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OFFICIAL REPORT
(HANSARD)

Wednesday, April 12, 2000

THE HONOURABLE GILDAS L. MOLGAT
SPEAKER

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THE SENATE

Wednesday, April 12, 2000

The Senate met at 1:30 p.m., the Speaker in the Chair.

Prayers.

[*Translation*]

SENATORS' STATEMENTS

JUSTICE

OFFICIAL LANGUAGES IN CRIMINAL COURTS

Hon. Jean-Robert Gauthier: Honourable senators, the Parliament of Canada needs to amend the Contraventions Act in order to protect language rights. The Contraventions Act allows substitution of tickets for the summary proceedings set out in the Criminal Code.

This statute was amended in 1996 in order to allow the criminal process in each province and territory to apply to federal offences. The modified legislation authorizes the Minister of Justice to reach agreements with the provincial, municipal or local authorities on procedures for the processing of tickets.

In December 1997, the Association des juristes d'expression française de l'Ontario drew to the attention of the Commissioner of Official Languages the agreement dated June 9, 1997 between the Government of Canada and the City of Mississauga. This agreement dealt with illegal parking at Lester B. Pearson International Airport, in Mississauga. It set out the process for parking tickets and the payment of applicable fines, including the procedure applicable to legal proceedings relating to these tickets and fines.

There was no reference whatsoever in this agreement to language-related rights or obligations. As a result of this agreement, individuals receiving parking tickets were deprived of the language rights guaranteed by the Criminal Code.

Having analyzed the pertinent provisions of the Contraventions Act, the Official Languages Act, the agreement and the documentation provided by the Department of Justice, the Commissioner of Official Languages concluded that the complaint by the Association des juristes d'expression française de l'Ontario was justified. The Commissioner recommended that the Department of Justice:

1. take the necessary steps to incorporate in the Contraventions Act, as a minimum, the same language rights as:

   a) those recognized in the Criminal Code (to be exercised before the courts);

   b) those set out in Part IV of the Official Languages Act (to be exercised outside the courts);

2. and consequently ensure that the agreements reached under the Contraventions Act guarantee that the provinces, territories and municipalities will respect the rights set out in recommendation 1;

3. consult the official language minority community and the associations of jurists before undertaking any project, concluding any agreement, or carrying out any legislative amendments to the contraventions system liable to have an impact on the use of French and of English;

4. re-examine any agreement ratified to date, in order to ensure that there is uniform protection of the language rights referred to in recommendation 1.

[*English*]

• (1340)

LETTER IN SUPPORT OF THE HONOURABLE RON GHITTER

Hon. Mira Spivak: Honourable senators, I used to believe in the separation of church and state and in rendering unto Caesar the things that are Caesar's and unto God the things that are God's, but I am not so sure any more. I refer to the case against former senator Ronald Ghitter where justice has been served but where, I think, there was also some divine intervention if not *deus ex machina*.

I should like to read into the record a letter that I wrote to one of the defendants in the action, namely Ezra Levant, the legislative assistant to Mr. Preston Manning. This letter was written on October 6, 1998, and reads as follows:

> Dear Mr. Levant:
>
> Prior to attending synagogue on the most holy day in the Jewish calendar, Yom Kippour, I caught your blasphemous, intemperate, patently politically inflammatory, not to mention defamatory, comments about Senator Ghitter, on television.
>
> The absurdity of your attack is most evident when one looks at Senator Ghitter's charitable, professional, political and elective service to his community. He has an enviable record as a human rights advocate, as a lawyer, as a former member of the provincial government in Alberta, and as an active supporter of outstanding leaders in Alberta.

On the other hand, the source of the politically motivated criticism of him — your humble self — has an unenviable brief career path as chief mouth piece to Canada's Ken Starr clone. I use that evocative description because of the indefensible manner in which the party you serve has chosen to target individual senators and their personal lives.

I know that this is just a temporary lapse, an overzealous reaction, and that you will go on to serious constructive criticism. So I am sure also that the God of the Old Testament, Yahweh, recognizing the callow youthfulness of your action, will refrain from smiting you.

But he did not refrain.

Hon. Senators: Hear, hear!

IRAN

ARREST OF THIRTEEN JEWISH MEN

Hon. Erminie J. Cohen: Honourable senators, in a little more serious vein, over a year ago, the authorities in Iran arrested 13 Jewish men on charges of espionage. They included the Chief Rabbi of Shiraz and other religious leaders. They alleged that the 13 were spies for Israel and the United States, charges immediately and vehemently denied by both these governments. Their trial is scheduled to begin on Thursday, April 13, which is tomorrow. Although three have been released on bail recently, the remaining 10 have now languished in prison for a year. As a humanitarian gesture, the local Jewish community in Shiraz has asked for a brief postponement of the trial and a request that the 10 still incarcerated be released on bail or on their own recognizance to spend at least Passover with their families.

