Time — 10:00 a.m.

CHAIRMAN — Mr. Warren Steen.

CONSTITUTIONAL REFORM

MR. CHAIRMAN: Committee come to order, please. To members of the Committee, we have a resignation from Mr. Gary Filmon, who was a member of the Committee last week; take it as received and we are open for a replacement.

Mr. Hyde.

MR. LLOYD G. HYDE (Portage la Prairie): I would nominate Mr. Henry Einarson from Rock Lake to take his place.

MR. CHAIRMAN: Mr. Einarson has been nominated to replace Mr. Filmon. Agreed? (Agreed)

It appears, to members of the Committee and those persons present, that we have seven persons wishing to make a presentation, so perhaps we can get started with Mr. C. Patrick Newbound.

Mr. Newbound.

MR. C. PATRICK NEWBOUND: Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Newbound, before you start would you do two things: firstly, identify a group, if you're representing a group; or if you are here as a private citizen, indicate which you are, a private citizen or representing a group. You have prepared briefs of your presentation?

MR. NEWBOUND: Yes, Mr. Chairman. I am representing Canadians for One Canada; I am the President of Canadians for One Canada and I am presenting a brief which is based upon the brief that was presented to the Special Joint Committee of the Senate and the House of Commons by the Honourable James Richardson, National Chairman of Canadians for One Canada.

MR. CHAIRMAN: And you have copies of your brief?

MR. NEWBOUND: I have copies of the brief which I have given to your Clerk.

MR. CHAIRMAN: Okay, you may proceed, sir.

MR. NEWBOUND: Thank you.

Mr. Chairman, even without the confirmation of the recent Gallup Poll, it has been apparent for some time that growing numbers of Canadians are opposed, not only to the unilateral process of Constitutional change, but also deeply concerned about the content and the substance of the fundamental and far-reaching amendments which the government intends to ask the British Parliament to make to our Constitution.

Our tradition as Canadians has taught us to believe in the supremacy of democratically elected Parliaments and Legislatures, and not in the supremacy of written Constitutions.

We believe that in future years Prime Minister Trudeau's proposed Constitution, with its rigid and inflexible amending procedure, could become "a dictatorship of words" overruling the parliamentary system that has for centuries guaranteed our freedom.

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

MR. CHAIRMAN: Mr. Kovnats on a point of order.

MR. ABE KOVNATS (Radisson): I am not getting any sound on my hearing piece and I was just wondering whether the speaker is being recorded? I can live without the sound, you know I can hear well enough, but just wanted to make sure that it is being recorded. I am sorry, I just didn't want to miss any of this.

MR. CHAIRMAN: Mr. Newbound, please carry on.

MR. NEWBOUND: Parliament responds to human needs in a way that a court can never do because a court is not being directed by human needs but by the dead hand of a written Constitution.

We ask you, why are we today trying to lock up Canada's future in a written Constitution? Why do we in this generation, in this day, in this brief span of Canada's history, believe that we have the answer for all time?

With Canada's future generations in mind, our warning to all Canadians continues to be: Do not give up the flexibility of statutory law for the inflexibility of constitutional law. Do not give up the supremacy of a democratically elected Parliament in exchange for the supremacy of a written Constitution.

Mr. Chairman, your Committee will recall that the Honourable James Richardson was opposed to the Victoria amending formula now set out in Section 41 of the proposed resolution.

When the Honourable James Richardson resigned from the Cabinet in October, 1976, he expressed his opposition publicly. In Mr. Richardson's letter of resignation to the Prime Minister, and in his statement issued the same day — more than four years ago — he said:

> "I believe it is wrong for two provinces, Ontario and Quebec, to each be given a perpetual veto over changes in the Canadian Constitution. This is the most obvious kind of discrimination, because it creates for all time two classes of provinces, first-class provinces that have a veto and second-class provinces that do not have a veto.
>
> How can we say that we believe in equality when two provinces are each to have a veto in perpetuity, regardless of the size of their future population relative to the other provinces?

In western Canada and in the Atlantic provinces there is a widespread impression, whether true or not, that Ontario and Quebec "run the country". We must not confirm that impression for all time, not only to ourselves, but also to the whole world, by giving Ontario and Quebec each a perpetual veto over changes in the Canadian Constitution".

We hope that your Committee will recommend that Section 41 of the proposed resolution be rewritten to provide an amending procedure that treats all Canadians as equals, and that enables Canadians, when amending their Constitution, to express the national will.

Although we still have some reservations about the "opting-out" provisions, we think that the Vancouver amending formula, requiring the approval of Parliament and seven provinces containing 50 percent of the population of Canada, is the best possible formula for amending our Constitution when it is finally here in Canada.

Throughout all that Canadians For One Canada wish to say today, we want to make it clear that we believe we are as aware as anyone of the very great contribution made to Canada by Canadians of French origin. Our purpose and our hope is to recognize that contribution, together with the contributions made by all Canadians, to the building of a united Canada. We believe that Canada is a partnership of all Canadians and not a partnership of two peoples or two founding races.

Mr. Chairman, we should also remember that the whole process of constitutional review was started because we were told that it was necessary in order to achieve national unity. We have to ask ourselves what we have been doing, or what we have been doing wrong, because the country is now much more deeply divided than when the constitutional process began.

We started out on constitutional reform because it was said that Quebecers were not happy in Canada — now no one seems happy in Canada]

Quebec is still unhappy,
The Native People are frustrated,
Newfoundland is enraged,
Ontario is bewildered,
Alberta is furious,
And the whole west is fighting mad]

Why are so many Canadians angry? We believe that one main reason is because the government is planning to ask the British Parliament to make fundamental and far-reaching amendments to the Canadian Constitution without adequate consultation, to say nothing about the approval of the Canadian public. Canadians are angry because these amendments could never be made in Canada using any of the proposed new amending procedures.

The fact that amendments contained in the proposed resolution could never be made in Canada was confirmed recently by Prime Minister Trudeau when he was speaking in Quebec City on October 22nd. On that occasion he said, "Speaking to you as a Quebecer, I can safely say that if we do not today entrench fundamental language rights in education, and in other fields in the Constitution, those rights will never become part of our Constitution. I know this because several provincial premiers have told me so and have asked that these measures be imposed on the provinces because the necessary legislation could never be passed in the provinces with small francophone minorities."

On that same occasion the Prime Minister had other revealing things to say. At a time when this committee and the whole nation are trying to determine the merits of enshrining human rights in our Constitution, it is fascinating to learn from the Prime Minister why the whole package of fundamental rights was included in the proposed resolution in the first place.

This is what Mr. Trudeau said to his Quebec City audience: "I'll tell you something else; we also wanted to entrench language rights; unfortunately, I think it's true that if we had done so we would have seen certain people in the country fighting the project saying, 'there goes that French power government again, which only wants to help and protect francophones.' It was to broaden the debate that we wanted to entrench fundamental rights. We knew that neither Mr. Levesque nor Mr. Ryan would oppose the substance of the move, and they didn't, and that the other provinces would be more likely to support the substance of bilingualism if they had fundamental rights protecting them in the fields of nondiscrimination, democratic liberties and so on. That was our thinking on the subject."

It would appear from what Mr. Trudeau says that fundamental human rights were included in the proposed resolution as a kind of decoy to attract attention away from language rights, and to gain support for what the Prime Minister calls "the substance of bilingualism".

Again, on the occasion, while speaking about entrenching The Official Languages Act in the Constitution, Mr. Trudeau asked his Quebec City audience this question: "Do you know that the bill before the House proposes entrenchment of the essential part of our Act on bilingualism?" And he went on to say: "We want to entrench in the Constitution, since Quebec will have a veto, the fact that this country will be bilingual from sea to sea."

After reading the Prime Minister's Quebec City speech, it is necessary for all of us to ask, is the proposed Constitution trying to protect minority language rights, or is it trying to create a bilingual country from sea to sea?

If we are trying to protect minority language rights there will be general approval and, we would hope, very little opposition. But if we are trying to create, in Prime Minister Trudeau's words, a bilingual country from sea to sea, reaction of most Canadians will be quite different. In this respect we would like to ask the Manitoba Legislative Committee and the Canadian public to consider carefully the wording of Section 16(1) of the proposed resolution. It says, as you know, that French and English are to have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and Government of Canada.

When your committee considers Section 16(1) in your clause by clause examination of the resolution we hope you will give full consideration to the meaning of the words "all institutions". There are more than 400 major federal government institutions operating in all parts of Canada and employing, when the Armed Forces are included, more than 600,000 men and women. When considering this

matter it is vital for us to realize that a country expresses itself to the world and, in a very significant way, identifies itself at home through its institutions. If Canada's institutions are bilingual under its Constitution, Canada is bilingual under its Constitution. This means there are serious questions that all Canadians must now be asked to answer.

Is Section 16(1) really what you wish to say in your new constitution?

Have you really been consulted and informed about these most fundamental and far-reaching amendment to your constitution?

Is there anything close to a consensus confirming that you want Canada to become a bilingual country under its fundamental law?

Until these questions have been thought about and answered in the affirmative by Canadians from coast to coast Section 16(1) should not be entrenched in Canada's Constitution.

Mr. Chairman, our purpose in being here today is to add our voice and the voices of more than 30,000 members of Canadians for One Canada, to the countless numbers of Canadians who are asking that the Canadian Constitution be patriated without amendment. We repeat - without amendment - other than the inclusion of an amending procedure that treats all Canadians equally and which enables Canadians to express the national will. When that is done we can then continue, here in Canada, to negotiate the substance of our future together. We believe that we will continue to be one country and that it will be a great country.

To conclude, let us describe the kind of Canada we believe in, the kind of Canada that we are for.

- We are for the supremacy of parliament.
- We are for One Canada, built on the Grand Design set out by the Fathers of Confederation.
- We are for a nation where minorities, large and small, are respected and their rights protected.
- We are for a nation that is united around its majority and around the unifying symbol of its flag.
- We respect diversity and duality but we know that if we enshrine diversity and duality in our nation's constitution we do so at our nation's peril.

Our Constitution should be an inspiring document reflecting the reality of Canada and expressing our pride in being Canadian.

Our Constitution must enshrine our unity.

It must enshrine our vision of the Great Northern Nation.

It must enshrine our vision of a Great Northern people who call themselves THE CANADIANS.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Mr. Newbound, would you permit questions from members of the committee?

MR. NEWBOUND: Certainly.

MR. CHAIRMAN: Are there any questions to Mr. Newbound from members of the committee? Mr. Einarson.

MR. EINARSON: Well, Mr. Newbound, from your brief, as I gather in going through very quickly, I think I would want to also study it very closely for some of the comments you make are very interesting to me. When we talk about entrenching the language rights of our French people whom I, over the years, have the greatest respect, and I concur on some of the comments you make to them here, but I would like to know if you would like to expand a little bit or how you feel about this. In Manitoba over the many years we have complemented our Canadians of French ancestry in the educational system. Do you feel that has worked satisfactorily in Manitoba?

MR. NEWBOUND: I think that the recognition of francophone education, French education, whether it be French, Ukrainian, Polish, etc., is a thing which is a changing thing depending on the makeup of the country and we really are talking about the future, we're not really talking about the past. The Constitution hopefully will lock in Canada for many many centuries and it should have the flexibility that if the population of Manitoba or another province increases in size with francophone population then we would hope that education would be provided to those individuals.

But on the other hand, if a particular province declined in the population of French francophones to the extent perhaps that there were none in a particular province, if you lock in the bilingual character into the Constitution — perhaps the best example of this is The Manitoba Act — the courts recently decided that Manitoba had to go back and put everything into English and French. But supposing the population of Canada, say in 20 years time, of French origin was zero, the courts could have done nothing else but to make the same finding because that is the dead hand of the Constitution.

I'm not sure whether I have answered your question.

MR. EINARSON: Yes, Mr. Chairman, I think the witness has done to an extent but the comments that we get and I get from many people, they are saying, look, if we want to have a bilingual country, particularly the recognition of our friends of French nationality, we should start in the schools rather than going the method which we are using and we will have a unified country. Is that a fair comment?

MR. NEWBOUND: I think that's the process of time, and I think that will inevitably happen. If the education system builds it in across the country ultimately that will happen, and it will then become the national will in the process of time. But I don't think that you can legislate a bilingual country forever. I think that's an impossibility. What it does do, I think, it sets the seeds in future generations. How do you change it? There is only one recourse democratically, there is no recourse.

