totalitarian police state and the not-so-obvious tyranny of the anarchy that ensues when we allow so-called individual rights to run wild.

Historically, British Canada was settled by the United Empire Loyalists who chose and opted for the umbrella protection of the monarchy in Parliament as opposed to the U.S. federal system. That's the basis of the British section in both southern Ontario and the Maritimes, which again formed a very large part of the formation of Canada. Now I am not suggesting here that because they opted for our system which we currently have, that we can't change it. What I am saying is, before we do change this, let's take a look at what we are actually in fact doing.

The Premier uses the example of the totally undemocratic bussing in the United States. He hasn't mentioned that they compounded that felony, the U.S. Supreme Court, with a further ruling on due process, where they decided that some troublemaker in school hadn't been allowed due process and as a result of that, 30 percent fewer troublemakers were turfed out of schools in the United States and as a result of that, 30 percent more classrooms are being tyrannized by individual troublemakers, and the majority of students in them, who want to obtain an education, are not getting it.

It has been suggested vis-a-vis this, that the U.S. Supreme Court in fact got an awful lot of black rights. Historically I am convinced that if anybody is to get the major credit for improving black rights, it has got to be Harry Trueman. In his bid for re-election in 1940, he specifically mentioned in the State of Missouri that he felt that all American citizens, black as well as white, should have their individual rights. One of his first acts as President of the United States was to integrate the United States Armed Forces. He sent a number of measures and requests to Congress, such that in the election of 1948 he was opposed by the Dixiecrats and he still managed to win re-election. I don't believe there was any significant civic rights legislation passed by Congress until 1957, but it was then passed, federal commissions were set up to monitor voting to ensure that negroes were allowed to register the vote, the unfair poll tax was taken away. All of these were acts of the Legislature, not the United States Supreme Court. I believe the United States Supreme Court had to make rulings on some of these things, but I can't see where certainly, in my view, Harry Trueman, a legislator, was the guy that got that ball rolling and kept it rolling.

I think we've got another example, a beautiful example, of the way courts can have some rather peculiar decisions come out and that's the case of the Star Phoenix, where our Supreme Court decided that newspapers couldn't publish papers or opinions that they didn't agree with or if they did, they were subject to libel suits, and in fact the Star Phoenix I believe got nailed for 65,000.00. This Legislature here has already responded to that and changed the law nullifying the effect of that Supreme Court decision. If this decision had been made on something that was in the Constitution, you wouldn't have been able to change it and they are still talking about an amendment to the U.S. Constitution outlawing bussing. Now how long has that been going on?

Americans particularly, and Americans that are here particularly, tell us that they have more human rights and I think that what people who say, oh yes, I'd like to have my human rights enshrined in the Constitution, are forgetting is that for each increase in the so-called human rights of individuals within society vis-a-vis the state, there is a somewhat

decrease in societal protection, because every time you grant all individuals more human rights, you are also granting the criminal element further human rights.

A recent article in Time Magazine, and I recognize it specifically dealt with Florida, although parts of it also discussed the U.S. as a whole, indicated that in 1979 the hard crime, violent crime, was up 9 percent and in the first six months of 1980 it was up 10 percent over that again in the United States of America. The article went up to point out that 40,000 handguns were sold in the State of Florida, an increase from 29,000 the month before. The thing was headlined, "It's War In The Streets". There was somebody teaching a course in how to handle a handgun. Most of the people registering for it are women. This is the sort of anarchy that I believe you can get into when you begin getting decisions that can vastly affect the States' ability to protect us.

Another part that bothers me very significantly and I don't have any means of monitoring Quebec from here, but at the time of the Quebec referendum, the federal government in particular went into Quebec and promised constitutional change from within to satisfy the desires of the Quebec people and so on and so forth, and everybody heaved a vast sigh of relief when 60 percent voted no. What amazed me, 40 percent voted yes.

What was put on the table at the constitutional conference? What is on the table in this constitutional package for Quebec? Well, we're going to enshrine language rights. Mr. Chairman, this country has been in a bit of an uproar since 1960. We have had the James Cross kidnapping, we've had the Pierre Laporte murder, we had mailboxes blowing up. We had all these various things. You mean to tell me that all we had to do was enshrine language rights in the Constitution back in 1960 and we would have satisfied all of Quebec's desires? I think that what they pulled there is an absolute total scheme, they promised change, they're getting virtually no change. Rene Levesque certainly doesn't want what they are offering and I gather Claude Ryan is in the same position. I think we are making a very serious mistake and I am afraid if that vote were held again in January or next spring, those people who voted no because of promises from the federal authorities may start voting yes, and we don't have to go very far and they have in fact got a majority, and we begin breaking this country asunder.

On the question of Newfoundland saying, we want to reserve jobs, particularly in the high-paying oil industry for our unemployed people, I think I would agree with Newfoundland's right to have that. It's interesting again here in connection with Saskatchewan and P.E.I., have legislation limiting ownership of land to residents. Here again, going back a bit historically, Prince Edward Island fundamentally was started by a series of land grants of approximately 20,000 acres and up until 1870, there was no . . . and I happen to have some fairly good knowledge on this because that's where my father came from, up until 1870 there was no way a Prince Edward Island farmer could buy his farm. He was a tenant farmer. He paid his rents to somebody back in Britain and there was no way he could ever buy his farm because the revenue coming from the tenant farmer was so much that there was no inclination on the part of the landowners outside of P.E.I. to ever sell the land to them. In 1870, Prince Edward Island passed legislation restricting foreign holdings to 500 acres, which meant that finally that Prince Edward Island farmers were in a position to be able to buy their land.

A very similar situation is currently extant in Saskatchewan. I have recently driven passed Dafoe, Saskatchewan, on a few occasions; I can remember going through Dafoe, Saskatchewan, in fact, stopping in Dafoe, Saskatchewan in 1953. It was a busy little farming community. It's dead today. I think that Allan Blakeney should have the right to respond to very serious social concerns with respect to what are we going to do with these rural areas if they are entirely owned by people who are non-resident and I don't think that Premier Blakeney would really care very much whether they were English, Dutch, German, or on Bay Street. I agree with the Legislature's right to intervene on behalf of its citizens in attempt to preserve a lifestyle.

We have had national standards and we seem to be heading toward a centralized sort of position in the past and Manitoba is still suffering from a national housing code that may have been satisfactory for Toronto, but certainly never was applicable in Manitoba because the cost of fiberglass, instead of 2-1/2 inches of insulation, filling up the studs, you would always pay for it within a year or two.

In conclusion, I agree with the repatriation of the Constitution. I agree with it on the basis that we repatriate it here and amend it here. We certainly don't try and pull this scheme of pretending that we're a sovereign nation but we want a colony for one day while they amend our Constitution and hand it back to us, absolute total scheme.

Thank you.

MR. CHAIRMAN: Mr. Lamont, would you permit question from members of committee?

MR. LAMONT: Yes.

MR. CHAIRMAN: Are there any questions to Mr. Lamont? Mr. Einarson.

MR. EINARSON: Mr. Lamont, just generally from your comments, the situation we find ourselves in Canada today, do I gather from your message that we would be better off if the Prime Minister's country had never bothered to embark upon patriating the Constitution in the way in which he wants to do it? Are we better off today instead of trying to follow his formula?

MR. LAMONT: Infinitely better and I am still seriously worried about Quebec.

MR. EINARSON: I am wondering then, Mr. Chairman, through you to Mr. Lamont, whether or not then the Prime Minister is engaged in an exercise because of his financial economic situation he finds his government in in this country, that he's using this as a means to cloud the issues. In other words, is he really serious and concerned about the rights of our Canadian citizens in this country?

MR. LAMONT: I can't really interpret what the Prime Minister has intended except insofar as he

makes statements. Certainly, if I had anything to say about it, patriation and amending the Constitution would be very low on my list of priorities.

MR. EINARSON: Thank you, Mr. Lamont.

MR. CHAIRMAN: Mrs. Westbury.

MRS. WESTBURY: Thank you, Mr. Chairperson. Mr. Lamont, I'm always intrigued when people say when you give rights to one group, you are taking them away from another group.

MR. LAMONT: I don't think I said that.

MRS. WESTBURY: You did say something to that effect and so did the previous speaker.