This major festival on the Jewish calendar, which begins next Wednesday, ironically celebrates the ancient redemption of the Jewish slaves from Egypt and exalts freedom, both physical and religious. The special ceremony marking the first two nights commands the participants to imagine that they, too, were slaves in Egypt so that they might appreciate even more our precious gift of liberty.

Religious freedom is very much on our minds as we advocate on behalf of the 13 Jews in Iran. They have the right to due process and a fair trial according to Article 14 of the International Covenant on Civil and Political Rights. Should their trial proceed as planned, there are at least two major areas of concern. As of now, international observers will be barred from the proceedings. It is also still not clear that the accused have been granted the right to choose their own legal representation and that such counsel has had adequate time to prepare their defence.

We call upon the government of Iran to ensure that the accused have access to legal counsel of their own choosing, that these lawyers have sufficient time to prepare a full defence, and that international monitors be allowed into the proceedings to ensure that they are open and transparent and conform to international standards of justice. These elements are fundamental to any fair trial and inherent to the dignity of human beings.

[Senator Spivak]

Honourable senators, we call upon Iranian authorities to do what is just and right.

[*Translation*]

ROUTINE PROCEEDINGS

MODERNIZATION OF BENEFITS AND OBLIGATIONS BILL

FIRST READING

The Hon. the Speaker informed the Senate that a message had been received from the House of Commons with Bill C-23, to modernize the Statutes of Canada in relation to benefits and obligations.

Bill read first time.

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

On motion of Senator Hays, bill placed on the Orders of the Day for second reading on Friday, April 14, 2000.

[*English*]

HERITAGE LIGHTHOUSES PROTECTION BILL

FIRST READING

Hon. J. Michael Forrestall: Honourable senators, I have the honour to present Bill S-21, to protect heritage lighthouses.

Honourable senators will appreciate the role that Senator Pat Carney played in the development of this bill.

Bill read first time.

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

On motion of Senator Forrestall, bill placed on the Orders of the Day for second reading on Tuesday, May 2, 2000.

CANADIAN NATO PARLIAMENTARY ASSOCIATION

JOINT MEETINGS OF DEFENCE AND SECURITY, ECONOMIC AND POLITICAL COMMITTEES HELD IN BRUSSELS AND PARIS— REPORT OF CANADIAN DELEGATION TABLED

Hon. Bill Rompkey: Honourable senators, I have the honour to table the fifth report of the Canadian NATO Parliamentary Association which represented Canada at the Joint Meeting of the Defence and Security Committee, the Economic Committee, and the Political Committee held in Brussels and Paris, February 20 to 23, 2000.

QUESTION PERIOD

JUSTICE

FIREARMS REGISTRATION FORM—
NATURE OF PERSONAL INFORMATION REQUESTED

Hon. Donald H. Oliver: Honourable senators, my question is for the Leader of the Government in the Senate and it deals with gun control. Most honourable senators in this chamber would agree that some form of gun control is necessary in order to afford protection to all Canadians, but I received a letter and a note from a businessman in Halifax recently that contained the firearms possession and/or registration form. The gentleman asked me to make an inquiry whether some of the questions on the form were not an invasion of personal privacy. The form requests information on personal history and information on the use of firearms over the past five years. At the end, it asks the following questions, and these represent the nature of my question to the Leader of the Government.

> During the past two years have you experienced a divorce, separation or breakdown of a significant relationship; a major failure in school; loss of jobs or bankruptcy, and if the answer to any of the above is yes, give the details below.

• (1350)

My question to the honourable leader is the following: Is this the kind of personal information that is required before a person is permitted to register for a firearm in Canada?

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, I wish to thank the honourable senator for raising that issue. I am not familiar with the details of the application form. However, the process does involve certain work by the Royal Canadian Mounted Police, among others, to ensure that the individual who is applying for the certificate is not a risk in any way.

I can inquire as to whether these questions are routinely included on the application forms, and if they are, what is the rationale for those questions.

Senator Oliver: As a supplementary question, I direct the leader again to the language on this form, which I have with me. It asks: "Have you ever experienced a major failure in school?"

What is "a major failure in school"? If you got an "F" in your Latin exam in grade five, does that disqualify you later on from having a firearm?