MR. EINARSON: Just one more question, Mr. Chairman, if this was incorporated into the Constitution we would not have the kind of freedom and rights as far as minority groups are concerned if it is entrenched in the Constitution as opposed to being dealt by Parliament.

MR. NEWBOUND: I think it should be dealt by Parliament. That's correct. You, in effect, remove some rights I think by entrenching it forever, unless

there is an acceptable amending formula, and that formula must treat all Canadians equal, not first-class and second-class provinces.

MR. EINARSON: Pardon me, Mr. Chairman, I thought I had come to my last question, but one more. When we talk about an amending formula, that means then we have to change the Constitution, and would you say that that would be a very difficult thing to change the Constitution, rather opposed to if you had to deal with Parliament on the rights of individuals?

MR. NEWBOUND: Sorry, if you, as I understand it, if these things are locked into the Constitution without an amending formula or with the formula that is being proposed where two provinces have the right of veto in perpetuity, then I think the possibility of changing the Constitution, say in one or 200 years time, becomes virtually impossible because regardless of the population they will still, even if there's a population shift, they will still have the right of veto. But many of these rights should be enshrined, if they are going to be enshrined, through acts of Parliament where future generations can decide the changes as social and political requirements are needed in the future to change that through the will of the national will, you know, democratically elected parliament.

MR. CHAIRMAN: Are there any further questions to Mr. Newbound? Seeing none, thank you very kind, sir, for your presentation.

MR. NEWBOUND: Thank you very much, sir.

MR. CHAIRMAN: Next on my list, League for Life of Manitoba Incorporated, president, Mrs. Patricia Soenen. Did I pronounce the name, Soenen? Please proceed.

MRS. PATRICIA SOENEN: Mr. Chairman, members of the committee, as the chairman has indicated, my name is Pat Soenen; I'm a registered nurse and I'm president of the League for Life of Manitoba. The League for Life of Manitoba is a provincial, educational organization dedicated to the defence of the right to life for all innocent human beings. It speaks particularly on behalf of voiceless and defenceless preborn babies.

As a right to life organization we are not concerned with the political process of patriating the Constitution. Our concern is that preborn babies not be deprived of their fundamental right to life, either by omission or commission. As the humanity of preborn babies has been clearly established by modern scientific evidence, they are entitled to the same protection accorded born infants, children, adolescents and adults. Any other position is a blatant violation of human rights. We insist that any Charter of Canadian Rights and Freedoms must enshrine the right to life from conception to natural death. Furthermore, this right must be unalterable and not subject to future amendments.

A Canadian Charter of Rights and Freedoms should be a statement of the fundamental values held by the people. It is disturbing to many that the proposed "Charter" makes no mention, as does the "Canadian Bill of Rights", of Canada as a nation, founded on principles which acknowledge the supremacy of God, or our roots within the Judeo-Christian heritage. Such an omission constructs a "Charter" in a foundation of sand, subjecting it to the shifting winds of political caprice and power. At present The Proposed Resolution Respecting the Constitution reads more like a political policy statement than a Charter of Rights and Freedoms. In a Charter of Rights and Freedoms what could be more important than recognition of "the right to life, liberty and security of the person"? It is the fundamental human right on which all subsequent rights depend. The right to vote, freedom of conscience, of religion, of language rights, of peaceful assembly, are all worthless if the right to life is not pre-eminent. It is clear that human beings exist prior to their constitution and laws; so do fundamental human rights exists, not because they are enshrined in a constitution of the state, but because they are inherent in the human being. The first duty of the state, its constitution and law, is to protect and guard fundamental human rights. It is unacceptable "the right to life, liberty and security of the person" to seventh place in the Charter and define it as a legal right, rather than a fundamental human right. We urge the government of Canada to begin its Charter by recognizing the spiritual heritage of Canadian society and by enshrining "the right to life" in its proper, pre-eminent position.

In presenting the case for an entrenched Charter of Rights and Freedoms, the Government has pointed to certain abuses which have occurred in the last 50 years wherein Canadians have been deprived of basic rights. Nowhere is this more apparent than in the more than 500,000 innocent Canadian lives destroyed by abortion. Destroyed, not because their existence was a genuine threat to the life or health of their mothers, but because their death provided an expedient and convenient solution to perceived social and economic problems. To fail to correct this blatant and monumental abuse is tantamount to making a complete mockery of a Charter of Rights and Freedoms.

We urge the Federal and Provincial Governments to protect babies from the time of their conception. This action would be consistent with the United Nations Declaration on the Rights of the Child, to which Canada is a signatory. The declaration states in part:

> "The child, in virtue of its lack of physical and intellectual maturity, needs special protection and care, including adequate legal protection, both before and after birth".

Thank you, Sir.

MR. CHAIRMAN: Would you permit questions?

MRS. SOENEN: Yes, Sir.

MR. CHAIRMAN: Are there any questions to the delegate from members of the committee? Seeing none, thank you kindly for your presentation.

Professor A. R. Kear. Professor Kear. Just before you start Professor Kear, you are appearing as a private citizen, am I correct?

PROFESSOR A. E. KEAR: Oh yes, I represent no one but myself.

MR. CHAIRMAN: All right.

MR. KEAR: Mr. Chairperson, Committee members. First of all, let me say I congratulate you on your patience. I know how hard working you are by hearing all the presentations and today you're giving people another opportunity.

Thank you for the opportunity for meeting you again as I was not convinced that our first meeting was mutually satisfactory. At this point I would also like to thank Mr. Jack Reeves for his co-operation today in providing the blackboard which we shall use.

We are dealing with a most serious question, Canada's Constitution, so the time we take today is both a nation and a province-building exercise. Canada's Constitution is too important to be tampered with lightly as in the proposed resolution currently before Parliament.

This presentation today is in two parts. First, primarly verbal, during which I would answer any questions; and second a written brief after which I would answer any questions. And then, finally, I will provide a resolution for your consideration in the Legislature. I suggest this procedure simply because the verbal portion was prepared yesterday as I have other university responsibilities to perform; I suggest this procedure because committee members might find it easier to deal with the verbal portion as I go along because they do not have everything in writing.

You and I play different roles which, if combined, should be good for the Constitution. You operate in the active role of politics and may lack the time for detailed analysis of something as complicated as the Constitution. You are inside politics while I am outside. Thus our two roles, yours as parliamentarians and mine as a political scientist outside politics, are today equally concentrating on the Constitution but from different perspectives. Different perspectives is not to suggest that you are right and I am wrong only that we each, in our own way, are trying to understand the proposed resolution and its implications for the future.

I have never been a member of any political party, I am not now a member of any political party. By being thus free of party membership I can best fulfil my role as an objective political scientist. However, I am a partisan in favour of retaining the Constitution as it has evolved. I welcome this opportunity to appear before an all-party committee; I'd welcome invitations to appear before any party caucus here or in Ottawa. I appear before you as a political scientist so I shall use the terminology and methodology of political science which is simply the study of the theory and the practice of the art and science of government.

Let us focus upon four matters:

First, the practice of unanimous agreement amongst governments since 1862, before creating the Constitution of 1867, and unanimity for constitutional amendments in 1940, 1951, 1960 and 1964, and I shall explain in a few minutes in other ways. Unanimous agreement was a condition laid down by the Imperial government in the dispatch quoted in my first brief to you on November the 17th. If you don't have copies of that November 17th brief I've extra copies here and I'd be delighted to provide it for you. That requirement of unanimity laid down by the Imperial government in 1862 was followed extensively at the Quebec Conference 1864 where most of the resolutions were adopted unanimously.

Secondly, the proposed resolution would abolish both the unanimity principle and the First Ministers' Conference wherein unanimity has been repeatedly exercised for constitutional amendments.

Thirdly, what will be the consequences of abolishing historical practices, constitutional principles and constitutional institutions which have evolved to become part of the Canadian spirit of government.

Fourthly, what should be done, but more about this later.

How many of you attended the First Ministers' Conference to discuss the Constitution? How many of you have watched a First Ministers' Conference on television?

Throughout my presentation I shall use the letters FMC simply as an abbreviation to make it shorter rather than continued repeating the longer phrase First Ministers' Conference.

What I'd like to do next is provide you with a diagram of what a federal system looks like because the general assumption is that Canada is a federation. We speak of the federal government and federal elections and the federal Prime Minister and we have these ideas because Canadians have been greatly influenced by experience in the United States and we have the habit in this country of assuming that what the Americans do, well that's what we do. Well, I want to point out to you, by this diagram, what the American system looks like and in a few minutes we'll look at what the Canadian system looks like, because we're not talking about the same system and our governmental system operates quite differently than it does in the federal United States.

I'd welcome any questions as we go along at this point because it's not an easy subject to understand.

In the American system, which looks like this, the Constitution provides for two kinds of government. The federal government, which as we know is located in Washington, and the different state governments. The American Constitution also provides for the Supreme Court, which plays the role as an arbiter, and this is why the Supreme Court is placed between the federal government on the one hand and the federated governments on the other. If there is a dispute as to the meaning of the Constitution, it is the responsibility of the Supreme Court to settle a dispute. And, in this sense, the Supreme Court acts as an arbitrator. You notice that in a federal system the people elect both the members of the federal government and they elect members of the state governments, and they're also subjected to the decisions of the Supreme Court. To repeat, the federal government is provided for in the Constitution, the Supreme Court is provided for in the Constitution and the state governments are provided for in the Constitution and all of this can be read from the American document.

The purpose of this diagram is to demonstrate, as we'll see in a few minutes, that Canada's system differs from the United States.

Do you know that the First Ministers' Conference distinguishes Canada from the United States? Do you know the First Ministers' Conference is the only institutional mechanism where provincial governments, as of historic right, participate in

constitutional amendments? Do you know the First Ministers' Conference is the best guarantee of the continuing existence of provincial governments and of provincial autonomy? Do you know the FMC gives Canadian provinces more power than American states? Do you know that if the FMC, with its unanimity principle for Constitutional amendments is abolished, as set forth in the proposed resolution, that the Canadian system of governments, as it has evolved since 1862, will be permanently and irrevocably changed.

Mr. Douglas Campbell, present with us today, attended what used to be called Federal-Provincial, or Dominion-Provincial Conferences. The name of this institution has undergone change, we just currently call it today the First Ministers' Conference — and Mr. Douglas Campbell attended these conferences when he was the Liberal Progressive Premier of Manitoba. Indeed he participated in the 1951 Constitutional Amendment which was achieved with the unanimous agreement of the provinces.

Senator Roblin, when he was the Progressive Conservative Premier of Manitoba, also attended FMCs and participated in the unanimous Constitutional Amendments of 1960 and 1964. Both Mr. Campbell and Senator Roblin have received copies of the brief that I presented to you. Myself, I became interested in this institution in government when I attended them while working for the Canadian Department of Finance and have subsequently studied the theory and practice of the FMC ever since.

Mr. Sterling Lyon, the current Premier, now enjoys the constitutional right to attend FMCs to discuss Constitutional Amendments. Mr. Mercier, in this room, has assisted as part of that provincial delegation but, of course, not as the head of Manitoba's delegation. If Mr. Howard Pawley becomes Premier he will be entitled to attend, as a constitutional right, as have all previous premiers.

In short, abolish the FMC and you destroy Manitoba's right, and indeed every government's right to participate in Constitutional Amendments in the future.

Let me now turn to the brief before you — I would ask someone to distribute these. The benefit here is that we have a diagram that all of us can follow.

For the members of the press who are present, they can receive copies of this brief. which was prepared in December and given to the Clerk of the House at that time. The press should note that there are changes on Pages 9, 10 and 11 in particular, and when I come to these pages today, they should take these changes into consideration. These changes on Pages 9, 10 and 11 were made during this past weekend.

I think there are 14 copies available there; there are certainly enough for everybody who is present in the room today.

If you would open up the brief and look, first of all, at the diagram on the inside of the page. What is the purpose of this diagram? The purpose of this diagram has been to demonstrate, for your assistance, several things.

First of all, the Canadian system of governments is evolutionary in character; ww do not have a revolutionary tradition in this country as in the United States. So, first of all, we have an evolutionary character, the Canadian Constitution, and indeed, I think it's essential to maintain this evolutionary character.