MR. LAMONT: What I said was that by vastly enhancing our individual rights vis-a-vis the state, we are downgrading the societal protection that the state gives us. It means that I don't have to go out and buy a handgun for all my family to protect them on the streets of Winnipeg. There is no place in Canada that I know of that I'm afraid to go. We are, to me, the freeist country in the world. There are many places in the USA that I wouldn't dare go.

MRS. WESTBURY: You are very fortunate because there are places in Canada that half the population are afraid to go.

MR. LAMONT: I agree with that.

MRS. WESTBURY: I would suggest that you actually did say — and I believe these are your exact words — that when you give rights to one group, you are taking them away from another group.

MR. LAMONT: No, I didn't say that, the previous speaker did. I didn't say that.

MRS. WESTBURY: I thought I heard you say it as well.

MR. LAMONT: No, what I said was . . .

MRS. WESTBURY: Then I won't challenge you on it.

MR. LAMONT: Okay.

MRS. WESTBURY: Wait for the next one.

MR. CHAIRMAN: Any further questions to Mr. Lamont? Seeing none, thank you very kindly, sir, for your presentation.

MR. LAMONT: Thank you.

MR. CHAIRMAN: Mrs. Bernice Sisler. We have finally arrived at your name.

MRS. BERNICE SISLER: Thank you, Mr. Chairman. I waited two days the last time and didn't make it, so I'm happy to be here.

MR. CHAIRMAN: But I promised you on the weekend that you would make it this afternoon, didn't I?

MRS. SISLER: Yes. I have copies to be circulated.

MR. CHAIRMAN: Mrs. Sisler, are you making the presentation on behalf of yourself or on behalf of a group?

MRS. SISLER: On behalf of myself, Mr. Chairman.

MR. CHAIRMAN: All right, thank you. Perhaps, Mrs. Sisler, you could start in and I'm sure that the members who don't have copies will soon catch up.

MRS. SISLER: Thank you, Mr. Chairman. Mr. Chairman, and members of the Legislature, I wish to thank the Government of Manitoba for the opportunity to present a submission on the crucial matter of patriation of the Constitution of Canada. I am aware that this is a privilege unique in Canada to those of us who live in this province. However, it would appear that the Government of Manitoba has already decided to oppose patriation at this time by the decision to take legal action against the Government of Canada. I would like to record my concern that the hearings are being held after the fact.

I commend the Government of Manitoba for its pursuit of the principle of uniformity in the area of jurisdiction over divorce. This position is delineated in its February 3, 1979, statement entitled "Family Law and The Constitution" in which it argues that not only should federal jurisdiction over divorce be maintained but that it should be enhanced. The reasons are spelled out clearly: "Federal jurisdiction and paramountcy would make it possible to have uniform grounds for separation, uniform grounds for divorce, and uniform relief upon marriage breakdown." Manitoba women involved in the recent family law lobby strongly support the logic of this stand.

Historically, women have not enjoyed equal rights with men in our society. The involvement of women in decision-making has been minuscule. In essence, the family law lobby was a lobby to correct this historical imbalance, to eliminate the discrimination women have suffered within the institution of marriage. The lobby for equitable family law sought to have principles established in the laws governing marriage. Those principles, that marriage is a social and economic partnership of legal equals, and that work performed in the home is of equal value in marriage to work done in the labour force, are principles which seek to establish equal rights for men and women in marriage and at marriage breakdown.

The lobby was arduous, intense and long. This is the process which I understand the Attorney-General of Manitoba would have us endure each time we wish to obtain our rights. Why in a democratic society should women have to lobby for what is rightfully theirs, rights which Canadian men have? Why should we have to beg or pressure government to consider our concerns? It is preferable to demand or enforce our rights in court. The Attorney-General claims that those who speak for the entrenchment of rights in our Constitution have "elitist notions". I would suggest that the lobbying process is elitist. It is elitist because only those in our society with the time, energy, money, access to legal knowledge, education and confidence to make presentations to government can pursue the lobbying course. Appearing here today has cost me time, energy and

money. I have referred to the fact that the privilege of making presentations on legislation is unique to Manitoba. Canadians in other provinces might justifiably argue that Manitobans are elitist in this respect.

Gentlemen and members of the Legislature, the main purpose of this presentation is to set forth the reasons why I speak for the entrenchment of rights in our Canadian Constitution. I have referred to the historical discrimination Canadian women have suffered. It took 51 years after Confederation for women to be enfranchised federally. A judgment in 1876 against an English woman who had had the temerity to vote that, "Women are persons in matters of pain and penalties, but are not persons in matters of rights and privileges", was used to challenge the right of a woman magistrate to pass judgment and led to the decision of the Privy Council of England that women were persons under The British North America Act and hence could hold office. This was established 62 years after Confederation. It is germane to note that the basis of the decision was that The BNA Act was ambiguous with respect to the word "persons", so that the decision did not upset the common law rule about the legal incapacity of women. The language in the Canadian Bill of Rights is not as ambiguous. It affirms that, "The Canadian nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men."

The fact is that neither the British common law tradition nor the legislative process have recognized that women have a human right to equality. Women's rights have neither been affirmed nor protected by law or by the state. The Attorney-General rightly points out that those who support entrenchment are really arguing that Parliament and the Legislatures cannot be trusted to make proper decisions about fundamental rights. Ask Indian women whether their fundamental rights have been protectd by our legislators. Ask Alberta women who have no equal pay legislation to ensure equality in the labour market. Ask Manitoba women who remember that legislators took away rights gained in family law. I would refer also to the padlock law that others have mentioned, in the 1930s, when without notice or trial a house could be locked and the person evicted if they were suspected of distributing Communist or Bolshevik literature. Also, I think someone has mentioned The Alberta Accurate News and Information Act which attempted to restrict freedom of speech in the press. So those are a few instances of restrictions of law passed by legislators.

I do not share the view of the Premier of Manitoba when he stated that it was legitimate for subsequent governments to take away rights determined by their predecessors. "That's the way it should be," he stated, "that's our democratic system." I cannot accept that interpretation of a democracy. It is a fact that if our governments chose to do so, collectively they could eliminate all freedoms in Canada. They have the power to pass any kind of law. The slippery slope tc republicanism pales beside the potential for dictatorship inherent in this lack of protection.

A democracy is a government of the people, presumably people of both sexes, a state characterized by formal equality of rights and privileges. Canadian women, looking at the record of the courts and legislators with regard to their rights and privileges, realize that they have not been allowed to participate as equals in our Canadian democracy. They are justified in asking the question Elizabeth Stanton posed to the Senate Judiciary Committee in 1872, "We have declared in favour of a government of the people," she said, "for the people, by the people, the whole people. Why not begin the experiment?" The experiment is best begun, given the record of the past 113 years, by entrenching fundamental rights in our Canadian Constitution.

What is the record of the past 113 years? Well, it includes The Indian Act which must be the most blatantly discriminatory piece of Canadian legislation, as has been pointed out here, Section 12(1)(b) spells out a denial of equality for Indian women before the law. An Indian woman who marries a non-Indian loses her Indian status. An Indian man who marries a non-Indian does not. The Supreme Court of Canada upheld this blatant discrimination in the Jeanette Lavell challenge arguing that the equality before the law guarantee in the Canadian Bill of Rights applied only to ensure equality in the administration of the law and not equality in the law itself.

I would point out too that the record includes discrimination against married women who used to be forbidden to teach in our schools. Recently, in Ontario, a woman teaching in a Catholic school was fired because she had married a divorcee.

A more recent case of discrimination upheld by the Supreme Court is the Stella Bliss case. Stella Bliss had not worked long enough to qualify for maternity benefits under The Unemployment Insurance Act. She didn't want maternity benefits; she wanted to work. Her employer dismissed her for maternity related reasons. Jobless, willing and able to work, she applied for regular unemployment insurance. She was advised that she was not entitled to regular benefits because she could have special pregnancy benefits. But she was advised that she couldn't have the pregnancy benefits because she hadn't worked long enough. She was denied unemployment insurance to which she had contributed because she got pregnant instead of ill. The Supreme Court held that the distinction made between Bliss and other workers was made on the basis of pregnancy, not sex, and was therefore valid. The decision is a discriminatory one, of course, because it can only apply to women.