Senator Boudreau: No, I doubt that it does. I can say that, not being an expert in the area.

Senator Meighen: Is the honourable senator sure about that?

Senator Boudreau: Without consulting the Minister of Justice, I will wager that that would not disqualify you.

There is a serious aspect to these questions. For example, the question of domestic violence is an important question. The incidence in this country of domestic violence makes it a significant issue and one that is related to the question of gun control. One tends to believe that the form, in asking for details, is doing so to make a judgment as to the risk assessment in a specific instance. I cannot imagine that getting an "F" in Latin, using the example given by the honourable senator, would qualify one as a risk.

Senator Graham: Particularly in Grade 5.

Senator Boudreau: Yes, particularly in Grade 5, as stated by my honourable colleague.

Senator Oliver: Does the honourable leader know if the same types of questions are asked of all members of police forces in Canada?

Senator Nolin: Just say no.

Senator Boudreau: Honourable senators, again, I have to plead ignorance on that issue. I do not know what questions are asked on the application for the various police forces. I should hope there would be some discussion of the individual's background before being hired. Whether or not there are regular updates required, for example, of any educational failures, I am not sure. One should err on the side of prudence, particularly where there is potential for domestic violence. I should hope that is the purpose of the questions.

Hon. Gerald J. Comeau: Honourable senators, I do not think the minister has responded to the question of why a divorce or a breakup of marriage would be asked on such a form. It is ridiculous that such a question should be asked on a Government of Canada form.

Senator Boudreau: Honourable senators, the party may have had an emotionally charged divorce situation. There may have been, for example, a history of violence. However, if the form simply asks if such an event has taken place and asks for details, one is not automatically disqualified. It is worth asking the question in order to ensure that there is no immediate danger of domestic violence.

Senator Comeau: Should the question not then be something to the effect, "Have you been arrested for any incidents of domestic violence?" and not, "Have you been divorced?" It now appears as if it is the position of the Government of Canada that people who have undergone a divorce are prone to being violent or dangerous.

Senator Boudreau: In this case, I am sure it is a situation where those involved in preparing the forms wanted to err on the side of caution and in so doing have attempted to create a description of the surrounding circumstances. There is no question there are incidents involving domestic violence when parties are getting divorced. It is an unfortunate fact. I am sure that an answer in the affirmative does not automatically disqualify anyone from applying for a firearm. In this situation I believe the government wants to err on the side of caution.

RESEARCH AND DEVELOPMENT

AUDITOR GENERAL'S REPORT—COMMENT ON RATIO
OF R&D TO GROSS DOMESTIC PRODUCT

Hon. Roch Bolduc: Honourable senators, regarding the tax credit program, the Auditor General asked a very interesting

question to which I hope the Government Leader can provide an answer. Pointing out that Canada has the most generous tax incentives for research and development in the G-7, he asks, "Why among the G-7 countries does Canada have the second lowest ratio of total spending on research and development to gross domestic product?".

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, I have not read that particular section of the Auditor General's report, which was tabled yesterday afternoon in the House of Commons. However, this government has initiated major efforts to increase the amount of research and development spending. In each of the last two budgets, the government has committed $900 million under the Canada Foundation for Innovation or CFI program, with the requirement that the funds be matched. That is $1.8 billion in the last two years, which represents a substantial effort in the area of research and development. There is no question that Canada wants and needs to do more. The two measures in the last two budgets are a significant part of that.

I might add that the announcement of the Chairs of Excellence for universities will allow Canada to develop an additional capacity for research.

Senator Kinsella: How many for Nova Scotia?

Senator Boudreau: That program is one of the most important and significant programs that we have seen recently. In the last two budgets we have seen $1.8 billion in the CFI program and another $900 million for the Chairs of Excellence, both huge government commitments to research and development.

THE ECONOMY

EFFECT OF TAX REGIME AND MIGRATION OF WORKERS TO UNITED STATES

Hon. Roch Bolduc: Honourable senators, could part of the problem lie in the fact that we have a tax regime that discourages businesses from locating in Canada and that the Prime Minister refuses to acknowledge that we have a brain drain?

[*Translation*]

Last year, the Prime Minister said that there was no brain drain. The Americans have usually been issuing some 30,000 temporary work permits annually. Last year, they issued 98,000 for Canadians.

Three quarters of the Department of Computer Science graduates, at the University of Waterloo, are now in Seattle.

[Senator Bolduc]

[*English*]

Senator Lynch-Staunton: Shame! We cannot keep them here?