Secondly, provincial governments have existed since 1758. If you look on the right hand part of the diagram, that indicates the year that Nova Scotia was given the first elected representative Assembly of any British North American colony.

Thirdly, the central or Canadian government on the left-hand part of the diagram, was created by The British North America Act in 1867.

The Supreme Court, also provided by The BNA Act 1867, was established in 1875. And as you know since 1949, the Supreme Court has been truly supreme with the ending of all appeals to the Imperial Judicial Committee of the Privy Council located in London.

Fifthly, the Federal-Provincial or Dominion-Provincial or First Ministers' Conference began to meet in 1906 and has evolved ever since. As we will see in a few moments, it has its roots in the period before 1867, particularly in the London Conference of 1866-67.

Sixthly, the Constitution exists to serve the people and that is why not necessarily the people on the bottom of the pile but the function of the Constitution is to serve the needs of the people and we know that the character of the Canadian society has changed.

The Constitution is also a reflection of popular ideas of the functions of government and how government should operate. To underline this point, at no time have the Canadian people ever asked for the abolition of the First Ministers' Conference and its unanimity principle.

At the bottom of the page, you will see a definition of the FMC and the definition is simply that the First Ministers' Conference consists of the heads of all of our responsible governments; that is, the central and the provincial governments. The municipalities are excluded from this as are the Yukon and Northwest Territories. The unanimity principle means simply that one government equals one vote for constitutional amendments; that is, every government is equal to every other government.

Now the size of the FMC varies according to the number of provinces. When Newfoundland entered Canada in 1949, it automatically gained a seat and became a participating member. The Yukon will gain a seat and become a participating member when it becomes a province.

If you turn to the first page, what I have provided here is a summary of the major points to underline what is the character of the First Minister's Conference and how it fits into our system. We just start at the top of the page and work our way along. There are two characteristics of our system of government, the written and the unwritten portion. The written portion, you can read in The British North America Act, but there are fundamental parts of our Constitution which are unwritten. The Cabinet, for example, is unwritten. Responsible government as a principle of operation is unwritten. You will not find a description of responsible government of the Cabinet in any statute, in any portion of The BNA Act. Likewise, the First Ministers' Conference is similarly part of the unwritten Constitution. It's the result of an evolutionary process.

Referring again to the diagram, the First Ministers' Conference and the Supreme Court, if you can conceive of this in a 3D conception, are on the same plane. They perform different functions; they perform by different methods and have different results. But both the Supreme Court and the First Ministers' Conference are there and have evolved to resolve relations amongst the central and provincial government. To contrast the two, the First Ministers' Conference is fundamentally political while the Supreme Court is fundamentally legal. Interprovincial or Intra-Imperial Conferences began in 1836 and we need to be reminded that the British North American provinces were initially part of the British Empire. The unanimity principle began as an "idea" in 1862 as an imperial crown for union, and a copy of this 1862 dispatch from the colonial secretary to the Lieutenant-Governor of Nova Scotia is contained in the brief I gave you on November 17th. I have extra copies of that brief here if you wish to look at it.

Most of the resolutions were adopted unanimously at the Quebec 1864 Conference. Now in the history of our country, the most important conference of all was that held at Quebec in 1864. That's equivalent to Runnymede in British history, or the National Convention held in Paris during the French Revolution, or Philadelphia in the United States in 1787. So Quebec in our system is the birthplace of practically everything that we're talking about today.

Among the resolutions adopted at the Quebec 1864 Conference there was not one word about conferences and this explains why they are evolutionary in character and of an unwritten form. The Intra-Imperial Conference in London, 1867, was the climax of the nation-creating process and indeed has become the model for subsequent Dominion-Provincial or Federal-Provincial or what are called today, First Ministers' Conferences.

The Intra-Imperial London Conference of 1866-67 adopted the London resolutions. These were based on the Quebec resolutions and as part of the London Conference the Fathers of Confederation then prepared a number of draft British North America Bills, with the assistance of British legal draftsmen, for presentation to the Imperial Parliament. That in short is a quick summary of the process before 1867.

The British North America Act, our written legal Constitution, began our system of governments by creating the central government, but notice there is nothing in The BNA Act that created the First Ministers' Conference. The Supreme Court of Canada established in 1875 legally keeps separate the central from the provincial governments and vice versa.

On the diagram, the line connecting the Constitution to the Supreme Court means the Supreme Court was created under and for the Constitution. If I can add a verbal improvement here, the line connecting the Constitution to the First Ministers' Conference means the FMC has become part of the Constitution through agreements reached in the FMC to amend the Constitution. Now when you look at the diagram provided here and look at the diagram on the blackboard about the American system, you will see that our system differs from the United States and this difference helps explain some of our difficulties in understanding what it is we're doing.

The First Ministers' Conference began meeting irregularly in 1906 but has been meeting increasingly frequently since World War II and today usually annually. In the evolution of the FMC it was given its own secretariat in 1968. Indeed that's a throwback to the time when Colonel Hewitt Bernard was the executive secretary of the Quebec Conference, 1864. In 1974, the FMC was given its own building in Ottawa, but more about that later.

Notice also the diagram that I provided for you in the brief, there is no line connecting the central with the provincial governments. The significance of this is that the absence of a line means that neither government has any direct control over the other governments. There are no institutional connections between the central government on the one hand and the provincial governments on the other. No province elects or appoints members of the Senate and today, with the disuse of reservation and disallowance, this power, while still legally remaining in The British North America Act, has no longer been exercised.

At the bottom of the page, the FMC politically unites the central and provincial governments through their governmental heads like no other institution. There is nothing comparable in the Canadian system of governments to the First Ministers' Conference; while the Supreme Court legally separates the central and provincial governments like no other institution.

If you turn over now to Page 2, the FMC has used the unanimity principle for Constitutional Amendments in 1940, 1951, 1960 and as I discovered this weekend also in 1964. The First Ministers' Conference has used the unanimity principle by the veto to prevent a majority amending formula in 1961 by Saskatchewan and in 1971 by Quebec.

So what I am saying here, that's the significance of the four stars, is that the unanimity principle as exercised through the First Ministers' Conference is explained in two different ways. First of all, in making constitutional amendments as in those four instances noted, and also on two occasions, first by Saskatchewan and then by Quebec, in stopping a majority amending formula.

This next point I would really like to emphasis very much, and that is we do have a constitutional amending formula in this country if people will only recognize the historical reality. The historical reality is the constitutional amending formula is unanimity.

Indeed, the FMC with its unanimity principle for amendments to the written constitution and by its prevention of a majority amending formula makes the Canadian system of governments unique in the world. The FMC, if you're looking for a motto, exemplifies simultaneous unity with diversity inside our system of governments.

Furthermore the FMC, through equal membership and a veto which can be cast by each government, guarantees equal status and power for all governments. PEI is equal to Ottawa when it comes to constitutional amendments. Unlike the Senate, or any majority amending formula that anybody can conceive, or indeed, the Supreme Court.

The FMC with its unanimity principle for constitutional amendments, can be summarized in six ways, five of which I have there. First of all, the

FMC with its unanimity principle prevents the central government from dominating over the provincial governments. It also prevents the provincial governments from dominating over the central government. It maintains a balance beginning in 1862 between the central government on the one hand and provincial governments on the other.

Fourthly, the FMC, with its unanimity principle, has enabled constitutional amendments to be made in 1940, 1951, 1960 and 1964. It has also prevented the constitutional amending formulas through the vetoes cast in 1961, 1971 and as we'll see in a few moments, in 1980. And finally, it makes our system of governments unique in the world.

If you turn over a page, what you'll see is a photograph and the purpose of this photograph is to point out to you that there is now a special building in Ottawa where the First Ministers' Conference meets. Parliament has its building, the Supreme Court has its building, and the significance of this separate and distinct building is that it is recognized now that the First Minsters' Conference, in a physical sense, has a continuing existence.

The First Ministers' Conference usually meets in the Canadian Conference Centre; it used to be called the old Union Railway Station. Mr. Douglas Campbell, when he was Premier, recalls when the Dominion-Provincial or Federal-Provincial Conference, as it has been called in times past, used to meet in the railway committee room of the Parliament Buildings, but it now meets in its own building.

To emphasize, the First Ministers' Conference is the only institution which connects the central and the provincial governments. Only in the First Ministers' Conference do the provincial and central governments talk to each other as governments. They meet as governments, they talk to each other as governments, there is no equivalent institution anywhere else in our system. Only in the First Ministers' Conference do the central and provincial governments bargain and agree with each other. There is no other institution in Canada like the FMC. It's very uniqueness differentiates Canada from the American system, which you can see on the blackboard here in the room.

The next, if you turn the page over, you will see a photograph of a First Ministers' Conference in session, and this was designed to make it easier for you to understand what may be a rather complicated argument. Formally the First Ministers' Conference consists of eleven people, that is the Canadian Prime Minister and the ten provincial premiers. There is, in addition to that, a secretary, and from time to time, other Ministers attend and participate according to the agenda. These other Ministers do not form part of the FMC which is only composed of heads of governments. Mr. Mercier knows that the practice is that from time to time other Ministers may speak, but with the approval of the conference itself.

Prime Minister Trudeau has repeatedly said there has been only failure since 1927 in finding a constitutional amending formula. He has repeated this so often, and the news media have reported this so often, that it's now accepted as being a true statement. The truth is the following: We have a constitutional amending formula if only people will recognize the FMC with its unanimity formula for what it is; the unanimity principle is part of our historical evolution, it is part and parcel of the evolutionary system of Canadian governments. There have been three constitutional amendments since 1927; 1940, 1951 and 1960, and all were achieved through unanimous agreements. I'm sorry for a slight repetition here but repetition may not be a bad thing. Yesterday I discovered a fourth amendment in 1964, which was also achieved through unanimous agreements amongst the governments. The 1964 amendment added supplementary benefits to old age pensions, including survivors and disability benefits. The judgment of the Supreme Court of Canada on December 21, 1979, of which I have a copy with me, that was the judgment of the Supreme Court that was asked to look at the proposal of the Government of Canada to amend the Senate and the Parliament of Canada referred this matter to the Supreme Court. And what did the Supreme Court decide? The Supreme Court refers to these four unanimous agreements. The Supreme Court recognizes that this is the constitutional convention for constitutional amendments in Canada. These four instances of constitutional amendments, made with unanimous consent, are noted in other sources and books. If you're familiar with R. McGregor Dawson's, the Government of Canada, the Fifth Edition, you can see them on Pages 124 to 125. And if you turn to Page 527 of Dawson you'll see the wording of the 1964 Constitutional Amendment concerning Section 94(a).

All of these four amendments since 1940 have been made without, and I wish to repeat, have been made without a majority amending formula. All of these four amendments since 1940 have been made through the unanimous amending practice. Unanimity for constitutional amendments works. Furthermore, on two occasions, 1961 and 1971, a majority amending formula was vetoed by two different provincial governments, in 1961 by Saskatchewan and in 1971 by Quebec. And Mr. Trudeau, when he was Prime Minister in 1971, accepted Quebec's veto. Mr. Trudeau has his own veto in September 1980. This, to my knowledge, is the first time the central government has ever cast a veto. If a provincial government can and has cast a veto, so can and has the central government. The unanimity principle applies equally then to all governments in Canada.

What does Mr. Trudeau want in his proposed resolution? What he wants is a majority amending formula, and I would suggest for a number of reasons. First, after the September 1980 meeting, it was clear that he did not like the First Ministers' Conference which uses the unanimity principle for constitutional amendments. The process takes time and its frustrating, but it works, as in the past.

Furthermore, Mr. Trudeau's position has not been consistent. He accepted Quebec's veto in 1971, and then by casting his own veto in September 1980, he is supporting the unanimity principle. But yet, in the proposed resolution, he is advancing a majority formula. The inconsistencies in his own position are clear.

3) Mr. Trudeau prefers a written majority formula rather than our historically sanctioned unwritten unanimous formula because he wants to strengthen the authority of the central government and weaken provincial governments in the long run.

4) He either does not know or does not understand the political history of the evolving constitutional First Ministers' Conference with his unanimity formula. There is nothing in his published ratings such as in the Federalism et l'Societe Canadien Francaise, which in translation has become Federalism of the French Canadians, to indicate he has ever studied the First Minister's Conference with its unanimity principle. But to be fair to Mr. Trudeau, to my knowledge I am the only person in the country who has studied the First Ministers' Conference in an extensive manner and I can provide writings on that subject if you like.