There are those who argue that our rights are protected by the Canadian Bill of Rights. Even given the Bill of Rights, judicial interpretation has shown little acceptance of the equality of men and women. The record illustrates the predisposition of the courts to interpret equality in the most narrow sense. As has been pointed out, I think, in one other presentation, our judges are drawn from a very narrow group in society: successful, middle-aged, white, male lawyers whose rights have not been denied by the courts and Legislatures. Studies have revealed that male judges hearing sex inequality cases may lack the essential judicial trait of impartiality, since their sex-role conditioning consciously or unconsciously may intrude on their judgment. It is absolutely essential if Canadian women are to achieve equality with Canadian men,

that the thinking of the judiciary be reoriented to an appreciation of the injustice inherent in sex discrimination. The Bill of Rights is an ordinary statute and has been interpreted by the courts as such. Entrenchment of fundamental rights in the Constitution is needed to place them above statute level. The very act of entrenchment is required to impress the judiciary of the crucial nature of equality for men and women in Canadian laws and to direct our judges to those principles of interpretation that offer the strongest defence against the violation of our rights.

The argument is made that had The BNA Act entrenched the principle that laws across Canada must not discriminate on the basis of sex, the battles for equality women are fighting today would not be possible. It is difficult to find logic in this argument. A principle articulating sexual equalities surely would not preclude action to achieve that equality. Even if there were a danger of this occurring, Section 15(2) of the constitutional proposals expressly permits affirmative action programs. I would point out too that having basic principles articulated will help individuals to speak up for their rights. There won't be the need to have large numbers of people to get political support. We all know that politicians look to large numbers in a lobby to protect themselves, and a single person lobby is rarely successful.

The entrenchment of rights hinges on the very principle endorsed by the Government of Manitoba in its stand on jurisdiction over family law, namely, uniformity. A compelling reason in favour of entrenchment is the achievement of uniform fundamental human rights legislation throughout Canada. I would point out too that the Royal Commission on the Status of Women Report stated at the beginning of its report, everyone is entitled to the rights and freedoms proclaimed in the universal declaration of human rights. Why should provinces experiment with basic rights? Why should the fundamental rights of Canadians living in British Columbia be different from those of Canadians in Newfoundland? Human rights are far too important to be left to a particular Legislature or the vicissitudes of politics.

Canada is a federation of provinces and territories united for common purposes. It seems to me that many provincial premiers are arguing for a loosely bound Confederation similar to that of Switzerland where power is vested in the cantons rather than at the federal level. It is interesting to note that Swiss women were enfranchised federally as late as 1971. It is my understanding that there are still cantons in Switzerland where women do not have the right to vote and it is the canton vote, not the federal one, which affects the lives of Swiss women and the rights they enjoy. I do not believe that provincial Legislatures are more sensitive to women's rights than is the federal government. The record shows that both levels of government have ignored women's rights unless its political expedience has dictated otherwise. The women of Canada pressured the government into establishing The Royal Commission on the Status of Women. The Report of the Royal Commission on the Status of Women recommended the establishment of advisory councils at federal and provincial levels. The Canadian Advisory Council was established in 1973 and in the 70's provincial councils were established in eastern Canada and in Saskatchewan. I find it interesting that Manitoba women waited until 1980, and a cynic might point out that that's the year before an election, for their advisory council.

That is why the entrenchment of rights in our Constitution is so vital for women. It would seem to me that a more productive direction than the confrontative one the provinces are pursuing over the matter of entrenchment would be a positive approach to improve upon the recommendations that have been made.

In essence, human rights are the people's protection against the government's misuse of power to enact laws. Entrenchment of fundamental rights in our Constitution deters individual governments from tampering with those rights. Court decisions will always be part of the process of the protection of those rights but legislators will still have the final say since the Constitution can be amended. Because women have been denied equal rights in the past they are all the more sensitive to the need for a guarantee of those rights in the future. Thank you.

MR. CHAIRMAN: Mrs. Sisler, would you permit questions from members of the committee.

MRS. SISLER: Yes.

MR. SCHROEDER: Thank you, Mr. Chairman. I noted with interest your comments with respect to the right to lobby being to some extent one which only is afforded to a certain group of people and I think that there's quite a bit of validity in that, and of course that Charter of Rights really comes down to the question of the right to lobby as opposed to the right to litigate. The people who say that Parliament should decide or the Legislature should decide, always come back with the proposition that the electorate will decide in its wisdom down the line. Now my question is, are you aware of any single case in Canadian history where a minority has been discriminated against, where first of all that discrimination became an issue in a subsequent election campaign or secondly, changed a government? I would refer you specifically to the discrimination against Japanese Canadians during World War II, whether that changed a government, or was an issue during the election campaign subsequent? Similarly the matter of the right of Canadian Indians to vote during the 50's, the 40's, the 30's, etc. The War Measures Act in 1970, many thought that that was very much against our human rights. Was that ever an issue and did that change a government? And of course you have referred to The Indian Act, I'm sure you heard me previously refer to the Sandra Lovelace case, which is before the United Nations. In that particular case we had a situation where a Conservative government, the previous government, in fact had indicated, Mr. Epp, the minister in charge of that particular portfolio, had indicated that next year he would legislate a change to The Indian Act. Despite that fact, first of all, did that issue become an issue in an election campaign and did it have any bearing on the success of that particular government or did it in fact fail because of the other issues that were involved at the time?

MRS. SISLER: To my knowledge I can't think of a single instance where any of these issues were major

issues in an election, or that they were issues that had some determining effect about the government that subsequently came to power. I would point out that most of those kinds of issues are "minority" and while I recognize that women are an equal or perhaps a small majority, they really in essence are a minority as far as power is concerned. So that I think that anybody running for office perhaps legitimately, I don't know from my point of view certainly not legitimate, understandably is a better word I guess, would not pay a great deal of attention to that kind of issue.

About The Indian Act, I understand that the Prime Minister has said that that would be changed within two years. I certainly hope that will be so. I was very disturbed to read in the paper the other day that the Indian bands say it's a non-issue, and it's certainly a non-issue to the male members of the Indian bands. I don't know that it's such a non-issue to the female members, particularly those who have married non-Indians.

MR. SCHROEDER: Yes. Just one further question dealing with the matter of judges. I happen to be a lawyer, a male, white, I'm not middle-aged yet. I think of myself as successful, the other qualification you should probably have added in if we're talking about federal judges as liberal, but you indicated that you would like to reorient judges. I'm just wondering how you would go about doing that?

MRS. SISLER: I really don't know how this is to be done, and I think women, certainly the women that were active in the Family Law Legislation and women who follow decisions relating to women, are very concerned about the stereotyping of women and the perception of judges of that stereotype idea of women. I think myself that the Bill of Rights hasn't made the least bit of difference to the judges in their interpretation as I pointed out in the cases that I listed.

I believe that the entrenchment of rights is the only thing that might change their ideas, other than perhaps having women appointed to be judges. I'm not holding my breath till the next woman is appointed to the Supreme Court or that women become say, four representatives on the Supreme Court. I don't think I'll live that long. I hope it will come, I hope my daughter will see that happen. I think that the only thing that can possibly change judges is the direction that equality has to be addressed — equality in the law as well as before the law.

MR. SCHROEDER: Thank you.

MR. CHAIRMAN: Any further questions to Mrs. Sisler? Seeing none, thank you very kindly.

Mr. C. H. Templeton. Do you have copies of your presentation, Mr. Templeton? Perhaps I should ask you as I do most other persons that appear before us, Mr. Templeton, are you appearing representing yourself or a group?

MR. C. H. TEMPLETON: Myself.

MR. CHAIRMAN: Thank you. Please carry on.

MR. TEMPLETON: I thank you for giving me, a citizen, the opportunity to express an opinion on constitutional reform. The theme of my presentation is that the constitution should be a "people document" rather than a "division of powers" document. It should be simple and short, understandable and have checks and balances to prevent our democracy being changed into an oligarchy or a dictatorship.

I think there are some lessons to be learned from the submissions by the people to date at both your hearings here and those held in Ottawa. Any assumption that the people were not interested in the Constitution should be put to rest by now. You're not even going to be able to hear all those that want to speak. The people are willing and able to participate if they are given the opportunity. Not only have they demonstrated that the present document is inadequately drafted, but it's incomplete. How incomplete it is we do not know because the time available to discuss it has been so short that it has been necessary to concentrate only on the points that the federal government put forth in its draft. But the Federal Government of Canada is operating as an entity unto itself rather than representing all of the people. I think you can see that in Quebec and you can see it in the west.