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, one of the results of a global economy is a mobile workforce. There are surprisingly some Canadians moving permanently, others temporarily, to the United States. On the other hand, there are some jobs coming from the south to the north.

• (1400)

Senator Stratton: Did you catch the CBC Sunday night?

Senator Boudreau: I was happy, as a matter of fact, to be involved in an announcement just last week, where the Government of Canada was instrumental in bringing 900 jobs to Sydney, Nova Scotia. Those jobs were previously located in South Carolina. I thought that was a wonderful initiative.

Senator Lynch-Staunton: High-tech jobs — minimum wage!

[*Translation*]

Senator Bolduc: Honourable senators, the minister reminds me of Mr. Duplessis, in Quebec. At one time, Mr. Lapalme quoted some statistics on economic, investment and employment trends. Mr. Duplessis rose in the National Assembly and told him that, the previous day, he had eliminated another paper machine in Trois-Rivières. In his reply, he referred to one case. We are talking about trends.

The minister said that the government would invest funds in the universities. Do honourable senators realize what will happen? The academics will eventually discover things after doing all kinds of research and then they will develop their findings in the United States. This is Canada's tragic story. Many inventors discover things, they have a great deal of imagination, but they end up moving to the United States to set up their own businesses, because taxes in Canada are too high.

[*English*]

Senator Boudreau: Honourable senators, I have no difficulty in saying that the tax regime that exists in Canada creates a potential problem. However, it did not just fall from heaven. It is a result of the huge deficits that were run up and the money that was required over the years to service those deficits.

Some Hon. Senators: Shame!

Senator Lynch-Staunton: That is Senator Graham's script. Come on now, read your own script.

Senator Meighen: Let Senator Graham do that.

Senator Boudreau: Where would the money come from, if not from the taxpayers of Canada? That is where the money came from. If the Honourable Senator Bolduc wants to talk about trends and look down the road, he will see long-term measures that are the result of balancing the budget four years in a row.

Senator Lynch-Staunton: Thanks to free trade and the GST!

Senator Boudreau: Therefore, in this year's budget we were able to see a reduction in the capital gains tax, which is important to business. We were able to see provisions that allow businesses and individuals to roll over $500,000 into newly created businesses without attracting capital gains tax. We were able to see the business tax lowered. All of those things did not occur by accident — they occurred because of good fiscal management.

Senator Meighen: You have free trade and the GST.

[*Translation*]

Senator Bolduc: Honourable senators, the minister says they are taking small steps. This is what I said on March 24. They are taking small steps and they are working on something that will take five years. In five years we will be dead! This is urgent; we must act now.

[*English*]

Senator Boudreau: In the past three years, we have seen dramatic changes and dramatic improvements in virtually every area. It is a staged program and a responsible way to make changes. We will not cut taxes on borrowed money, as Mr. Harris does in Ontario. That is not the way to cut taxes. A government cuts taxes by putting its fiscal house in order. We have done that, and we will continue to reduce taxes, Employment Insurance premiums, capital gains tax, and all those things in a staged, responsible way.

Senator Lynch-Staunton: Ontario booms. Ontario drives the Canadian economy. Shame!

THE CABINET

POSSIBILITY OF RESOLUTION TO RECALL PRIME MINISTER FROM MIDDLE EAST

Hon. Noël A. Kinsella (Deputy Leader of the Opposition): Honourable senators, I have a question for the Leader of the Government in the Senate. Would the minister be able to confirm or deny that a resolution has been passed by the cabinet to recall the Prime Minister from the Middle East?

Senator Forrestall: Leave him there!

An Hon. Senator: Joe was there!

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, I am sure the Prime Minister appreciates the interest that his trip has generated among the opposition benches.

Senator Taylor: At least he did not lose his luggage.

An Hon. Senator: He did not have any.

Hon. John Lynch-Staunton (Leader of the Opposition): Honourable senators, my understanding is that the cabinet was seized with a resolution but that Mr. Martin and others voted against it.

The Prime Minister has caused no end of embarrassment to this country in the last few days in the Middle East. Obviously he has been poorly briefed and poorly informed. This has caused many problems for the parties who, for decades, have been trying to come to a resolution. I will not dwell on that, however.

FOREIGN AFFAIRS

VISIT BY PRIME MINISTER TO MIDDLE EAST— STATEMENT ON NUMBER OF LAKES IN CANADA

Hon. John Lynch-Staunton (Leader of the Opposition): Honourable senators, I wish to ask the Leader of the Government in the Senate about the Prime Minister's knowledge of geography. According to the *National Post* today — and I heard it on the television last night, so the quotation is accurate — the Prime Minister said:

> For a Canadian we have 30 million lakes so we don't see it in the same perspective but I can understand the need for Israel to keep the only lake they got.