The Constitution is more important than the views of any one man or any one party temporarily in power. The FMC with its unanimity principles has evolved and has been accepted by both Liberal and Conservative governments, three unanimous agreements by the Liberals in 1940, 1951, 1964 and by Mr. Diefenbaker's Government in 1960. So both national parties have accepted the unanimity principle. In short, the First Ministers' Conference with its unanimity principle is above partisan politics as part of our Constitution.

I sent copies of my November 17th brief to all provincial premiers, to Mr. Joe Clark and to Mr. Ed Broadbent. In retrospect I should also have sent a copy to Mr. Trudeau. Except for the pro forma responses written by correspondence secretaries or executive secretaries only three people responded and at this point I'd like to read to you shortly the letter I wrote and the responses, and you'll see that some people in this country are beginning to understand.

My letter was entitled "Abolition of the First Minister's Conference and the Unanimity Principle".

"The enclosed brief to Manitoba's Legislative Committee on the Constitution demonstrates that the proposed resolution currently before Parliament will, if adopted, abolish the First Minister's Conference and the unanimity principle for constitutional amendments. If you want to retain the constitutional First Minister's Conference and the unanimity principle you had best act immediately."

The three premiers who responded are the following:

Mr. Brian Peckford, Premier of Newfoundland and Labrador. "I wish to acknowledge your recent correspondence and thank you very sincerely for the enclosed brief to Manitoba's Legislative Committee regarding abolition of the First Minister's Conference and the unanimity principle.

"As you are probably already aware we, as a government, feel very strongly about any and all changes being made to our Canadian Constitution by the British Parliament before it reaches our Canadian nation. These proposals have dramatic implications for all provinces and we must do all in our power to ensure that these changes are not implemented. The support of all people will be required at this most crucial time in our history.

"Your comments regarding the effect the proposed changes will have upon the First Minister's Conference and the unanimity principle are gratefully acknowledged and noted.

"Thank you very sincerely for having contacted me in this regard."

In chronological sequence of the receipt of letters, the next came from Mr. Sterling Lyon. "I acknowledge receipt of your recent letter as well as the attached brief to the Manitoba Legislative Committee on the Constitution.

"Thank you for taking the time to bring this material to my attention. I value having your opinion on this important matter."

The third person who responded, by himself, is Mr. Joe Clark. "Just a note to thank you for your letter of November 28 and enclosed copy of your brief to Manitoba's Legislative Committee on the Constitution.

"I appreciate your thoughtfulness in providing me with this material. Please be assured that it will receive full consideration during my Party's deliberations on this important matter."

And then this morning in looking through my notes I came across a response from the Executive Secretary of Mr. Rene Levesque and if you like I can give you a translation of the letter.

In short it says that the Premier, Mr. Rene Levesque is knowledgeable of your letter as to the possibility of abolishing the Conference of First Ministers and the principle of unanimity in the case of constitutional amendments. We share your point of view and your apprehensions. Here is why everything is being undertaken in Quebec to stop this unilateral federal action. Monsieur Levesque has asked me to express his sincere thanks for your correspondence in this regard and offers you the best in the New Year.

The issue in short is the following:

Whether you wish to retain Canadian Constitutional principles and practices, or whether you wish to do something else contrary to our evolutionary past. At this point if you would turn to the brief itself and I can explain things as we go along if anybody has any questions. The essence of this . . .

MR. CHAIRMAN: Perhaps I could stop you at this point, Professor. Is it your intent to read the nine or ten pages word for word or are you going to highlight the changes that you've made from your earlier presentation?

MR. KEAR: Whichever the committee likes. What I'm really planning to get across is a very important point and if it would assist to get across a very important point by reading it, I'm prepared to do that.

MR. CHAIRMAN: Whatever method you think is best, sir.

MR. KEAR: All right. Let me begin informally by saying that when I attended these conferences I was puzzled. As an undergraduate and as a graduate student none of my professors ever mentioned these conferences to me and none of them ever existed in the textbooks that I studied, and yet I attended these things, I saw them in action and I began to ask myself what's going on, something's wrong. Either the textbooks are wrong or what I see does not exist and it was this experience as an official of the Canadian Department of Finance that led me to this study that I've been undertaking ever since.

What system and union of governments have we created throughout our history? The point here is our evolutionary practices. Our system has become

neither French nor British nor American but purely Canadian. It has not been unitary as in France and Britain. It has not been confederal when the United States, Switzerland and Germany were confederations. It has not been federal when America, Switzerland and Germany changed from confederations and remained federations. Our system and union of governments has been neither unitary nor confederal, nor federal, but it has become unique. Why?

The origins of our systems of government lie in the will to unite provinces and provincial governments through conferences and agreements amongst governments in British North America when our provinces were colonies inside the British Empire. The first conference amongst British North American colonies was held in Bathurst, New Brunswick in 1836 to discuss lighthouses in the Gulf of St. Lawrence with representatives attending from the governments of Upper and Lower Canada, New Brunswick and Nova Scotia.

Sixteen conferences amongst the colonial and imperial governments were held between 1836 and 1867, including those famous ones of Charlottetown 1864, Quebec 1864 and London 1866-67. The latter conference, that is of London, was held in the imperial capital where imperial officials assisted the Fathers in translating the London Resolutions into draft North American Bills. This process of conferences and agreements amongst the governments led to 1867 when the British Parliament enacted The British North America Act creating Canada.

Since 1867 there have been many dominion-provincial, federal-provincial or what are today called First Minister's Conference to discuss the Constitution. In my last count it is somewhere in the neighbourhood of 90. Sometimes these discussions precede and help lay the groundwork for constitutional amendments much like the conferences before 1867. The First Ministers' Conferences have been held more frequently since World War II and in recent years almost annually. Three were held in 1979 and two in 1980. The FMC receives much press and media attention, including live television coverage. The FMC is composed of all the Canadian and provincial heads of governments, currently numbering 11. Each government is represented by its head.

To further demonstrate the uniqueness of the Canadian system, the FMC has never existed in France, nor in Britain, nor under the American Articles Confederation, nor in the Swiss and German Confederations, nor in the American, Swiss and German Federations. The FMC has made Canada's system of governments unique and is its most distinguishing feature.

The FMC guarantees the provincial governments, as governments, the equal right of membership participation in the country-wide policy-making institution. Its most important function is discussing and particularly agreeing upon constitutional amendments. Its evolution, composition, roles, etc., sharply distinguishes it from all our 11 Legislatures, all our 11 Cabinets, all our courts and all our 11 bureaucracies. It is unique and special institution inside Canada's system of governments.

What does the proposed resolution respecting the Constitution of Canada, currently before Parliament, contain about the FMC? Part III, Section 32, is entitled "Constitutional Conferences" and is as follows:

"Until Part V comes into force, a Constitutional Conference of the Prime Minister of Canada and the First Ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year unless, in any year, a majority of those composing the conference decide that it shall not be held."

If you take a literal reading of Section 32, it means that when Part V comes into effect the First Ministers' Conference is a constitutional amending mechanism and the unanimity principle will disappear permanently.

Part V of the resolution sets forth the "Procedure for amending the Constitution of Canada" and ensures, when, and if, Part V comes into force, there shall never again be even one more constitutional FMC because Part V contains a constitutional amending formula to permanently replace the FMC.

What would be the consequences of the abolition of constitutional FMCs?

1. Canada would lose its unique system of governments because constitutional FMCs do not exist in France, Britain, America, Switzerland and Germany which are or have been unitary, confederal and federal systems.

2. No present or future Prime Minister could ever again convene a constitutional FMC to agree upon constitutional amendments if Part V takes effect. When and if Part V takes effect, constitutional FMCs, if called, would have no legitimacy in constitutional law. Convening such a conference would be a violation of the written Constitution. No Canadian Prime Minister would have any authority to convene a constitutional FMC. No provincial Premier would have any constitutional authority to attend. Any decisions reached therein would have no constitutional authority.

3. Each and every provincial governmental head would never again have the time honoured right to participate in a constitutional FMC or to cast a veto to stop a constitutional amendment contrary to a province's vital interests. Quebec, for example, has a vital interest in the French language and culture. Newfoundland has a vital interest in off-shore natural resources. Manitoba has a vital interest in the Hydro dollars earnable in exporting electricity. What would Manitoba gain by giving up this poker chip that it can play? These are a few examples of "provincial vital interests" that are now protectable by the veto cast by any one provincial head in the FMC.

4. The Canadian government could not again cast a veto to stop a constitutional amendment detrimental to one of its vital interests. The personal income tax is one example of the Canadian government's vital interests. Canada's veto in September, 1980, speaks for itself.

5. Each and every provincial government, as a government, would become subordinated to the amending formula set forth in Part V so that no province could protect its vital interests by casting a veto for a proposed constitutional amendment.

6. Manitoba, with 5 percent of Canada's population — I discovered the other day it has slightly less than 5 percent — would be subjected to a nation wide popular referendum (to be used as a

deadlock breaking device so it is argued). Manitoba's 5 percent population would count as nothing. PEI's smaller proportion of the Canadian population would count as less than nothing in face of a popular referendum to be decided by a simple majority. Saskatchewan's 5 percent of Canada's population would count as nothing. Each small province with their individual populations would count as nothing. No small province would ever again, in the face of a popular referendum decided by a simple majority, be protected by the veto a small province now can exercise.

7. Canada would break from its historical principles and practices of conferences and agreements amongst governments for constitutional purposes most notably demonstrated before 1867 by the Charlottetown 1864, Quebec 1864 and London 1866-67 Conferences. The first resolution of substance adopted at the 1864 Quebec Conference was adopted unanimously:

"That the best interests and present and future prosperity of British North America will be promoted by a federal union under the Crown of Great Britain, provided such union can be effected on principles just to the several provinces."

This is quoted in full in Browne's book "Documents on the Confederation of British North America". If you like, read Browne's collection of documents, of which I have a copy with me today. You would learn that most of the resolutions were adopted unanimously in the Quebec 1864 Conference.

8. Canada would break forever from its time honoured principles and practices of constitutional FMCs since 1867, whereby, for example, constitutional amendments have occurred in 1940, 1951 and 1960, and as I learned yesterday, 1964, after unanimous agreements were reached in constitutional First Ministers' Conferences. The 1940 amendment introduced Unemployment Insurance to be legislated upon by Ottawa alone. The 1951 constitutional amendment gave Ottawa concurrent jurisdiction with provincial governments to legislate on Old Age Pensions. The 1960 constitutional amendment required Superior Court judges to retire at age 75, and the 1964 constitutional amendments gave Ottawa additional authority with respect to Old Age Pensions and survivor's benefits.

9. Ottawa would become dominant over the provincial governments, as Washington has become dominant over American state governments. America has a majority amending formula. The proposal contains a majority amending formula contrary to the Canadian principle of unanimity reached in the FMC. There is no constitutional FMC in the USA and if you look at the diagram, that's easily demonstrated. The President and state governors have never met to determine constitutional amendments and there is no system in the United States where a state government could cast a veto to stop a constitutional amendment attacking a state's vital interests. The FMC and the unanimity principle clearly differentiates Canada from the United States and these differentiations are worth preserving as America has never been Canada. If we adopt a majority formula for constitutional amendments, our system of governments will cease to be unique. We don't have to copy American ways to become ourselves and to remain ourselves.

10. The Canadian equilibrium, or balance between the central or Canadian government on the one hand and the provincial governments on the other, would be permanently changed through abolition of the FMC and our unanimity principle for constitutional amendments. We would be turning our backs on our history, on our principles, on our practices as we have created them. The consequences of denying ourselves in the future through abolishing the constitutional FMC and the unanimity formula would be an incalculable leap into the dark.

11. Manitoba, for example, would become permanently less rather than equal in power to Ontario for constitutional amendments with equality of provincial status and power destroyed forever through abolition of constitutional FMCs and abolition of the unanimity principle for constitutional amendments.

12. Newfoundland would become permanently less rather than equal in power to Quebec for constitutional amendments with equality of provincial status and power in constitutional FMCs. For example, Newfoundland and Quebec are now having a dispute as to Newfoundland's ability to transmit hydro-electricity through the Province of Quebec. Newfoundland is trying to resolve this problem, but if you go to a majority amending formula, Newfoundland's right to protect itself will disappear.