Thus we should be discussing what the people want in the Constitution, not just a draft of what the central government wants. It did not bother to ask the people what they want and, of course, it did not include anything that would significantly limit the central government's power.

Many of the submissions to the Federal Government Joint Committee gave illustrations of frustrations in dealing with government — particularly the federal government. These submissions often concluded with a recommendation for a particular section in the Bill of Rights. But a written Bill of Rights, as Mr. Sid Green pointed out, does not always give the protection that people anticipate. You will remember the lady from Pinawa that appeared before you who said she had changed her mind about needing a Bill of Rights after hearing Mr. Green. We all need discussion before making up our minds on such an important document. This discussion would do two things — it would improve the Constitution and it would help bring the people back into the democratic process.

Democracy is like a muscle — if it isn't worked and exercised, it will become useless when it's needed. I believe the present cynicism and frustration with government is because the people have left government to bureaucrats and politicians and now they do not like the result.

Manitoba should give its democratic muscle a little workout and get the people discussing the Constitution with respect to the problems of today. Discussions should not be limited only to those items that the federal government is interested in. The people should be asked what should be in a Constitution to meet the hopes, aspirations and problems of our country today.

Your committee could start that exercise. Your present set of hearings are of necessity short. They cannot be expected, in my opinion, to produce definitive public opinions and the reason is simple. The people are busy with their own affairs and have not taken the time to clearly articulate their ideas on the Constitution. They need time and discussion with

others. Only then can one get the ideas and participation one wants and it's understandable. If one were to ask any of you to describe your spouse in five minutes, I suspect you would make a pretty poor stab at describing the person you know best. But if one was to sit down and discuss with you your spouse's characteristics, physical, mental, thoughtfulness, humour, willingness to work and hang-ups, you could paint a pretty accurate picture. And so it is with the Constitution. The people need time, a format and an informal atmosphere to discuss the problems of our democracy and what sort of a Constitution is needed in Canada to meet these problems.

You could enlist local organizations to form study groups to outline the problems they see as fundamental issues of today. They could make recommendations as to how to deal with these issues. You might have to supply some staff to research answers, but care should be taken to make sure that they in no way — the staff — guided the results. When the local groups have finished their discussions, the leaders of the local groups would come together in regional groups, and finally the regional leaders would come together in a provincial group. The provincial group would publish a report for submission to your committee. Your committee should hold public hearings then to let the people express themselves on the report. You would then report to the Legislature. I am not suggesting that the groups should take over the authority or responsibility of this committee or of the Legislature. They would only provide an input from the people in the consideration of the most fundamental document in our democracy.

Below is a list of problems — and it's a short one — that I should think could be discussed. Not all of the solutions can or should be written into a Constitution, but only by recognizing the country's problems and what the people think can one set the foundation on which a democracy can be planned for the future.

The first problem is the centralization of power in the Prime Minister's Office. Duff Roblin in a speech in Calgary said he and the other Senators were appointed by the "personal patronage of the Prime Minister". But not only senators are appointed that way; a partial list is the Governor-General, Lieutenant-Governors, Federal Cabinet Ministers, Deputy Ministers, head of all the Crown corporations such as Air Canada, Petro-Canada, the CBC, appointments of all federal boards and commissions, and all judges. As a consultant, I have seen how decision-making in and outside government is controlled by the appointment of proper advisers, consultants, staff, and even pollsters. The influence the Prime Minister can wield through these appointees is much much too much. Whether this can be corrected by the Constitution directly is a moot point, but the methods of limiting it should be discussed and perhaps partially corrected in the Constitution.

The second problem is inflation. I think most Canadians seem to agree that inflation is one of our most serious problems of today. Deficit financing is one of the chief causes. Alexis de Tocqueville said a long time ago, "The American Republic will endure until its politicians find they can bribe the people with their own money." The same is applicable in Canada. It is not likely a solution to a deficit financing problem will be found at a meeting of the First Ministers. The Constitution might reflect a means of preventing one generation from mortgaging off the "homestead" of future generations.

Judge J.V. Clyne of B.C. suggests it should be unconstitutional for a federal government to produce a deficit budget unless approval was given by two-thirds majority in both Houses.

The third problem: What is the national interest in our natural resources? The national interest in natural resources is presently being discussed in terms of exploitation and political control, but surely there is more to the national interest than that. Should a resource in Alberta be exploited for the benefit of present residents only, many of whom have not lived there more than a year? What about the pioneer residents of Alberta who recently moved to B.C.? Do they not have an interest? And what about the future Albertans? A body which does not stand to profit from the exploitation is needed to look after the interests of future generations.

One would normally think that the broader role should be filled by the federal government, but under the present method of operation, the federal government is interested mainly in control and revenue and is not credible as an advocate of the interest of past or future generations and I think there is some doubt about the present generation. Perhaps the national interest could be expressed by the federal government if in the Constitution it was excluded from the revenue that exploitation produced. Any sharing of revenue could be made directly between provinces rather than through a federal filter.

What is the national interest in conservation of the natural environment is the next topic. It is very clear that nature cannot withstand unlimited exploitation. It will adjust to changing conditions to a point, but after that it will collapse. The fate of the buffalo, the passenger pigeons and the Lake Erie pollution are well known examples. But what of the future? Obviously coal must be used as a supply of energy, but in burning it, the degradation of the water, air and plant environments will result. The slowness of regrowth of the cut areas of forests and the loss of soil due to erosion is another future problem. There is a national as well as a provincial interest in long-term management of the natural environment. Although the federal government has a Department of Environment, its purpose is vague. As an advocate of conservation, it is completely inadequate and the Ministers get shuffled regularly and often or are given other assignments like the present Minister's salesmanship of the federal constitutional package.

Perhaps the Constitution should only spell out an ethic such as, "It is the federal government's responsibility to maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations." The spelling out of such an ethic would at least provide a goal which we do not now have.

The next subject to be discussed is how to limit the overhead costs and power of the public service. With over 40 percent of the GNP is presently being spent by governments and growing fast. It is

essential that a means be found to limit the overhead costs, the power and the patronage of tme public service. A number of people have suggested that the cost of all levels of government should not exceed 35 percent of the GNP if we are to remain competitive with the U.S. Of course, the allocation of that percentage between the three levels of government would not be easy to set, to divide or administer. Perhaps another means could be used. Despite the difficulties, the sheer joy of exercising power, plus the dollar costs of the federal rates of pay, the tenure, the perks — including indexed pensions — is so much better than that enjoyed by the people who pay these costs that some means of limitation must be found.

Ministers are so harassed by outsiders and staff wanting more programs and even more staff that it is very unlikely that the serious restraint or even philosophic acceptance of restraint can be effected from within government. Some kind of general constraint in the Constitution might be effective.

The next problem that could be discussed is the Senate and regional representation. There has been much discussion of reforming the Senate to reflect regional views and it seems to me to be a good way. I won't go through it here because you have heard it all before, but I think the discussions should be continued and I expect that a reasonable method can evolve. My only hope is that the reasonable method does not involve patronage appointments by federal, provincial or party organizations, and these have all been suggested.

The next topic that could be discussed is how can the municipal level of government be involved in revenues and decision-making? The BNA Act does not mention municipalities for the simple reason that they were not an important part of government in 1867. Today they are a big part. More and more, the municipalities are called upon to deal with the people's social and economic problems. Their tax base is inadequate and their effect on the decision-making is small indeed. The present "dole system" is as inadequate for governments as it is for people. Gladstone, in a debate in the British Parliament in 1840, said, "Invariably in history the strength of a union was increased by granting greater local autonomy and was weakened if not destroyed by too great a centralized power." I'm sure that you can see the applicability of this when you are discussing the federal government's grab for power, but can you see it, when you are discussing your powers with the municipal governments? I believe the municipal level needs some kind of recognition in the Constitution.

The next question that could be discussed is to whom is the public service responsible? The Minister of a department needs information, administrative assistance and people to carry out his policies, but of late, some groups of the federal public service have become so partisan on behalf of the Ministers, they regard the opposition and even the public as "the enemy" to be conquered or manipulated. It seems to me that the freedom of complete and factual information, except in very exceptional instances, is a fundamental right of all citizens in a democracy. The public service has a duty and responsibility to the people and that includes the opposition parties as well as the Minister. Whether this right should be written in the Constitution or in regular Canadian legislation can be argued. Without the freedom of complete and factual information in a rapidly changing technological society, the people, including the opposition parties and even the backbenchers of the party in power, are relegated to roles of observers rather than participants in democracy.