Forget the grammar and the ignorance. I should like to know if the Leader of the Government in the Senate, who is so anxious to run with the Prime Minister in the next election somewhere in Nova Scotia, could identify the 28 million lakes which have yet to be identified by the sources I have consulted, thanks to the Library of Parliament.

The Canada Information Office says that there are 2 million lakes in Canada. The *Canadian Encyclopaedia* — and this is thanks to the Library of Parliament, whose research facilities are extraordinary — says that recent surveys suggest there may be as many as 2 million lakes in Canada. A quiz book put out by *Canadian Geographic* poses this question: How many lakes are there in Canada? The answer is — my final answer — that it is estimated that Canada has 2 million lakes.

The Prime Minister told his international audience that there were 30 million lakes in Canada. I should like the Leader of the Government in the Senate to identify the 28 million missing lakes.

Senator Forrestall: Are they all ponds in Newfoundland?

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, I have not felt this much pressure since Grade 5 geography class.

I can only suggest to the Honourable Leader of the Opposition that the Prime Minister, being in the Holy Land, was seized of the spirit of the country and was speaking to some degree in parables.

VISIT BY PRIME MINISTER TO MIDDLE EAST—
SOVEREIGNTY OF SEA OF GALILEE—GOVERNMENT POLICY

Hon. Lowell Murray: Honourable senators, given the Prime Minister's statement, with what country does sovereignty over the Sea of Galilee lie in the view of the Government of Canada?

Hon. J. Bernard Boudreau (Leader of the Government): Honourable senators, in the reports I have read, the Prime Minister made it clear that it is the position of the government that these are matters of negotiation between the parties. It is the parties that will resolve the myriad of issues that exist between them. This will be one of those issues. At this point, Canada supports that process and will support the results. With respect to the Sea of Galilee and all of the other issues, we will support the conclusions of that peace process.

Senator Murray: I appreciate that there may be negotiations at some point on the issue, but my question was and is: With what country does sovereignty lie in the view of the government? I believe that is a proper question to ask following the statement of the Prime Minister. What sovereignty does the Government of Canada recognize over the Sea of Galilee?

Senator Boudreau: Honourable senators, the Prime Minister, as I understood the matter — and I have not read the reports in detail — expressed an understanding of Israel's wish to resolve that issue in their favour. He understood, I think, why that might be the case. However, the Prime Minister also went on to say that we would support the peace negotiations. I do not know that it is helpful for Canada or for any country to issue formal statements, either here or anywhere, that indicate the government's position on those issues.

• (1410)

I do not think that is what the Prime Minister did or what he intended to do.

Hon. A. Raynell Andreychuk: Honourable senators, is this another mistake by the Prime Minister on this trip?

Senator Boudreau: No, honourable senators. I believe that the Prime Minister expressed an understanding of how people felt. He went on to say that he understood how the matter would be resolved and that we would support that resolution.

ORDERS OF THE DAY

NISGA'A FINAL AGREEMENT BILL

THIRD READING—MOTION IN AMENDMENT—
DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Austin, P.C., seconded by the Honourable Senator Gill, for the third reading of Bill C-9, to give effect to the Nisga'a Final Agreement;
>
> And on the motion in amendment of the Honourable Senator St. Germain, P.C., seconded by the Honourable Senator Andreychuk, that the Bill be not now read a third time, but that it be read a third time this day six months hence.

Hon. A. Raynell Andreychuk: Honourable senators, I wish to make a few preliminary comments before proceeding with my main remarks on Bill C-9.

First, Bill C-9 and the accompanying agreement is the most significant piece of legislation to be brought before the Senate in my seven years in this chamber. Second, I wholly and enthusiastically support the concept of a negotiated settlement for the aboriginal peoples with the Government of Canada. Next, I believe the issue of aboriginal inherent rights and land claims is a most complex area. I therefore commend the efforts of the Royal Commission on Aboriginal Peoples which furthered my understanding of the varying perspectives, issues and actions that need to be taken.

I believe that the royal commission report is mandatory reading for all senators if they wish to fully understand the implications of Bill C-9. That report lays out a blueprint for restructuring the relationship between Canada and aboriginal peoples and a road map for renewal in Volume 5 entitled, "Renewal: A Twenty-Year Commitment".