13. The First Ministers' Conference, as the uniquely Canadian constitutional amending mechanism with its unanimity principle for constitutional amendments, would be permanently replaced by a majority amending formula when and if Part V of the proposed resolution is adopted.

In short, abolition of the First Ministers' Conference and the unanimity principle for constitutional amendment purposes would permanently and irrevocably change our system of governments in ways and with consequences which cannot be foreseen.

Do Canadians and all Canadian governments want these permanent, fundamental, irrevocable and revolutionary changes to our unique system of governments contrary to evolutionary and creative practices which began in 1862?

Do Canadians want a revolutionary and permanent break with our creative past, our historic principles and time honoured practices, or do we wish to continue our known evolutionary development in the generations ahead, most uniquely exemplified in constitutional FMCs and so on.

Adoption of the proposed resolution for abolishing both constitutional FMCs and the unanimity principle would be a revolution in our way of doing things. A revolution through abolition of constitutional FMCs and its unanimity principle as advocated in the proposed resolution, or maintenance of Canadian evolutionary practices is the choice facing all eleven governments who participate as a constituional right, and cast vetoes in the FMCs. What's sauce for the goose is sauce for the gander. Both the central or Canadian government and all provincial governments would lose.

To maintain or abolish the constitutional FMCs with its unanimity principle for constitutional amendments, that is the question.

Canada would only lose through abolishing both the FMC and the unanimity principle. Let us retain

our uniqueness with the unanimity principle. This would be the Canadian way. Any other way would be foreign to our Constitution which is neither French nor British, nor American, but Canadian.

Mr. John Roberts, the Minister responsible with Monsieur Jean Chretien for the Constitution during the summer, has said the government does not like constitutional FMCs. I must apologize to the committee, this is where I had to make some editorial changes yesterday so now you're looking at my handwriting rather than typing. Presumably, Mr. John Roberts also does not like the unanimity principle for constitutional amendments, but I ask, which is more important, one's likes or abiding by the Constitution.

When Mr. Trudeau introduced his proposed resolution at a press conference on October 2nd, he described the unanimity principle as a tyranny. This was the word I thought I heard, but my memory was that he used the word tyranny in his verbal statement. Since writing this memo in December, I have received the recorded statement and for the sake of accuracy, the following are the appropriate quotations:

Statement of the Prime Minister, October 2, 1980. Issued by the Office of the Prime Minister on the day the Joint Resolution was placed on Parliament's Order Paper.

Page 5. "The Resolution proposes, first, that the Constitution be brought home in a way that will lead, by the end of four years, to a new amending process, free from the straightjacket of unanimity. I think this phrase, straightjacket of unanimity, flies in the face of reality, and it's the historical reality that I've been presenting to you this morning.

La rsolution propos d'abord que la constitution soit rapartrie suivant une formule qui pourra vous mener, dans un dlai de quatre ans, a un nouveau process d'amendment, libr du carcan de l'unanimit.

This same Prime Minister Trudeau has favoured that the First Ministers' Conference be constitutionalized. And here, once again, I would demonstrate there's an inconsistency in his approach. "The idea of establishing the First Ministers' Conference in the Constitution is not a new one. It goes back at least to Article 48 of the Victoria Charter proposed in 1970. It was also favoured by the Special Joint Committee of the Senate and the House of Commons which issued its final report in 1972. It reappeared in Bill C-60 in 1978."

This quotation is from the Report on Certain Aspects of the Canadian Constitution, report to the Senate of Canada by the Standing Committee on Legal and Constitutional Affairs, November 1980, Page 15. Mr. Trudeau was Prime Minister during the Victoria Conference, and he was the Prime Minister who introduced Bill C-69 into Parliament. Since he approved constitutionalizing the First Ministers' Conference in Bill C-60 in 1978, has the failure of the September 1980 First Ministers' Conference led him now to want to abolish the First Ministers' Conference?

We should recall that during the Quebec Conference, 1864, most resolutions were adopted unanimously. Look at the names of the people who participated in those decisions. John A. MacDonald, George-Etienne Cartier, Leonard Tilley, who was the Premier of New Brunswick, Charles Tupper, the Premier of Nova Scotia, Oliver Mowat, Premier of Ontario. Ontario's Premier, Oliver Mowat, won many successful constitutional battles in the courts in the 1870s, 1880s and 1890s, in defence of provincial autonomy. Need it be said that provincial autonomy is a bedrock principle in our constitution?

Prime Ministers and provincial premiers since 1867 have accepted Dominion-provincial, federal-provincial, or today's name for the same institution, the FMC, as the constitutional amending mechanism of the unanimity principle. To repeat, the amendments of 1940 and so on, were all made by the unanimity practice.

Abolition of the FMC with its unanimity principle for both constitutional creation as before 1867, and constitutional amendments since 1867, would be contrary to what has been accepted by all the Fathers of Confederation in the 1864 Quebec Conference, the most important of all the pre-1867 conferences, and by all Canadian and provincial First Ministers since 1940 including Mr. Trudeau in 1971 and again in 1980.

Abolition of the FMC and its concomittant unanimity principle would be revolutionary rather than evolutionary in the Canadian system of self-government containing both central and provincial governments.

Evolution is better than revolution. Evolution is the Canadian way.

Unanimous co-operation amongst the Canadian and provincial governments for constitutional amendments is the Canadian principle of government. Destroy the FMC and the unaimity principle and you destroy the Canadian system of government.

What we have before us is a choice. What system of governments do Canadians want? The First Ministers' Conference and the unanimity principle have stood the test of time.

MR. CHAIRMAN: Mr. Kear, would you permit questions from members of the Committee?

MR. KEAR: Absolutely.

MR. CHAIRMAN: Thank you kindly, on behalf of the committee, for a very in-depth presentation. It's obvious that you've spent a lot of time on this subject.

MR. KEAR: Well, it's also part of what I teach so I'm able to combine the two talents sometimes.

MR. CHAIRMAN: Are there any questions to the Professor?

Mrs. Westbury.

MRS. JUNE WESTBURY (Fort Rouge): Thank you, Mr. Chairperson. I didn't hear Professor Kear's first presentation because I was away.

MR. KEAR: I can give you an extra copy now, if you like, Mrs. Westbury.

MRS. WESTBURY: I have a copy, thank you.

I had not been aware of the statement that the federal government's amendment insures abolition of the First Ministers' Conference, and I was of the

opinion, in fact, that the intention was to continue First Ministers' Conferences. I wonder if Professor Kear has made this presentation to the federal committee? I would be interested in hearing a debate on the topic at that level.

MR. KEAR: I submitted, on November 17th, a memo by mail and asked to appear, and as you know the government majority on the Committee decided that only five experts were to appear and I wasn't one of the five.

MRS. WESTBURY: That's too bad.
Well, if I may ask a few questions . . .

MR. KEAR: But if I can elaborate a bit, if any party caucus wants to invite me to Ottawa, I'd be delighted to go. Not just for the trip, but I think this is really vital.

MRS. WESTBURY: Page 2, the first paragraph. Sometimes these discussions precede and help lay the groundwork for constitutional amendments, but the First Ministers' Conferences have not been held only to discuss constitutional amendments. At times in your presentation I got the impression, I know you don't think that, but at times in your presentation I got the impression that this was being said, that that was the only purpose for the First Ministers' Conferences, was to decide constitutional . . .

MR. KEAR: Oh, you're really quite correct. The First Ministers' Conference meets on all sorts of topics. They've discussed Medicare, Wage and Price Controls, they talk about equalization payments, the federal-provincial financial relations, and so on and so on. And quite often, during these discussions, sometimes constitutional amendment gets on the agenda.

Now, there's no guarantee that just because it's on the agenda that an agreement will be reached but sometimes these conferences, other than purely constitutional conferences, help lay the groundwork for subsequent agreement as to a constitutional amendment.

MRS. WESTBURY: My concern in drawing that to attention is that there still presumably would be First Ministers' Conferences even if they were not held to discuss constitutional matters, and so . . .

MR. KEAR: They would continue as they do now, they can continue on an informal basis, that's quite correct. But the point is though, the point I wish to emphasize, is that no FMC could meet to make an amendment to the Constitution, could agree to make an amendment on the Constitution.

MRS. WESTBURY: Wouldn't you have enough confidence in our Premiers and our future Prime Ministers to know that if there was something that needed to be discussed, they could find a way to get it onto the agenda under some other topic?

MR. KEAR: The substance of the proposed resolution is to abolish the FMC as a constitutional-amending mechanism. That is the substance of Section 32.

MRS. WESTBURY: Yes. That leads to some other questions, bottom of Page 3. When and if Part V takes effect, constitutional FMCs, if called, would have no legitimacy in constitutional law. Does it have any legitimacy in law now?

MR. KEAR: There's a difference between constitutional law in practice and constitutional law in writing. The FMC has legitimacy now in practice, which was part of what I am saying, but if you include Section 32 in a written statement in The BNA Act, then the FMC would have no constitutional basis in written constitutional law to meet or discuss or decide.

MRS. WESTBURY: As it has no basis now.

MR. KEAR: It has a basis in constitutional practice.

MRS. WESTBURY: In practice, right, but not in law of any kind.

MR. KEAR: That's right. There's a clear distinction between constitutional convention and constitutional written law and the emphasis here is on constitutional, unwritten convention.

MRS. WESTBURY: Page 4, again, this is continuing the same subject. Any decisions reached therein would have no constitutional authority, as they have no authority in law now. Correct?

MR. KEAR: No, not necessarily. Again I would emphasize the difference between unwritten practice and written constitutional law. The authority now is that if a unanimous agreement is reached, then the constitutional amendment follows. But if an FMC cannot even be called as proposed in the resolution . . .

MRS. WESTBURY: On specifically constitutional matters.

MR. KEAR: That's right. So . . .

MRS. WESTBURY: But even now, any decisions they reach unanimously are not entrenched. They have no authority in law.

MR. KEAR: Not in written law but in constitutional practice they are accepted by the participating governments.

MRS. WESTBURY: In paragraph 3 on Page 4, you said each and every provincial governmental head would never again have the time-honoured right to participate in a constitutional FMC and you have just, I think, confirmed my note here which is that time-honoured right really means only a right by virtue of established practice.

MR. KEAR: Well, you could just as easily say that the Cabinet exists only by constitutional right because it's not provided in any written portion of the Canadian Constitution, so if you like to follow that argument, you could say that the Cabinet system of government should be abolished because it doesn't exist in written constitutional law.

MRS. WESTBURY: My point in trying to bring this forward is to suggest that practices become established and this does not mean that a practice cannot again become established if it is desirable.

MR. KEAR: I would think that it would be most unlikely, if once Section 32 is adopted, and if once you abolish the FMC for constitutional amendments, I think it would be most unlikely that the practice would ever emerge again of doing what we've done in the past.

MRS. WESTBURY: So that your presentation is really — would you say your presentation is your opinion of the natural consequences of these amendments being passed or is it based on the actual factual analysis of the Constitution?

MR. KEAR: My argument is based on constitutional practice, constitutional history, which is part of our basic system. But Section 32 would stop that practice.

MRS. WESTBURY: But you have said that Canada is unique, there's no other country that has the same system of government, so really wouldn't that mean that there is no established system that you could be studying that would lead you to this conclusion. Would you agree that it's your opinion after reading . . . I'm not altogether in disagreement with everything you say in this but I'm trying to clarify this in my own mind whether this is based on the facts as you read them in the constitution and the government's amendments or whether this is your professional and informed opinion after reading these documents?

MR. KEAR: Let me put it this way. When the British North American provinces came together in the 1860s, this was the first time that responsible government, cabinet government in the British tradition, was melded with any form of federalism. That was a unique creation in the 1860s, there was no other model in the world to look for for comparable study purposes. Likewise today the emergence of the First Ministers' Conference and the role it plays; there's nothing comparable in any other political system in the world so there's no other that we can compare it with.

MRS. WESTBURY: Is there a virtue in being unique?

MR. KEAR: Sure.

MRS. WESTBURY: Of itself, is that what we should be seeking, something that is unique in the world or we should be seeking the best answer?

MR. KEAR: I think each of us as an individual is unique and certainly we believe in the uniqueness of each individual in the . . .

MRS. WESTBURY: Would you say that again, I didn't hear you.

MR. KEAR: Each of us is an individual. Each person is a unique human being. We value the uniqueness of the individual in our political system, in our democratic values, and likewise, I think Canadians should also value the uniqueness of our system.