Mr. Chairman, the above list of subjects is submitted as a start of a list which could be used to get discussion going. No doubt more will surface in the discussion groups. Once a list is compiled, then it will be necessary by discussion in the groups to reduce the number down to a few of the most important and then the groups should be asked to suggest solutions. By the use of discussion groups, you would not only get answers that would be useful to your government in future intergovernmental dealings, but the people would understand the problems, the complexities, the trade-offs and be able to participate in democracy more effectively. That's what democracy is all about.

Now, Mr. Chairman, I put something in my brief and I know you're late and perhaps to prevent other people being excluded from your discussions, I'll only say what my opinion is. If you want to ask questions, it's all right. I think Mr. Lyon's point about civil law is one that should not be forgotten. There are a lot of us who have grown up in that; we have all grown up in it and I think we shouldn't forget that the civil law that we have is part of our cultural heritage. I agree completely with the people who are coming up before you saying that the women are not given proper status and they are not, and the Indians aren't either. But how do you give it to them without writing a law today that is going to be a long time in the future? I would suggest that the Legislatures and the federal government have been so engulfed in a growth business of writing laws that they don't bother to administer them. In fact, a lot of the people in the Legislatures have nothing whatever to do with the administration. I think the system has failed, but I don't know whether you can cure that by writing laws. I think you've got to get the people back into it, you've got to get everybody back into it. I couldn't help but quote one little quote of Judge Clyne again, in speaking to the law students of British Columbia, he said: "Any law that is" and he quotes Section 25 which says: "Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and no force or effect." He offered the following comment, "I think that you as law students will readily see that such provisions will provide a ready income for lawyers for many years to come and will need still more judges on the bench." He continued, "Whether or not they are in the general interests of the public remains a matter of discussion."

I think that many of these things puts a strait-jacket into the system that I would sooner see us get busy and look after the rights of the people. I spent a lot of time in the Yukon dealing with the Yukon Indians and a great many of them kept saying, we don't want that legislated, we just want you to recognize that we're people and we've got our culture and our way of doing things and all we want is you to recognize it. But there's only one man on the Yukon Legislature that's an Indian, and yet 35 percent of the people are Indians and that's the

difficult part, but I'm not sure that you can do it by legislation.

I'd like to conclude with suggesting to you to resist with all the persuasiveness you have, the passage of the present drafted Canada Act submitted to the British Parliament by the Government of Canada. I suggest that you support the concept of bringing The BNA Act to Canada unchanged, and I suggest that you start and actively assist in a series of study groups, workshops and public meetings to involve the people of Manitoba in drafting the most important concepts of a new Constitution. Then working with other provinces and the federal government integrate Manitoba's hopes and aspirations with those of other regions, and out of this process should come a people's Constitution that the people have been involved in preparing and one that they can understand, live with, and in the future, amend. Thank you.

MR. CHAIRMAN: Mr. Templeton, would you permit questions?

MR. TEMPLETON: Yes.

MR. CHAIRMAN: Mr. Brown.

MR. BROWN: Mr. Templeton, you have a lot of suggestions and things which you are suggesting that the people within the provinces and the provinces themselves should be doing. I take it then that you are opposed to the unilateral activities which probably will be taken by the Prime Minister in order to get the Constitution to Canada.

MR. TEMPLETON: Yes I am, but I don't think that precludes you taking the steps that I've suggested of getting the people into the Constitution, and doing whatever we have to do. I disagree with what he's doing, but I don't think that you can just either put that in or defeat it and say, well, I've done my job because I don't think you will have.

MR. BROWN: You did not address yourself to the problem of, or not a problem whichever way you look at it, of an entrenched Bill of Rights. Can you state your opinion as to — would you like to see an entrenched Bill of Rights or do you think that the legislators should be the ones who would be forming the rights on behalf of the people?

MR. TEMPLETON: Oh, I think it should be done in Canada, the recommendations I have, and I put some more in the brief but I didn't read it here, was that I believe that anything that's done should be done in Canada. I think it's improper to go over and ask the British Parliament to change something that can't be done in Canada.

MR. BROWN: Do you think that these rights should be determined by the people through their legislators and ultimately Parliament, or do you think that they should be done by the Supreme Court?

MR. TEMPLETON: Well, I think they should be done by their Legislatures because that's part of our history. That's the common law that we have, but I don't accept that it should be done by the Legislatures who get in and make their promises and say, well, I'll come back in four years. I think it's a peoples . . .The very definition of democracy is that the rule is by the people or by their elected representatives acting on their behalf, and we've gone away from that. People sometimes tend to think that they have, once they get elected, they have complete right and they're not responsible to the people, so I suggest that you have to go farther than just do one or the other — that there's a process that's to be gone through and that Canadians should participate in that process and express themselves.

MR. CHAIRMAN: Mr. Parasiuk.

MR. PARASIUK: I have a question and it's just a follow up to Mr. Brown's question and your answer. When Mr. Brown asked you whether in fact you felt that the rights should be determined by Legislatures, I'd like you to answer whether in fact you feel that an individual citizen should have access to some remedial action in the event that a Legislature using its majority passes an act which infringes on a person's rights or what that person considers to be his inalienable human rights. Should they have access to some remedy apart from going to an election or to the electorate every four years?

MR. TEMPLETON: Well, I don't think going to the electorate every four years has worked too well, and I think that's part of the problem. I'm not sure that putting in a Bill of Rights in the Constitution, or particularly one that's done in England is going to achieve that. What is needed is a process whereby they can express themselves. Now quite a few of the people that have appeared before you have said that we've got to do something about the Native people, but I defy you to write a law that is going to give them that, because what it is, what's wrong as far as I can see is an attitude. We've got to change the attitude of the people, the Legislatures and the bureaucrats and everybody else, that they're not children that we're going to look after in our own way and tell them how to think, and that they should become duplicates of French or English citizens — they're not. So we've got to change the attitude of how we're going to give them a chance to participate in their own way with their own culture and feel that they're wanted, that they have a sense of ownership. Because their land claims that they're talking about are not just a title in a land title's office, there a concept, includes the air and the water and the birds and the fact that they can go out and hunt.

MR. PARASIUK: My question was basically about remedial action in the event that a Legislature transgressed on someone's individual liberties, and you seemed to indicate at the beginning of your answer that you felt that just going to the electorate every four years wasn't a sufficient form of remedy.

Right now, Mr. Templeton, if a government feels that another government is acting in a way which is unconstitutional, it takes that government to court and right now we have the Manitoba government, for example, taking the Canadian government to court. It is seeking a remedy against an action by the federal government which it feels is unconstitutional. Do you think the individuals should have the same right of access to remedies that governments are

now saying they have, in terms of trying to remedy an action by a government which it feels is unconstitutional? Should individuals have the same rights as governments?

MR. TEMPLETON: Well it isn't quite as simple as saying, should they have the same right. Individuals, I suppose, should have the same right, but it isn't so easy as to say — I think a good example was Mitchell Sharpe went up Teslin, a little community in the Yukon, and the trapper said, "If the pipeline runs across and spoils my trapline what'll I do?" And his answer was, "You go to court". The guy has never seen a lawyer in his life and where would he get 20 or 30 thousand to pay for it? So it isn't available to him anyway. So was the Teslin said to Mitchell Sharpe, take off for Ottawa and stay there, and he's never been back and perhaps it's the best.

MR. CHAIRMAN: Mr. Einarson.

MR. EINARSON: Mr. Chairman, just from the question that Mr. Parasiuk put to you, Mr. Templeton, would you not say that as an individual, Mr. Forest, had a case insofar as his rights are concerned and was successful as an individual? How would you like to comment on that?

MR. TEMPLETON: Mr. Forest's case was . . . it was a case in which the federal government gave him the assistance. They gave him the assistance to fight the case and this is not available to every woman or Indian that wants to come and talk about their rights.

MR. EINARSON: From your comments then, Mr. Templeton, are you saying that the court costs for Mr. Forest were paid for by the federal government?

MR. TEMPLETON: Well that was my understanding.