At the outset, I wish to commend the people of the Nisga'a nation for their tenacity, perseverance, and good faith in negotiating the Nisga'a agreement. No doubt, as history will prove, and as the royal commission recommended, compromises have to be made on all sides. I believe that it is not the responsibility of this chamber to determine in any way whether the Nisga'a agreement complies with the rules, customs, and laws of the Nisga'a nation. Rather, the concern in Bill C-9 is whether the federal government is exercising its jurisdiction appropriately on behalf of the people of Canada. In that I include all Canadians and take into account the special fiduciary relationship with aboriginal peoples. In other words, while the federal government had the responsibility of negotiating the Nisga'a agreement, it is also accountable to ensure that it complies with the Constitution of Canada.

Honourable senators, that is our role and responsibility as well. In addition to ensuring that Bill C-9 and the accompanying agreement are constitutional, we must ensure that we have discharged our fiduciary responsibilities. Further, the Senate has the responsibility to ensure that minority rights are upheld.

Therefore, I found extremely puzzling certain statements made in a recent article in the *National Post* by Neil Seeman. Commenting about a second lawsuit on the Nisga'a agreement, he indicates that Patrick Monahan, a constitutional law scholar at Osgoode Hall Law School in Toronto, predicted that the British Columbia courts would bow to Parliament. He quoted Professor Monahan as saying:

> The treaty has been passed by the House of Commons and has already been ratified by the B.C. legislature. I strongly doubt the courts will interfere in this process.

I do not know whether Professor Monahan was simply providing legal advice to the Government of Canada, or legal and policy advice, but these comments dismissing the role of the Senate are indeed troubling, for, as I understand Professor Monahan's argument in support of the constitutionality of Bill C-9, he seems not to have put much weight on the intent of the legislators at the time of the passing of sections 35(1) and (3) of the Constitution. Yet, he invites us to accept the proposition that the legislative intent behind Bill C-9 is sufficient for the courts not to interfere with the process. He also discounts the role of the Senate. I find this troubling and inconsistent.

Finally, we have heard repeatedly in this chamber that it is necessary to pass this bill because it is the right thing to do morally — that it is a humanitarian act. I find that to be paternalistic. I say no. I believe that inherent rights and land claims are based on the rule of law. The claims of the aboriginal peoples are grounded in the rule of law, as must be the answers to such claims.

I wish to speak in support of the amendment proposed by Senator St. Germain. First and foremost, it is important to reiterate that I do not question the value of negotiated settlements. In a democracy that prides itself in diversity, it is the most civilized and productive way to achieve consensus of governance. Equally important is the rule of law, and it must be maintained.

I subscribe wholly to Mr. Willard Estey's remarks before the Committee on Aboriginal Peoples. He stated:

> First, we must remember that the Constitution is the real wall between chaos and civilized progress. No community on the face of the earth has ever made it into the higher standard of living to which we all aspire without a set of rules, which are called a constitution.

He later stated:

> You need rules to keep our impulses subdued.

The real issue is that, if we accept the right of self-government within the framework of Canada, does the Nisga'a agreement and the enabling legislation find its legitimacy in section 35 of the Constitution or, to accomplish the same, is a constitutional amendment necessary?

It is the responsibility of each and every senator to ensure that the legislation passes the test of constitutionality.

I do not hold myself out as a constitutional lawyer, nor do I even rely on my legal ability with some experience in constitutional law. Rather, I ask you to look at the evidence presented to the Committee on Aboriginal Peoples. There were basically two approaches presented to the committee. The first, presented by Mr. Estey and two former attorneys general, among others, can be summarized by Mr. Estey's statement, after reviewing our history:

> Now we are facing something new. This is the third plateau — section 35 in the Canadian Constitution, 1982. It is high time we activated that section, and we all welcome this process in the Senate as one important lifeline, going back to the community, as to what section 35 is all about. I thank the committee, and particularly the Chairman, for allowing us that lifeline.

• (1420)

Mr. Estey stated further:

> There is 100 per cent sovereignty contained in the two sections.

He is referring to sections 91 and 92.

> Section 35 causes us to weld together the original settlers, who now manage affairs through section 91 and 92, and the aboriginals, who have been ignored for a century and a half. Their rights must now be sifted out of sections 91 and 92.
>
> We suggest that the details of the bill, of the agreement appended to it, and of the studies that back it all up, must be viewed from the simple reality that we are trying to put muscle into section 35 without destroying the power in sections 91 and 92, except to the extent it is found necessary. When it is found necessary, we have to amend the act. That is no big deal.