MRS. WESTBURY: But should we be striving for a unique system just for the sake of uniqueness? You've referred many times in your presentation to the uniqueness of the system and is that in itself a virtue? I would question that that in itself would be our ultimate goal, to be unique rather than to have the best system that could possibly be entrenched or legislated.

MR. KEAR: Since there's no other system to compare ours with there's no way to say that another system is better than ours.

MRS. WESTBURY: And I'm not saying that either.

MR. KEAR: I know. Let me put it on a different plane. One of the difficulties of being a Canadian of whatever linguistic background or whatever province one lives in is trying to define what is this thing we call a Canadian. The usual stock answer is that we are not American which is a poor way of defining us in a positive sense. I would argue that this approach, the maintenance of the FMC and its constitution amending process would positively add to our "national identity", our understanding of our own political system. The fact that Canadians have contributed a new way of governing, if I can elaborate just a bit, and here we have to give the Americans full credit. When the Americans created this system of government in Philadelphia 1787, they created a system of government that had never before existed in the history of human government. They created something new and different and unique and we've really got to tip our hats to the Americans for doing that. We've done the same thing.

MRS. WESTBURY: Why, because it was better or because it was unique?

MR. KEAR: It was different from what the Americans had been subjected to.

MRS. WESTBURY: Exactly, but you know I don't want to live under the American system.

MR. KEAR: But that's what I'm afraid the majority amending formula would result in.

MRS. WESTBURY: But if we're trying to find something that's unique should that be our goal?

MR. KEAR: Sure.

MRS. WESTBURY: Why, please?

MR. KEAR: Well, let me give you another illustration and this is an historical illustration. If you read Article 11 of the Articles Confederation adopted by the American Continental Congress, the Americans offered Canada the opportunity of joining the United States, they did not extend that offer to any other country. Well needless to say we never accepted that offer. I think quite frankly that the option of a majority amending formula, of whatever variety, will lead us in the same direction as the American system and I don't want that. I'd rather retain the practices that we have created, that we have developed in this country.

MRS. WESTBURY: So would you then prefer to leave the constitution now as it is under the control of the British government or do you want to bring it back without an amending formula.

MR. KEAR: Oh no, it's a myth to say that the Canadian Constitution remains under the control of the British Parliament. When we go back and study the events up to 1867 we know that the British only did what we asked them to do. But the British did require us in that dispatch from the colonial secretary, the Lieutenant-Governor of Nova Scotia in 1862, that there be unanimous agreement among the provinces, and the British Government promised in that 1862 dispatch that if unanimous agreement was reached union would be brought about — the British did that. The British contribution to creating The British North America Act is minimal — if I can take just a second to elaborate. The only time when British officials were present during this whole process was at the London 1866-67 Conference. They only came in after the London resolutions were adopted, which were themselves based on the Quebec 1864 resolutions, and the only role that British officials had to play in the London 1866-67 Conference was to bring in a legal draftsman to translate the London Resolutions in The British North America Act. From then on in the British Parliament put a rubber stamp on it. Every time we've asked the British Parliament to amend our Constitution they put a rubber stamp on it. The British contribution has been formal, not substance. So to say that The British North America Act is still under the control of the British Parliament is a bit of a myth, based on historical facts.

MRS. WESTBURY: If we require unanimity to change it maybe that is the best answer. I'm not arguing with you but I'm saying if we require this how long do you think it will be before we can have any amendments whatsoever?

MR. KEAR: Well we've had four since 1940 which is not bad. Let me put it this way. Getting unanimity is difficult, I don't deny that. But one of the advantages of unanimity is that no bad feelings are left afterwards. If you have a majority formula, the way the House of Commons operates or the way any provincial house operates, the opposition party knows that it can be beaten any day of the week but the government majority, what's the end result of this political process between the majority and the minority in the House of Commons or in a Legislature? The opposition gets angry and frustrated and annoyed that their ideas are perennially rejected. That's standard practice, you know exactly what I'm talking about and these gentlemen know what it's like when they were in the opposition. Okay? If you adopt a majority amending formula, any variation of a majority amending formula, you're going to have exactly the same impact. PEI is going to be mad or Nova Scotia is going to be mad or Manitoba is going to be mad or some, you know, some provinces are going to be mad. If you retain the unanimity principle which we have evolved, which we have used successfully, '40, '51, '60, '64, agreements are accepted by everyone, there's no bitterness left over after that kind of constitution amendment is reached. We've done it in the past, there's no reason why we can't do it in the future.

MRS. WESTBURY: Do you think we can have unanimity while we have one, I'm trying not to sound political on this, too political . . .

MR. KEAR: It's all right.

MRS. WESTBURY: . . . while we have one political party representing one level of government and that political party not represented at all in the provinces as we have now?

MR. KEAR: If we come back and look at our examples . . .

MRS. WESTBURY: Don't you think that a lot of the lack of unanimity is political, politically motivated now.

MR. KEAR: Sure, that's the name of the process. If we go back and look at examples of 1940, who was . . . let me think, that was the Liberal government.

MRS. WESTBURY: It was a Liberal government all of those years I think except 1960.

MR. KEAR: Well I'm trying to remember, 1960 certainly was a Conservative Government but I'm trying to think of the colour of the other political parties. In 1960 there was a Conservative Government in Ottawa; there was a Union Nationale in Quebec; there was a Conservative Government in Ontario; I'm sure there must have been one or two Liberal Governments; the CCF were in office in Saskatchewan in 1960, so it's part of the process that we're going to have different political parties in power in the different governments, but this has not stopped constitutional amendments. At a certain point in the constitutional process the constitutional process rises above party allegiances.

MRS. WESTBURY: Not in 1980 I don't think.

MR. KEAR: Well, that is for the political parties to sort out. I'm merely saying that from past experience, on the base of those four amendments, there have been a variety of political parties with different personalities and different party labels in office and yet constitutional amendments were reached and they were reached unanimously.

MRS. WESTBURY: I just have one other question, Mr. Chairperson. Professor Kear referred to several other countries which have federal types of government — and I don't know the answer to my question so it's not a trick question. Did you study Australia at all? Do they have anything that equals our First Ministers' . . .

MR. KEAR: That is the one I know least about and there's something equivalent to the FMC in Australia but I don't have the details and I don't know how it operates. I do know that, in terms of the financial arrangements in Australia, what's called the Commonwealth Council, that's not quite right — it's been a long time since I've looked at this so I'm a little shaky — it was called the Commonwealth Loan Council. In Australia the central and the state governments get together on the Australian Loan Council and decide which governments can borrow how much money in any fiscal year. We haven't reached that point, maybe we shouldn't. But as how the Australians make constitutional amendments I'm really very hazy here.

MRS. WESTBURY: Would you agree that they do not have to go back to Britain for constitutional amendments?

MR. KEAR: Again I am hazy. I haven't . . .

MRS. WESTBURY: I don't believe any other Member of the Commonwealth does have to go there.

MR. KEAR: The answer to your question lies in the Statute of Westminster 1931 and Canada is the only one at the moment that is in the position that it's in. Canada is the only one that still has to go back to London for any formal amendments.

MRS. WESTBURY: Thank you.

MR. CHAIRMAN: Mr. Walding, do you have a question for the Professor?

MR. D. JAMES WALDING (St. Vital): Mr. Chairman, I wanted to follow up Professor Kear's remarks about the Parliament of Westminster. I understand from your brief that the principle of unanimity makes it a simple matter for Westminster to simply rubber stamp any change that is requested. What is the present situation that Westminster finds itself in where there is not unanimity, in fact a majority of the provinces are opposed to the proposal that is being put before Westminster, what's the constitutional position?

MR. KEAR: Obviously I can't speak for the British Parliament. All I can say is what I read in the newspapers. It may not be a very satisfactory answer but the position from the viewpoint of British Parliament would be much simpler if there was unanimity. There was unanimity in 1867; there was unanimity in the other four amendments, '40, '51, '60 and '64 and all of these were made by the British Parliament. Looking at it from the strictly practical point of view, from the British Parliament, if they get 11 different requests for 11 different amendments, how can the British Parliament make any decision on the strictly practical basis? So from their point they would obviously prefer unanimity. Also from the British point of view, as far as I can judge, they're embarrassed. They don't want to get in the Canadian fight, we're the last colonial. They'd rather we settle our own problems and that they would put a rubber stamp on it. This is why I think, but again I have no inside information or anything like that, I think this is why Mr. Trudeau keeps saying that Mrs. Thatcher has promised that whatever we send over will be accepted. What's the alternative, are the British going to send over the household cavalry to put down the colonials, I mean really, do you know what I mean?

MR. WALDING: Would you regard it as interference if the Parliament of Westminster did not comply with the federal government's request or would it be a matter of interference in Canadian affairs if they did not?

MR. KEAR: Let's put it this way, they've never interfered in the past. Every time we have asked them for an amendment, either in the four cases I mentioned or in the other cases in the past, every time we've asked for an amendment they've done it, every time. On that basis of constitutional tradition I would assume they'll do it again but I can't predict what the British Parliament is going to do. I can only assume on the basis of past practice that that's what they're going to do again. Indeed Mr. Trudeau's argument has been repeatedly that every time we've asked the British have acted and he's assuming the British will act again.

MR. WALDING: Can I ask you what would happen, presuming that Westminster does in fact approve or rubber stamp the present request, do they then put The BNA Act in an envelope and mail it back to Ottawa or does The BNA Act then cease to exist?

MR. KEAR: The original BNA Act lies in a British archival deposit, I think it's the Public Record Office. It's possible to see the original 1867 document with Victoria's signature on it. Let us suppose that the proposed resolution is adopted by the British Parliament, in a formal sense, it would be nice if we had the original 1867 document in the Public Archives of Canada, but in a legal sense, it's a British document. The symbolic significance of the proposed resolution if adopted is this: The symbolic significance is that the last legal colonial link will be cut, the last legal colonial link will be cut. At the moment legally we are a colony of Britain, legally, that's why we have to go back to Westminister, legally we are a colony. But if and when the British act, that will cut the last legal link between what used to be the British Empire and Canada. In that sense, legally we will be a sovereign state, legally. Sentiment, that's another matter, but legally that would be the last connection between what used to be the British Empire and the colony of Canada.

MR. WALDING: Mr. Chairman, I'm not quite clear on that point. Can you confirm to me that if the requests to Westminster were passed, whether that would in fact repeal The BNA Act or would it be . . .

MR. KEAR: It would replace it.

MR. WALDING: . . . an amended BNA Act.

MR. KEAR: You see, the proposed resolution, plus a number of annexes, sets out how The BNA Act is to be amended. And if the proposed resolution and annexes is adopted by the British Parliament, then The BNA Act would be amended, but that would be the last time the British would do it, we could never go back to the British again.

MR. WALDING: Are you telling me then that after that has happened that it will be possible for the House of Parliament in Ottawa to further amend The BNA Act itself? Will that be an amendment of a British act that's done in Ottawa?

MR. KEAR: No, no, it would then become, if you like, 100 percent Canadian Constitution as it has been a 100 percent Canadian Constitution since 1877 except for the legal formality of the British Parliament.

MR. WALDING: I understand. Would there be anything to prevent, in future years, the Parliament of Westminster from further amending its own amended BNA Act?

MR. KEAR: Sir, the last link is cut. Suppose the proposed resolution is adopted by the British

Parliament and that would end the last legal connection. What authority would the British Parliament henceforth have over Canada? It wouldn't have any authority at all.

MR. WALDING: But if The BNA Act was a British Act in the first place and all the amendments to it have been British amendments to a BNA Act . . .

MR. KEAR: Only in a legal sense, only in a written legal sense.

MR. WALDING: But will not The BNA Act remain in London and be an amended Act of the British Parliament that they could amend at a further time if they wished to?

MR. KEAR: All right. I see what you're driving at.

MR. WALDING: I'm not suggesting they will ever want to, you know, because of the nature of the thing but is it still possible that it could happen?

MR. KEAR: I don't think so. We would then come under the Statute of Westminster, 1931, as we might have become in 1931. The Statute of Westminster, 1931, set free Australia, South Africa, Ireland, Newfoundland, New Zealand, except Canada at the specific request of Canada, except Canada, but that would end.

MR. WALDING: I presume that the Statute of Westminster, 1931, is still in Westminster.