MR. EINARSON: Mr. Chairman, I'd like to ask Mr. Templeton another question. I'm very interested in the matter of democracy and as we operate in this country, I was intrigued by his message. Would you say then, Mr. Templeton, that the metric system as it's been brought into this country was done by the people, from the wishes of the people?

MR. TEMPLETON: Certainly not, as an engineer I could assure you that.

MR. EINARSON: I just, Mr. Chairman, would like to use that as one . . .

MR. TEMPLETON: It was a good idea, but it was put in wrong. That was what was wrong with it.

MR. EINARSON: I just thought, Mr. Chairman, from the message that Mr. Templeton gave us in his entire speech, I think the question that was apropos to his comments and I just used that as one example and that is what I understand from you, Mr. Templeton, is your message is what is wrong with the whole system, when things are imposed upon people without their wishes. Is that the interpretation you want to give us?

MR. TEMPLETON: I want to get back to the people.

MR. EINARSON: Thank you, Mr. Chairman.

MR. CHAIRMAN: Mrs. Westbury.

MRS. WESTBURY: Thank you, Mr. Chairperson. Mr. Templeton, I understood you to say that you feel that any development of a Bill of Rights, an entrenchment, should be done in this country and should not be done by the British Parliament. How long do you think it would take the provinces and the federal government to agree on such a Bill of Rights given the history of the whole matter?

MR. TEMPLETON: There's a lot of talk about us being at this for 50 years, and I'm over 50 years old and I don't know where it's been going on, because I haven't heard of it or been part of it. I think if they started to ask the people what they want in the way I've suggested that a way could be found. I don't think the people have the big hangup that they're attributed to have. I think it could be done but you can't just ram something through. The people would resent that. We've got to make trade-offs because as somebody said earlier, when you give rights somewhere you take rights away somewhere else, sometimes it's to society and sometimes it's to an individual and it takes discussion to know how far in that respect you should go.

MRS. WESTBURY: Well, I can't help but agree that when you give rights to a housewife you're taking away from her husband the right to deprive her of her income, deprive her of her livelihood if the marriage breaks up, if that's what you mean by taking away the rights of one person to give rights to another. But I wondered, I hope you won't find this question offensive because I'm not directing it at you personally or at your brief, but I wonder if you too were struck by the fact that all of the people who are coming here telling us that we don't need our rights entrenched belong to that very group whose rights have never been threatened in this country?

MR. TEMPLETON: I think that's a fair statement. I would agree with that. It's easy for me in the majority to be complacent, but I've also seen some really good work done by people even like me, who do respect other minority rights, if they are given an opportunity to participate in and understand the problems and be able to do something about it.

MRS. WESTBURY: I know something of your background and I know that is true of you, but unfortunately it's not true of everybody and even including people who are in positions of power and if we could trade places for a moment, would you feel that your rights could be properly protected by a person who claimed to have respect for the group to which I belong because of his breeding capabilities?

MR. TEMPLETON: No, but I'm not sure I got your point but . . .

MRS. WESTBURY: All right, to be more specific, would you feel that your rights were protected by a person who was a Premier of a province and who stated that their respect or their concern for women was exemplified by the fact that they are the best breeders in the world?

MR. TEMPLETON: I don't agree with that.

MR. CHAIRMAN: Mr. Schroeder.

MR. SCHROEDER: Mr. Chairman, some images are flashing through my mind in terms of some of things we have heard here. There appeared to be a failure to communicate. We heard earlier from Mr. Templeton that we needed a change in attitude and it reminded me of the Paul Newman movie, "Hud", and the failure to communicate there.

You made some references to the Forest case in response to Mr. Einarson's questions, Mr. Templeton. You indicated that the difference between that case and the case of the Eskimo was the fact that the federal government actually intervened in that case to assist financially. Is that correct?

MR. TEMPLETON: The case of the Eskimo . . . Are you talking about the Bakers Lake case now?

MR. SCHROEDER: No, I'm talking about the example you gave of Mitchell Sharp coming up north. I don't know anything about that case.

MR. TEMPLETON: He was an Indian, okay. Go ahead.

MR. SCHROEDER: Are you saying that was the distinction, the fact that the federal government in that case . . .

MR. TEMPLETON: I think Mr. Forest had a great deal more going for him to bring the case than does any of the Native people because he understands the system and he can do this, whereas the Native people and a lot of women, they wouldn't stand up here because they are just not geared that way. — (Interjection)— All right, some of them, but there are a great many people that don't want to do that and they are not built that way and there are a lot of men like that too.

MR. SCHROEDER: I suggest, Mr. Templeton, that there was a much more serious and fundamental distinction and that was that Mr. Forest had a built-in constitutional right on languages and that is what he was challenging. The right to litigate was what he had, because he had an act, a constitutional act dealing with his right to speak French, his right to have certain court processes dealt with in the French language, it was entrenched. The courts held that in fact it was entrenched.

When you speak about the Indian and the land claims, there is no entrenchment and therefore there is no right for the ordinary individual to go to court. There was no right for a woman to go to court no matter what she knew about the system, no matter what the federal or provincial government was prepared to pay a woman, she could not go to court to get the right to vote. There was absolutely no constitutional right. I suggest to you that you are wrong when you say that it has something to do with money or knowledge of the system, that in fact, the fundamental distinction between the Forest case and the Indian case you are referring to at Bakers Lake, has to do with entrenched rights as opposed to no right at all, the basic four-year dictatorship of a government.

MR. CHAIRMAN: Before Mr. Templeton answers, I would remind all members of the committee, let's not try and have an argument between members of the committee and the person that is appearing as a delegation. Let's try once again keeping our questions as short and to the point as possible.

Mr. Templeton.

MR. TEMPLETON: You may well be right there, but don't forget there are a lot of other people that don't have that privilege or they haven't got the ability. For example, in the Baker Lake case which is not the case that I was speaking of, of the Indian trapper. This is a case right north of here where the Baker Lake Indians have been there for several hundred years and they have lived and their culture is based upon the caribou. That's the reason they are there. Some companies decided a few years ago that they wanted to exploit the mineral resources and some of them even had no Canadian shareholders. The Government of Canada — now we all thought that the Inuit, having been here, regardless of whether it was written in one of our acts in ink, the Inuit had some rights. I think most Canadians would accept that, and I don't think you have to have everything just written, but the Government of Canada went on behalf of itself and these mining companies and argued that because Charles II did not write that into the grant of land in The Hudson's Bay Company that therefore they had no rights. The Government of Canada in that case won the case. They tortured the words to the point and here is a whole group of people today, and all the other Native people too, are wondering what have they got, so where there is a written thing and there are unwritten things, I think we have to recognize them all.

MR. SCHROEDER: Mr. Templeton, if you feel that court case was wrong, would it not have been better to have an entrenched statement indicating what the rights of the people at that particular point were so that they could challenge the government with a particular document. They could go to court and say, this is our right, this is what we base it on, because if they don't have that right, then I suggest . . . if they don't have that piece of paper, they have nothing to come to the government with.

MR. TEMPLETON: A lot of us, and I am not a lawyer, a lot of us thought they had it, but when you get to court it isn't always justice that wins, it's how the words are written and sometimes the drafters aren't able to think 200 years in advance.

MR. SCHROEDER: Thank you.

MR. CHAIRMAN: Mr. Desjardins.

MR. DESJARDINS: Mr. Temepleton, I must say that I found your brief very interesting and I sympathize with you, although I disagree with you in many instances. If this brief was meant to make us think or have a change of attitude, this is exactly what I did while you were speaking, but then there was no answers coming. I found that maybe you were over-simplifying and I understand very clearly that somebody is in favour of an entrenched Bill of Rights and others aren't and this is something that we've heard is fairly evenly divided. I have my views on that.

On this thing of patriating the Constitution, you agree. You say it should be done here. You don't like

the way, and I agree with you on that, the federal government is proposing it without any discussion you say, and I agree with you also. But then there is no solution. If you say we must go back to the public. You might not remember but the public had it under the Larondo-Dunton Commission. It's been discussed between provinces for years. We've had the Pepin Robaerts, and I find that there is only one way. If you are going to delay and delay and if you are going to bring patriation here, it doesn't mean anything. It seems to me that if you are going to change the system, then in all fairness, that maybe you should say, all right, let them lock them up, lock them in somewhere all these different governments at the provincial and federal levels, but give them a certain time and then if this doesn't go, the federal government will have to act, because that is exactly the situation now and it's not new. When you say, well, it was just discovered all of a sudden that the people have been invited to present their views, that is not the case.