He concludes in paragraph 15 of his written submission:

> From the foregoing it is clear that the Agreement provides for the transfer from the governments of Canada and British Columbia to the Nisga'a nation very significant sovereign powers presently possessed by Canada and British Columbia in accordance with the Constitution of Canada. This transfer is by itself unconstitutional.

By that, he means that an amendment to the Constitution is required.

In a nutshell, these legal scholars on this side of the argument argue that section 35 is expressly silent on self-government. While self-government was discussed in 1982 and subsequently in 1983, no consensus arose; hence, the Charlottetown Agreement, Meech Lake Accord, a series of conferences, and then turning the whole matter over to the Royal Commission on Aboriginal Peoples for study.

The second major approach was put forward by legal scholars such as Professors Ryder and McNeil, and crystallized by Professor Monahan and Dean Hogg. Although they did not testify before our committee, we were asked to apply their testimony from the House of Commons. That is a shame, in my opinion, because their elaborations would have been helpful to our deliberations, as the Government of Canada seemed to use their opinions, although we are not certain, as this is cloaked by executive privilege.

Succinctly, and I hope accurately, I think they argue that First Nations, at the point of Confederation, retained all their inherent rights and land claims. Therefore, contrary to the opposing view, they state and infer that "inherent rights" includes self-government. Section 35, therefore, implicitly covers self-government. Therefore, rights are concurrent and exclusive, and they are not taken from sections 91 and 92. They are merely given constitutional status.

Some scholars in this approach stated that paramountcy for the federal government was extinguished by sections 35(1) and 35(3) and concurrency governance was acknowledged. Professor Monahan stated to the House of Commons essentially his view that sections 35(1) and 35(3) contemplate an agreement such as the Nisga'a agreement and, upon ratification, are constitutionally protected. He stated further, in the House of Commons evidence:

> On the second question, the issue of infringement, yes, I agree with that. I think there would be some scope for Parliament under the *Sparrow* test, under the *Badger* case, to pass a law that might in some circumstances take precedence over the terms of the treaty.
>
> I would say, though, in fairness, that I think the courts would construe that very narrowly, because the test of justification that would have to be applied in those circumstances would be a very significant test, I think, a very rigorous test. Because how could the courts say that we have now entered to this agreement and compromises have been made — the aboriginal people have made compromises, federal and provincial negotiators have made compromises — and now Parliament in effect wants to overturn that? I think it would be a very limited kind of circumstance in which you could envisage Parliament or the legislature enacting laws that were inconsistent with the provisions of the treaty.

In conclusion, honourable senators, what is left? Both agree that self-government for aboriginals is necessary and that this right was not extinguished, although perhaps dormant. Both agree that the Supreme Court has not yet ruled on this matter. The first view states that sections 35(1) and 35(3) have not implicitly allowed for self-government. The second view states that self-government is implicit and does not place weight on what legislatures, I gather, intended at the time. Perhaps what they are saying is that there was sufficient discussion to give credibility to it, or they are simply saying that those who passed the amendments in 1982 and 1983 may have intended one thing, but the words speak so loudly to another course. Of course, the Supreme Court has not made a determination.

The first view certainly states that in 1982 the Prime Minister and premiers discussed self-government, transfer payments, who exercises self-government, what format it should take, and so on, but there was, sadly, no consensus; hence, the aboriginal conferences and hence the royal commission. Since the Charlottetown Agreement was rejected, it cannot be used to support or reject conclusions in the interpretation of section 35(1).

The second view employs the "living tree" doctrine of Lord Sankey, who described the BNA Act as a "living tree capable of growth and expansion within its natural limits." A written constitution is not the whole constitution. One must take into account practices and conventions.

The Royal Commission on Aboriginal Peoples struggled with two concepts — and this is overriding, I believe, in their report — namely: first, who in the aboriginal community has the right to exercise the right of self-government; and, second, if self-government exists, how does it square with the Canadian Constitution.

I think they saw a vacuum of consensus on the points. Therefore, they prefaced their conclusion with a huge blueprint of renegotiations of the Royal Proclamation and companion legislation, a Canada-wide framework agreement and parliamentary act, a social and economic underpinning, and, above all, public education before the Canadian government gained legitimacy to negotiate a modern-day agreement that would include self-government. It was only at that point that the Royal Commission on Aboriginal Peoples introduced the "living tree" doctrine. We must remember that their blueprint asked for 20 years so that those practices and conventions could be put into place.