MR. KEAR: Oh, yes.

MR. WALDING: It's still an Act of the Parliament of Great Britain and as such is amendable if they so wish.

MR. KEAR: In theory, in legal theory that's quite right. In legal theory the British Parliament can do what it likes and there is the classic aphorism that legally the British Parliament can declare a man a woman and a woman a man, and that's within the legal power of the British Parliament. Perfectly legal, perfectly constitutional in the British system.

MR. WALDING: So then what you're saying to me is that even The BNA Act, as amended by this proposed resolution, would still technically be able to be amended by Westminster at some future date?

MR. KEAR: Yes and no. How would you enforce any amendment? How would you enforce any amendment? The only way you could enforce any amendment would be for the Canadian Parliament to accept or, as I said earlier, to send out over the household cavalry and put the colonials in their place. I mean really.

MR. WALDING: Thank you, Professor Kear.

MR. KEAR: My pleasure.

MR. CHAIRMAN: Any further questions to the professor? Seeing none, thank you very kindly, sir.

MR. KEAR: Well, gentlemen, I've really appreciated this opportunity and thank you very much.

MR. WALDING: You're welcome.

MR. CHAIRMAN: To the members of the committee and the persons present, I have a question to four persons whose names are on my list, Robert Moffat, a John Michniuk, S.K. Varma and the Ukrainian Women's Association. Mr. Douglas Campbell, the former Premier of our province, would like to appear before this committee. He can not make it back this afternoon when we will be once again sitting but he will not go ahead of those four persons without their permission. We, as a committee, would like to hear Mr. Campbell, but the gentleman that he is, he will not go ahead of those four people. Any one of the four that I have mentioned, do they have any disagreement if we heard . . .

MR. DOUGLAS CAMPBELL: I won't go ahead even with their permission.

MR. CHAIRMAN: Oh, I see.

MR. CAMPBELL: People who are on the list should be first.

MR. CHAIRMAN: All right. Mr. Moffat is the next person on my list then. Oh, Mr. . . .

MR. KEAR: First, Mr. Chairman, I'll leave it with you, but what I also meant to give you was the suggested resolution that I've composed that this Legislature of Manitoba could adopt and this suggested resolution is a summary of what I have told you this morning.

MR. CHAIRMAN: Would you give it to our Clerk please, Committee Clerk? Mr. Moffat, are you present?

MR. ROBERT E. MOFFAT: Mr. Chairman, I think you can hear me without the additional mike. I'm not sure, sir, as to your procedure as to how long it might be your plan to stay in session. What I have in mind to do would take about 10 minutes, maybe.

MR. CHAIRMAN: As I mentioned just before you came to the lectern, Mr. Moffat, is that we have the four persons whom I named and then Mr. Campbell, in that order. I am confident that we will conclude our hearings from the public by 5 o'clock today based on the numbers that have come out, but we will be going till 12:30 and then breaking till 2:00 p.m.

MR. MOFFAT: Thank you. I am appearing here on my own behalf and not as a representative of anybody, although as some of you may know, over a period of over 30 years I have appeared before various committees on this subject in various capacities, having been quite deeply involved in the whole constitutional question some 30 years ago and being very much interested in it ever since. What I have put together here for your consideration is a few, what I might describe as major points, which I think deserve to be brought to the particular attention of the committee and of the public at this time. I brought eight copies with me. I don't know whether you're interested in copies and thus obviously not enough to go around but you are welcome to them if you want or if you would like them afterwards.

MR. CHAIRMAN: Mr. Moffat, we would prefer them now. We can have additional copies made by our Clerk's office.

MR. MOFFAT: One other comment on procedure, Mr. Chairman. I don't propose to read it exactly; I will ad lib a little bit but I think I will be a little faster if I stay fairly close to the text.

The public controversies which have built up in Canada about the Constitution have taken attention away from things which are of much greater importance, inflation, unemployment, energy, education, pollution and several other subjects are of much greater importance. Nevertheless the public and the media have given so much attention to Constitution changes that although the changes themselves are not important the controversy has grown so big that it looks as if it must be settled before attention can be brought back to important things.

Canada is a great nation. Canadians live well. Canadians have more individual freedom than almost any other group of the same size. Canadian standards of living are among the highest in the world. Nobody wants to change these major important issues. The great controversy is about small changes in some fundamental laws and about the words to be used to express principles which are accepted by almost everyone.

It is said that Canada has failed to agree on amendments to the Constitution. "Failed" is the wrong word. What has happened is that the group as a whole has "lived with what we have" because they have not found anything any better.

My first important point therefore is that when a meeting discusses a change it is not a failure if the decision is that "what we have is workable so let's keep it", rather than change to something we are not so sure about. Every proposal for a change must therefore face the test — does the community want the change or would they sooner carry on with what we have?

It seems to me the question should always be treated in that way. It is not a vote yes or no for the change; it is a vote "would you support the change or would you prefer to carry on as is"? A decision to keep what we have is not a failure, it is a declaration that what we have is working pretty well. In those terms it seems to be clear that a vast majority of the people of Canada would vote to keep what we have rather than make any major changes.

Another important point is that speed is not the main requirement. Things have worked reasonably well for many decades. We have just heard a long history of how long this thing has gone on this way and it has worked very well and we have produced a very fine way of life in Canada, there is no hurry to make a change in the next few weeks. If a change is approved there should be a delay before it is put into effect, and after some time has elapsed there should be a formal method by which any large group can express the conclusion that, really, we don't want this but we'll keep what we have. This could be achieved by a provision — and here I want to ad lib a little bit. This could be achieved by a provision that someone would put up a concrete proposal — in my notes the suggestion is that it be the Parliament of Canada but maybe it could be two or three of the provinces — put up a concrete proposal. That proposal then would become effective if, after a period of a couple of years, no major group has come along and said, no, better keep what we've got. This could be achieved by a provision that any amendment approved by the Parliament of Canada would not become effective for at least two years and not unless it has been approved again by parliament after a general election. In that way the second parliament might express the conclusion that it would be better to keep on with what we have.

If two parliaments express the opinion that a change should be made, then it should go into effect unless the Legislatures of half the provinces, containing more than half the population, express the opinion that we should stay with what we have. Now let me repeat that again. Somebody would make a concrete proposition; the Parliament of Canada, three or four of the provinces, it doesn't matter. Once you get something concrete instead of arguing about all the general principles that might be . . ., once you get something concrete then that goes into effect after a couple of years. If the Parliament of Canada, after a second election, has still said, yes, that's okay; or if half the provinces can come in and say, no, we don't want it, but it would have to be the action of the Legislatures. Now I'm not trying to introduce this as a concrete proposal, I'm saying this is a different approach altogether from the general type of thing that we've been talking about up till now.

In principle, this approach could apply to any fundamental law. In principle, it applies to each proposed change. But what is now before the country is not a debate for or against a particular change. Instead, it has developed into a huge complicated piece of legislation and the vote is to be all or nothing. Either we get all the changes or we get none of them. Some of the changes are necessary, and almost everyone agrees that they would be better than what we have. Some of the changes are desirable from one point of view, but very dangerous, because they start the country down a road which leads to trouble. Some of the changes are desirable now, but they should not be written in stone so that they can never be changed. Some of the changes are so vague and ambiguous that no one knows what they mean.

It may be of interest to look at two or three of the major categories of changes which are included in the present proposals. First and primary is the amending procedure. Once an amending procedure is set, then any changes will be made in Canada. Patriation is a big sounding word but really all it means is that Canada has to accept a procedure for making Constitution changes in Canada. Once we've got a Constitution amending procedure, we've got patriation. It appears that there is almost 100 percent in Canada for this idea. But there is a huge battle over what the formula for amending should be.

My view is that the key question is, how small a group should be able to say no to a change, and let's stay with what we have. The key question is, how small a group is going to be able to say no, let's keep what we've got. It probably doesn't matter whether there is support from six provinces or eight provinces. Obviously, if it has to be ten provinces, then any one province can say, keep what we have. Probably the practical thing would be to provide that

on a few subjects, a small group can say, leave it as it is, but that on most subjects, the group has to be fairly large.

Let me repeat again. I don't see the problem as being one of who can make a change, I see it as being one where some group has the right to say, let's stay as we are.

Tied in with the amending procedure are a few very fundamental issues such as the continuation of an elected Parliament and the fact that there must be a new election at least every five years. A few of those things should be written in so that you have to have practically unanimous consent to make any change. But most of the others, with this delay process and a second look at it, then you can have a requirement of a fairly large group to say, no, let's not change it, let's leave as is.

These changes have to be definite and cannot be changed unless there is almost unanimous support. If any change is proposed, there must be a provision that a very small group can say no, that's the reference to these very fundamentals, such as that there be an elected Parliament and that there be an election every five years. But for other things, it doesn't need to be nearly so tight.

Now I want to turn to two other subjects. The rights and freedoms of individuals are a different issue. A Bill of Rights should specify the rights of individuals which cannot be changed by government. If a Bill of Rights is included in a document which cannot changed, then it is very dangerous.

If it is not right, in other words if there is a bug in the drafting, or if there is anything ambiguous, or when new points arise, then the procedure is to argue about the meaning of words on a piece of paper. Lawyers and judges engage in long, complicated arguments about the words that were on a piece of paper, and you can see the picture of a battery of well-paid lawyers on this side, another battery of well-paid lawyers on this side and another battery of well-paid lawyers sitting up on the bench, and they're arguing about the words that were on a piece of paper 50 years ago, or 75 years ago.

Forty or fifty years from now, and we're talking about the next century, we're not talking about 25 years ago, 50 years ago, 100 years ago, we're talking 50 years ahead, 40 or 50 years from now, our grandchildren, in the year 2025, will be told what to do by some words approved by people who never even dreamed of what the world would be like in 2025. The issue therefore is, will it be better to act over the years after arguments about what is fair in the light of circumstances then? Maybe some actions will be wrong, after democratic argument most decisions will be not too bad. At least the decisions will be related to the circumstances at the time.

Some people don't accept this. They claim that we should have a Bill of Rights now which will settle these issues for all time. In effect, they are saying, we will write it out now and for years to come our arguments will be about the meaning of words written in 1981. The problem is that those words may be completely out of touch with the circumstances in 2025.

There is much merit in both points of view. My own conclusion is that we would be better to leave the issue to arguments about what is fair and reasonable at the time. But there will be not much harm done if the decision is to write out some of the main principles now. That's a kind of a backhanded compliment, really, not much harm will be done if we write out a whole lot of principles now.

As I see it, the great danger is that the words used in a Bill of Rights will be so vague as to be meaningless or will be so specific as to make matters worse.

To repeat, my own conclusion is that it would be better to leave most issues to political arguments as to what is fair and reasonable and practical under the circumstances of the 21st Century, but not much harm will be done if a short Bill of Rights is frozen into words in 1981. Every extra section added to a Bill of Rights will make the harm greater because it will add to the arguments about words and restrict the discussions about what is fair and reasonable.

There is, however, one other type of issue, and that is of great importance. Most of the provisions about individual rights say that each individual or family has the right to do this or to refrain from doing it. The individual or family is given freedom to choose which way it will move.

But there are some other provisions which create permanent barriers. If a person or a family is in one group, they must stay there forever. If my family speaks French, I can do certain things. If my family does not speak French, I can't. If my family speaks English, I can do certain things. If they do not speak English I can't do it. This division of Canada into two separate groups is fundamentally wrong. It may be, however, that it is a fact of life and Canada must live with it. Nevertheless, it is one thing to have a situation which we must live with. It is something quite different to make an unchangeable law that it must always stay that way.

The most serious fault in the whole proposal is this set of provisions that harden and make permanent the division of Canada into two language groups. I don't want to be misunderstood. Please let me repeat this again. I don't want to be misunderstood. I'm not saying we should not have two language groups. We have them. We need to make fair and reasonable arrangements to carry on with them. But we should never make unchangeable laws which make the separation permanent. We must always leave wide room for the many families which, in the next century, will have grandparents and great grandparents from both groups and who will therefore certainly use a language different from the one that was used by some of their grandparents because their grandparents used different languages. Which one of the grandparents are you going to tie back to? If you once start making rules, you get into it.