MR. TEMPLETON: I suggest that it is because, and you mentioned a number of these Commissions, and you are one of them. You have a limited time, you are all busy people, and those who are sufficiently vocal will come forth and give you something and there are Canadians and there are eastern Canadians and western Canadians and then there are those who owe their allegiance to a party because if they don't they are not going to be there.

I don't consider at all the Pepin-Robaerts Commission as asking the people about a Constitution. It was asking it mainly about language and if you were there, I was, I sat through the whole thing, and when Whitehead, the Indian leader, got up and spoke, two of the commissioners talked to themselves the whole time; they never listened to one word. The other one, whether he was asleep or not, I don't know, but he looked it, and when the people were allowed to speak at night, the one night they were allowed to speak, they were told they had to keep their presentations down to 20 minutes. When they got there they found that they were interrupted at a minute and a half and their microphone was cut off in two minutes and they went over to the other one. A lot of the Manitobans, who aren't this way, stood up and shook their fists at the Commission and said, go back to Ottawa where you belong. Now that's not participatory democracy. There is nothing good about that because I blame that Commission for the absolutely stupid thing that was going on in City Hall not too long later when they were discussing about whether they would allow bilingual signs to go to the washroom, which was completely crazy to even discuss.

They didn't ask the people. They gave a format and I was asked to be on the organizing committee, the Pepin-Robaerts thing. I went down, I looked around and I saw Anglo-Saxons and French there. There were no Indians, there were no other ethnic groups there and they said, we haven't got time to listen to the people. I got up and walked out, Art Coulter walked out, and a number of others walked out. It was geared to say we've had public participation, but they did not.

MR. CHAIRMAN: Mr. Desjardins.

MR. DESJARDINS: Mr. Templeton, you say that they were only interested in certain aspects of it. We can say the same thing of this committee, but we've heard everything. Now I am certainly not responsible for the way they conducted their meetings, but I say that if you wanted to insist and make a point I am sure that it would have been accepted and it was in the Larondo-Dunton Committee before. There has been people meeting, like you say, I met with, . . .

MR. TEMPLETON: The Larondo-Dunton is the B and B Commission?

MR. DESJARDINS: Yes, the B and B Commission and there were other things in the time of Pearson's. There were committees meeting of different groups, different associations such as, we had, where Stan Roberts was the president, that encouraged that. They have had meetings in . . .

MR. TEMPLETON: You mean the Canada West Foundation?

MR. DESJARDINS: Right. They have had meetings . . .

MR. TEMPLETON: Well, I am a director of that and they have not had any public meetings with the exception of the one in Banff this week and one two years ago.

MR. DESJARDINS: I'm not talking in that case, I'm not talking about public meetings, I'm talking about meetings that they have had where they invited certain people across the country to represent this group, at least that was an attempt to get views from different people and across the country. There have been meetings in different universities where different groups were invited. I am not saying that every single person and Canadian had a chance, but I think you are dreaming if you feel that this is going to happen. By the time this is finished you will have to start all over again because it will be passe. I think the point that I was trying to make is fine, I agree, let's change the point of view of a lot of people but let's have a definite target date or you will go on forever.

MR. TEMPLETON: I think you have to have a target date, but I don't think you limit what they are going to talk about. If you give them the time, and look at this committee gave one week for all the people. Now everybody doesn't have the time to present a brief in one week. It's more than a week now, but before the first set of hearings, it was one week.

MR. DESJARDINS: There is no limit, I don't know if you got that impression, but there is no limit. Nobody has made a decision yet if we are going to meet again and then people can send their written briefs also. But sometime, some day, somewhere, somebody is going to say that's enough, or you will go on forever.

MR. TEMPLETON: The system isn't working very well. I think you've got to agree with that, and so my suggestion is, take a look at it and say why isn't it working and what can we do about it.

MR. CHAIRMAN: Any further questions to Mr. Templeton? Seeing none, thank you kindly, sir.

The hour being about seven minutes to seven, or to five . . . well, after a long day it gets confusing.

The Winnipeg Jewish Community Council are next on the list and after supper we would start with the Chamber of Commerce because they have out-of-towners. Would the Jewish Council like to start into their brief and conclude after the dinner break or would they like to wait and do it all, but then we will deal with the Chamber of Commerce first because they have out-of-towners?

MRS. BLANKSTEIN: I think we would like to go now.

MR. CHAIRMAN: All right, would you give your name for the Hansard?
Mr. Desjardins.

MR. DESJARDINS: Mr. Chairman, if these people start now, then surely they will be allowed to come first after supper to finish their brief.

MR. CHAIRMAN: Yes, yes, that was what I meant anyway. If I wasn't clearer, I'm sorry, but what I think you can do, I do have a copy of the brief, it's seven pages. Perhaps the members of the committee will hear the brief read and then we'll lay the questions over until 7:00 p.m. Is that agreeable?

MR. DESJARDINS: Good idea.

MR. CHAIRMAN: Okay, would you like to proceed?

MRS. BLANKSTEIN: Thank you, Mr. Chairman. I am just making a few introductory remarks, and on behalf of the Winnipeg Jewish Community Council I would like to express our appreciation for the opportunity to share with this committee our thoughts and feelings about the importance of entrenchment of human rights in a Canadian Constitution.

My name is Marjorie Blankstein and I am the president of the Winnipeg Jewish Community Council and I am also Chairman of the Manitoba-Saskatchewan Region of the Canadian Jewish Congress. The Canadian Jewish Congress is national representative body of Canadian Jewry, sometimes referred to as the Parliament of Canada's 300,000 Jews. The Winnipeg Jewish Community Council is an umbrella organization and is the central community organization for Winnipeg's 18,000 Jews. The community council acts as the spokesperson for the Jewish community.

I would like to introduce the members of our delegation to you, Abe Anhang — perhaps they will just rise — who is chairman of our Constitution Committee and a member of our executive; Richard Kroft, a member of our Constitution Committee and also a member of the Community Council executive; Yude Henteleff, a member of our Constitution Committee; Lil Hirt, who is the vice-president of the National Council of Jewish Women, Winnipeg section, who is joining with us today. Unfortunately, Mendle Meltzer and Marvin Samphir of Canadian B'Nai B'Rith, they are with us in spirit but they couldn't manage to get here at this time. Ann Stangl, assistant to the executive vice-president of the Community Council; and David Matas, who is chairman of the Constitution Committee of the Canadian Bar Association, a member of the Canadian Jewish Congress Select Committee chaired by Dean Maxwell Cohen, the only Manitoban on this committee. David has appeared before the Joint Commons-Senate Subcommittee Hearings on the Constitution and he is a member of the Canadian delegation to the United Nations.

Mr. Chairman, we are here today, not as Conservatives, nor Liberals, nor New Democrats, but rather as Canadians, as Manitobans, and as Jews, with a deep commitment to this land and the values it espouses. In speaking on behalf of my community, I would like to describe the people who I am representing. We are pioneers who have helped settle this prairie community. We are immigrants from European countries who came to Canada to escape the ghettos where we lived in fear and persecution. We are survivors of a holocaust. We are relative newcomers from Russia who fled the virulent anti-Semitism there. We are the children and the grandchildren and the great grandchildren of the pioneers, the immigrants, the survivors and the persecuted. People who came to Canada to live in freedom, to own land, to follow our religion without fear and we became Canadians. As Canadians, we cherish our freedom because of our historical experience as victims of the violation of human rights. We want to see these rights and freedoms protected and affirmed.

If our rights are violated, then it becomes easier to violate the rights of other Canadians, such as Catholics, blacks, native people, women, the handicapped and the elderly and, as Canadians, we have accepted the responsibility that freedom brings. The responsibility to contribute our time, energy, expertise and money to enhance the quality of community life in the arts, in sports, politics, medicine, commerce, industry, law and so forth. Having shared with you our feelings about why it is important to entrench human rights in the Canadian Constitution, I also want to say that we would like to see the Constitution be a strong positive statement. The brief prepared by the Select Committee of Canadian Jewish Congress chaired by Dean Maxwell Cohen supports the concept of entrenchment and presents a number of deletions and changes to the proposed resolution. We would like to provide you with copies of this submission; we have copies with us. I would like to now call on David Matas who will speak to the point of entrenchment.