I want to then draw your attention to this book, The Covenant by James A. Michener, which is his new book on South Africa. James A. Michener's new book, The Covenant, deals with South Africa, and describes at length the actions by the Boer groups to stamp out the influence of the English-speaking community. At pages 700 and 701 there is a fictional account of a proposal for taking control of administration. One of the Boer leaders lays out a program using an insurance company as an illustration. His program deserves attention in Canada. And this is his program, this is the fictional Boer leader who was putting out this program. And I

think the program can be best followed by a direct quotation from the book, so I have three paragraphs here out of Page 701.

"He launched an ingenious program aimed at filling every available administrative position with Afrikaners; of course, the Englishmen will continue to occupy the flashy front offices. We'll take the unseen jobs, none of them attractive or well paid. And once we hve Afrikaners inserted in the system, we'll promote them quietly until they attain positions of real power.

"Then do you see what will happen? The insurance company will still be owned by Englishmen, but other people will pass the little rules by which they operate. And in time we will control everything — not own it, control it.

"He preached that an essential factor in such a strategy was the proliferation of minor administrative jobs. Where one man is needed let us appoint three. If an old office falters, let us establish two new ones, staffed always with our people. Jobs, jobs, jobs. Whether they're needed or not, create more jobs because they must pay for them. And always in the legislation creating them, insert the phrase, the occupant must be bilingual. With Afrikaners we will strangle them to death."

Now, I want to end up then with this point, that anything that hardens this division into two groups heads us in this direction. Let's have the two groups, by all means, let's have the two groups, but let's not make our great grandchildren and our great great grandchildren choose sides. It's bad enough to choose sides now, but if we lock them into it what are we going to do with the ones who have grandparents from three or four different racial groups and two or three different language groups, the next generation, the third generation, the fourth generation down the line, you can't tie them back to the language that their grandparents used. My grandparents used Gaelic. It's a good thing I quit using it, I'd never have got around in the world now. Let's not write in laws of stone that it has to be this way forever.

Thank you.

MR. CHAIRMAN: Mr. Moffat, would you permit questions from members of the committee?

MR. MOFFAT: Certainly.

MR. CHAIRMAN: Mr. Desjardins.

MR. LAURENT L. DESJARDINS (St. Boniface): Yes, thank you, Mr. Chairman.

First of all, to Mr. Moffat, where is it suggested by anyone that people would be forced to take their schooling in English or French? From the way I understand it, the request is that they have a right to do it if they wish. I don't see anywhere that people are forcing them to take their education in a certain language. It's just an option and that option is left to all Canadians, not just those of us whose mother tongue is French or English or anything else.

MR. MOFFAT: To all Canadians except the ones in Quebec at the moment. Under the Quebec law, if your mother tongue is not English or French, then you don't have the choice.

MR. DESJARDINS: We're talking about the change in the Constitution.

MR. MOFFAT: We're talking about Canada.

MR. DESJARDINS: Yes.

MR. MOFFATT: And people who are citizens of Canada are citizens of Canada.

MR. DESJARDINS: That's right, but where is it that the proposed change, not the existing laws, the proposed change, will force anybody to stay . . .

MR. MOFFAT: There's another illustration which bothers me equally much and it is not in it, but is being proposed, and that is this proposal to enshrine so-called native rights. Again you're getting into this field of saying, you must choose up. Are you native, are you not? You're into that whole field is being proposed as another section to be added into this Act. There are a number of those kinds of things . . .

MR. DESJARDINS: Pardon me, Mr. Moffat, but you're not answering the question. My question is, where any change, including the one that you have where it makes it an obligation instead of an option of having a right protected if you wish to take advantage of it . . .

MR. MOFFAT: No, I agree with you. There is nothing in these particular changes. There's a whole pattern being established and they're pushing in that direction.

MR. DESJARDINS: So we shouldn't be as fearful as first indicated by some of your words.

Now secondly, my next question is, if the Province of Quebec, the Government of Quebec, wanted to pass a law stating that all education for everybody should be in French, for instance, as the reverse is done in other provinces, and all the language in the courts and so on should be in French, do you feel it would be fair to leave that to the province, to the Government of Quebec, without guaranteeing any rights to the people that do not wish to the situation to exist in Quebec?

MR. MOFFAT: Mr. Chairman, I think on balance it would be better to leave that to be decided by the political process in Quebec.

MR. DESJARDINS: You feel that it should be left to the government.

MR. MOFFAT: I say it would be better. There are disadvantages both ways. But the disadvantage of trying to specifically provide the exact rules and details of how it will be done and then engrave them in laws that cannot be changed, is probably worse than to leave it to the political process, the practical operation over a period of time.

MR. DESJARDINS: It would be worse to have something fairly vague that would say that the minority, in this instance, of Canadians who are using mostly English as the official language should have certain rights that are protected. Do you feel that it would be better to leave it to the province?

MR. MOFFAT: With a vague general principle, which I think everybody agrees now that they should

have a reasonable chance where's there's a reasonable number of people. I don't think anybody's ever objected to that, but what I see is very dangerous is to try and write it down in exact words that are unchangeable for all time to come.

MR. DESJARDINS: Well I'm not talking about exact words, I'm just talking about stating a principle and a right in principle and then let the people go ahead, but I'm talking about a principle for instance to do away with this, this situation that could happen in Quebec, and say that they have the right when they're in sufficient numbers, of course, if they wish, not force it on them, if they wish to have education in their language.

MR. MOFFAT: But if you read what I said here, that's exactly what I said, general principles but if you start trying to get it down into details and trying to write out an elaborate code, then you'll get into great complications that are very, very dangerous.

MR. DESJARDINS: Well I'm I'm going to pursue this if that's clarification then, am I to understand that you're not objecting to have a statement of right. What you're objecting to is a detailed declaration or a manner of doing certain things that can't be changed. You're not against a right.

MR. MOFFAT: No, that's right.

MR. DESJARDINS: Oh, okay. You're stating the right and this is . . .

MR. MOFFAT: And this is already accepted and I think . . .

MR. DESJARDINS: You're not against enshrining this in a Bill of Rights providing it's not . . .

MR. MOFFAT: Flexible, providing it's flexible.

MR. DESJARDINS: Fine.

MR. MOFFAT: But I would like though to emphasize that this problem is not only English-French.

MR. DESJARDINS: Oh I understand that.

MR. MOFFAT: This problem is in a lot of other cases where we are being asked to put in specific provisions to deal with a whole number of situations. One of the most dramatic ones is this question about Native rights because again you've got the problem. What happens two, three generations from now. Who is going to be a treaty and who's not going to be a Treaty Indian in two or three years from now, or two or three generations from now? And there are a number of other things . . .

MR. DESJARDINS: But I'd like to pursue that with you then now that you brought this thing in because I don't see anywhere, I'm not choosing sides on this, but I don't see anywhere where it says that for all eternity anybody that had any relatives that were Treaty Indians are Treaty Indians, you must stay a Treaty Indian. I don't see that anywhere. I think that it says that if willingly they wish to remain this they have certain guarantees, that's all I see and if there's assimilation through other ways, that could never be changed with a Bill of Rights even if a Bill of Rights is in it because it's not forcing anybody to do that — it is protection if they wish to take advantage of that protection and then they have to be, of course, sufficient numbers or it won't work.

MR. MOFFAT: Yes, this applies to all the others. On the treaty rights thing I have not read any of the detail. All I get is the impression that's coming out in the press, that there's a push to have that created as a separate group that will be different and treated differently from others and this is the impression that seems to be coming through in the press and it was this that I'm trying to comment about here.

MR. DESJARDINS: Thank you, sir.

MR. CHAIRMAN: Mrs. Westbury.

MRS. WESTBURY: Thank you, Mr. Chairperson. Through you to Mr. Moffat, in the 110-odd years that Manitoba has been a province, Mr. Moffat, would you agree that a majority of Manitobans in that time have not had equal rights with a minority of Manitobans, for instance as far as voting privileges are concerned?

MR. MOFFAT: I don't know who you're talking about.

MRS. WESTBURY: Well what I'm trying to talk about is this. In the 110 years, for nearly half of that time women did not have the right to vote. For about 80-90 years of that time Natives did not have the right to vote; for something like 60 or 70 years people who were not ratepayers did not have the right to vote, so tenants didn't have the right to vote, people under 21 didn't have the right to vote. Somebody says, oh come on, but you know these I believe are facts. Now the government that giveth can taketh away and don't you feel that, it seems a remote possibility at this time, but with the changing attitudes is it not possible that those rights can be again removed from some of those people or others with the changing governments and over the period of 40 or 50 years that you have suggested, and can you not understand that therefore some of those people want their rights entrenched so that it's really not going to be as easy to take away those rights as it was to give them?

MR. MOFFAT: Well, I made the point right at the beginning that particularly the fact of an elected Legislature, the fact of an election every five years has to be entrenched. Now that carries with it, I think, the implication that everybody has a vote. We still raise the question at what age? Where are you going to draw the discrimination? If you say everybody has the right to vote you're still going to have to draw discrimination at some point. You go back to 17, 16, 15, what age are you going to cut off at? So there's still going to be problems with those borderline cases, but the general principle certainly is implicit there, if you're going to have an election everybody should have a vote, yes.

MRS. WESTBURY: I haven't heard any great demand from people under 18 for the vote. Maybe the votes in a few years will be reduced to 15 and

we'll all have a chance to debate that, but nevertheless there are people now with those rights that did not have those rights even 25 years ago, and may have very real reason to be concerned that they'll be taken away, or maybe some of the others, you know, think of a situation where, and I would say probably this is pretty unlikely but not impossible, that Rene Levesque would become the Prime Minister of Canada. You know, I wonder how many of us would feel that our rights would be protected. I wouldn't feel very secure under that situation.

MR. MOFFAT: Well this is the other point that I tried to make in this material, Mrs. Westbury, is that these kinds of changes should be only brought in if they are wanted over a period. They shouldn't be a one-shot decision; there should be a specific proposal, then have two or three years to have a look at it and then a second look at it with a federal election or something of that sort in between, so that you have enough time. But if the public over a long period of time wants to make a change who's to tell them, I'm not going to play God and say I'll not tell the public what to do, the public's got to make up their mind.

MRS. WESTBURY: Well then, so you do believe in the entrenchment of rights and for the changes in those rights to be a subject of debate over a period of years. Is that correct?

MR. MOFFAT: Yes. They're really two different problems. There's the problem of how do you make the changes and there's the problem what specific changes do you make right now. There are quite a few specific changes being proposed right now which would be better not made because they will complicate and tie things up in a knot, but the procedure for setting down the formula for future amendments needs to be dealt with right away.

MRS. WESTBURY: What I'm trying to sort of say is that, with respect, you probably belong to a group that would always through these 110 years have had the right to vote. I do not belong to that group. I want my right perpetuated forever and the rights of my female children.

MR. MOFFAT: Sure, no question about that. Everybody agrees with that. And the right to have an election implies the right that everybody has a vote, sure.

MRS. WESTBURY: But right now nobody would even suggest taking the right to vote away from women but they may suggest —(Interjection)— Somebody would suggest it. I would suggest that there are people not very far away who would be delighted if no women could be elected to the Legislature and so that possibly is a right that we should be concerned with. There are other people who are perhaps less privileged than I now who may have reason to believe that their rights could be taken away from them.

MR. MOFFAT: People have reason to believe and I sympathize very greatly with these people who fear the awful things that might happen to them, but in many ways the surest way of having them happen is to start making issues of them. The general public is pretty reasonable, especially after a period of time democracy works out, again going back to the wording I used in here, it won't be always right but it'll be pretty well acceptable, and the worst thing that can happen is to start trying to be specific and saying I can go from here to there, because as soon as you write down I can go from here to there — we had an illustration a few minutes ago, but it didn't say you could go from here to there, therefore you can't go from here to there. And as soon as you start specifically defining the rights you cut down all the alternatives, and this is the dangerous part.

MRS. WESTBURY: I can understand your concern, I'm wondering how we can perhaps meet those concerns that I'm raising and at the same time meet your concern. Perhaps that's something we'll have to address.

MR. MOFFAT: Well this is the problem. If you spell it out you get into real difficulties because you just look at what the exact words are on that piece of paper.

MRS. WESTBURY: If I leave it to you I'll be gone.

MR. CHAIRMAN: Thank you, Mr. Moffat, for your presentation.

The hour of 12:30 having arrived we will reconvene at 2:00 p.m. and I think we have five or six persons who wish to make representation this afternoon.

Committee rise.