MR. CHAIRMAN: Perhaps Mr. Matas, before you start, your brief is some seven pages in length and rather than trying to rush you to do it in about four minutes, would you prefer to deliver it at 7 o'clock, and then have the questions follow right up after that?

MR. DAVID MATAS: Actually I have no objection to doing it even quickly now. Of course, it's subject to the will of the committee.

MR. CHAIRMAN: The reason why I mentioned that is that there are four members of the committee that have a 5:15 dinner appointment and they have promised to be back at 7:00, so that's the reason I ask. If some members of the committee get up and leave, you'll understand that they have dinner commitments.

MR. MATAS: Yes.

MR. CHAIRMAN: Okay, proceed then please.

MR. MATAS: We favour a Charter of Rights and Freedoms entrenched in the Constitution. We favour an entrenched Charter because we believe that entrenchment is the best way to protect and advance our rights and freedoms. An entrenched Charter prevents a temporary majority in Parliament or the Legislatures, reflecting only a plurality of voters, from subverting our fundamental rights and freedoms.

To the argument that an informed citizenry will protect our rights and freedoms better than an entrenched Charter, we say that a Charter will mean a better informed citizenry. An entrenched Charter is an educational tool. It tells us what our rights are; it serves as a symbol of our fundamental values.

To the argument that a democratically elected Legislature will protect our rights and freedoms better than an entrenched Charter, we say that the Charter protects the very existence of a democratically elected Legislature. What the Charter sets out are the assumptions, the bases, the prerequisites, for democracy. Without freedom of expression, universal suffrage, freedom of assembly, democracy would be meaningless. An entrenched Bill of Rights does not subvert a Legislature. It supports a Legislature.

To the argument that an entrenched Charter means transferring powers from the Legislature to the courts, we say that an entrenched Charter means transferring the power from the Legislature to the law. A Legislature without an entrenched Charter, is free to pass any law, no matter how arbitrary. The courts, with a Charter, are not free to do whatever they want. The courts do not create judgments out of their own imagination. Even when the law is general in its terms, the courts direct themselves to applying the intent of the provisions, not their own whims.

To the argument that an entrenched Bill of Rights in the United States has meant getting the courts involved in bussing school children, we say that an entrenched Bill of Rights in the United States has meant giving the vote to blacks who would not otherwise have had the vote. Our experience in Canada since 1960 with our federal legislated Bill of Rights, which gives the courts power to hold federal legislation inoperative, is not such as to lead us to fear judicial adventurism in Canada. On the contrary, the extreme caution the courts have shown with our legislated Bill of Rights is one more reason why we entrenchment. Only entrenchment will give a Bill of Rights real bite. To the argument that the courts change the interpretation of a Bill of Rights over time, and those changes show that an entrenched Charter means judges make the law, we say that the courts give to the Constitution, like any other law, contemporary meaning, adapted to the realities of the day. The words of a law are not restricted to the meaning they had at the time the law was enacted. A law speaks to the present, not to the past. The ordinary meaning of constitutional phrases like "equality before the law" or "freedom of speech" and the realities to which they apply change, not quickly, but slowly over long periods of time. The courts give effect to the changes.

There is an attitude common in this whole constitutional debate that is, at bottom, based on a contradiction. It is the attitude that we should keep the status quo. We need not change the present division of powers. It has served us well. We should not entrench a Charter of Rights and Freedoms in the Constitution. It will give the courts too much power.

However, if the constitutional status quo is satisfactory, the reason is that the courts have done their work satisfactorily in interpreting the division of powers. If the courts have done their work well in interpreting the division of powers, why would they not do their work equally well when interpreting an entrenched Bill of Rights? It is inherently implausible to be pleased with what the courts have done up to now, and yet fear what they will do in the future.

To the argument that many undemocratic totalitarian countries have entrenched Bills of Rights in their Constitutions, we say that we must have not only entrenched rights, we need ensured also independent courts. We need democratic traditions. Totalitarian countries are not totalitarian because of their constitutional Charters of Rights. They are totalitarian because there are no means of enforcing the rights set out. There is no history of democracy. The courts in these countries are servants of the state. A Bill of Rights facade slapped on to a totalitarian structure will not change that structure. A Bill of Rights added to a democratic structure will strengthen that structure.

To the argument that Canada has done well up to now in protecting rights without an entrenched Charter, we say Canada has not done particularly well. Legislatures of Canada have passed laws, one that naturalized Canadian Chinese could not employ white females, another which denied Hutterites the right to purchase land for their colonies, another which forced the press to publish the government version of events, another which provided that houses used to propogate Communism could be padlocked, another which denied the Jehovah's witnesses the right to distribute religious pamphlets on public thoroughfares, and another which violated the rights of Japanese Canadians during World War II.

To the argument that an entrenched Charter leads to undesirable rigidity and inflexibility, we say that the principles in the Charter are principles that should be stable. They should not be easily or lightly changed. They are fundamental to our notions of the way we should live in society. Stable does not mean fixed for all time. Even an entrenched Charter can be changed. Entrenchment will stop a transient plurality from acting in haste. Entrenchment cannot thwart the sustained will of a clear majority.

To the argument that rights entrenched in a Charter prompt the idea that the rights are capable of being suspended or taken away, we say that entrenchment does not make the suspension of rights easier. Entrenchment makes suspension more difficult. Canada has committed itself through the International Civil and Political Covenant to respect even in times of emergency certain fundamental rights. The International Civil and Political Covenant is one more reason why we should entrench rights. Manitoba, along with all the other provinces and the federal government, authorized Canada to sign the covenant. Entrenchment is not the only way to bring the covenant into force in Manitoba. It is one way. In our opinion, it is the best way. It means the covenant

will be brought into force in the same way throughout Canada.

Those opposed to entrenched rights continue to glorify parliamentary sovereignty when the reasons for its glorification have passed. Parliamentary sovereignty was important to control the Crown. It meant the demands of the Crown for supply could be resisted until the grievances of the House of Commons had been redressed. The Crown is no longer a power in Canada in its own right. Lip service to the tradition that the Crown must follow the advice of the House of Commons must not obscure the fact that Parliament, without an entrenched Charter, is subject to the unchecked control of the government. To be accurate, we do not have parliamentary sovereignty. We have governmental sovereignty. Except in cases of minority government, it is the government that rules, not the members of Parliament.

For all except the most politicized issues of the day, what that means is we have government by bureaucracy. An elected government has neither the time nor the inclination to control its bureaucracy except on the major political questions of the day. Statutory provisions, by their terms, give discretion more and more to Cabinet, to civil servants. Our laws regulate more and more areas of our daily lives. The exercise of these discretions, the enforcement of these laws, by the police and others, requires scrutiny to ensure that what is being done under authority of the law is fair and reasonable. The sheer volume and detail of government makes the Legislature incapable of doing this scrutinizing. If we are to have effective control of government, that scrutinizing must be done by the courts. If we are to have effective control of government, we need an entrenched Charter.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Matas, you will permit questions after 7 o'clock? You will be available?

MR. MATAS: Yes. I wonder if the committee might wish and, in fact, depose their questions now in view of the fact that I am only dealing with the one topic. It may not be too lengthy, the questions.

MR. CHAIRMAN: Mr. Brown, did you have a . . .

MR. BROWN: Mr. Chairman, we have a commitment at the Winnipeg Inn at 5:15 and that gives us five minutes to get there, so there will be no time for questioning I'm afraid.

MR. CHAIRMAN: That's certain members of the committee that have that commitment; if others wish to stay, I'm not involved in that commitment. I'm prepared to stay if it's only a few minutes. Mr. Schroeder, do you just have one question or so?

MR. SCHROEDER: I would expect, Mr. Chairman, that there would be a number of questions. I think it would be more appropriate to come back at 7:00.

MR. CHAIRMAN: The committee will reconvene at 7:10. Mr. Brown.

MR. BROWN: It is my understanding, Mr. Chairman, that the Attorney-General will not be . . .

MR. CHAIRMAN: Well, we can do that at 7:10.

MR. BROWN: Oh, okay.

MR. CHAIRMAN: For the information of those present, we will finish with Mr. Matas starting at 7:10 and then we will deal with the Manitoba Chamber of Commerce, Mr. Gary Gilmour from Winkler, who's from out-of-town, then we will revert back to the list of the Liberal Party, Alec Berkowits and Georgia Cordes, in that order

Committee rise.