The Hon. the Speaker *pro tempore***:** Honourable Senator Andreychuk, I am sorry to interrupt, but your speaking time has expired. Are you asking for leave to continue?

Senator Andreychuk: Yes.

The Hon. the Speaker *pro tempore***:** Is leave granted, honourable senators?

Hon. Senators: Agreed.

Senator Andreychuk: One must remember that the royal commission recommendations were just that, recommendations. Their conclusions are simply their opinions, not with the full force of judicial sanction. At pages 119 and 120 of Volume 5, under the chapter "Constitutional Amendment, the Ultimate Challenge," the commission stated the following:

> In this report, therefore, our recommendations are presented in such a way as to ensure that they can be implemented without constitutional change.

They had one exception, with which I am sure Senator Chalifoux is familiar, namely, the Alberta Métis Settlements.

• (1430)

On page 120, they say:

> ...Commissioners have reached a number of legal conclusions that clearly push the boundaries of the constitution to new limits. Critics of these conclusions may well disagree and offer alternative interpretations. Rather than risk conflict over what the constitution does or does not mean, some would prefer to resolve issues through formal constitutional amendments.

They conclude that the aboriginal and treaty rights recognized and affirmed in section 35(1) include the right of self-government. However, they stated:

> It is impossible to predict whether the Supreme Court would reach the same conclusion, but it is a major premise upon which much of our report is based.

Honourable senators, that is important because the scholars upon which the government seems to have relied are the same scholars who gave legal opinions to the effect that it push the limits of the Constitution to avoid constitutional amendment. Rather than following the whole network, the government seems to have relied on the legal interpretations that might lead to the point of view that a constitutional amendment is not required and, therefore, the scholars still maintain their position.

To defend the commissioners — and I think it is fair to do so — they were painfully aware of the failure of the Charlottetown Agreement and of the prevailing climate and the lack of appetite for constitutional amendment. Therefore, they put in this elaborate policy process and framework to give the Canadian government legitimacy in negotiating before they stretched the Constitution.

Regrettably, the Canadian government has taken none of the steps outlined in the royal commission report or created their own approach. Instead, Minister Jane Stewart announced the 1995 "Gathering Strengths" policy, and then the government brought in Bill C-9. The professors who gave their opinions on this proposal to stretch the boundaries of the Constitution to new limits have, of course, maintained their views despite the legitimacy of implementing the fabric of the royal commission report.

Much must be said about negotiated settlements as being the best approach. However, again, it is interesting to note at page 120 that the royal commission report had a slightly different take on this issue. They said the issue could be resolved through formal constitutional amendment or through litigation. The question raises the prospect of a legal challenge from adherents of one of the stated positions, as we now have. How such a case might arise is, perhaps, of less significance than the eventual resolution, which must be linked to a interpretation of section 35 of the Constitution, 1982.

Therefore, honourable senators, my inference is that the royal commission needed, wanted, and was trying to find a way to push the limits to gain certainty on what section 35 means. It is so painfully obvious to us today that the necessary interpretation must avoid the need to go back and restart with the aboriginal peoples. That would be inherently unfair.

Therefore, with everyone so certain that litigation is inevitable to determine the meaning of sections 35(1) and 35(3), and with two lawsuits pending already, the proposed amendment by Senator St. Germain would allow the government to make the following reference. It would give clear direction. It would not create winners and losers. Supreme Court Chief Justice Antonio Lamer once said that we are all here to live together, that therefore, winners and losers should not be our end gain. It would save horrendous costs and time, and it would give the certainty that this bill in and of itself does not.

I now turn to my deepest concerns about Bill C-9 — minority rights and our fiduciary responsibilities. The Charter of Rights and Freedoms is Canada's main instrument for protecting minority rights. Does it apply to aboriginal governments, to the Nisga'a agreement, and more particularly, to Bill C-9? The Nisga'a and the federal government say yes. If that is so, it should have said just that and nothing more. Sections 25, 28 and 35(4), which provide equal guarantees between men and women before their governments, would have been guaranteed.

However, the agreement states that the Canadian Charter of Rights and Freedoms applies to Nisga'a government in respect of all matters within its authority. They then added, "bearing in mind the free and democratic nature of the Nisga'a government as set out in the agreement." What does this qualifier do to sections 25, 28 and 35(4), let alone all of the Charter? To qualify the Charter application is dangerous to the protection of minority rights and gives uncertainty to the fundamental rights of minorities — both Nisga'a and non-Nisga'a.

I will not elaborate on the point of the non-Nisga'a. I believe Senator Grafstein has raised that question, and it has not been answered fully yet. I would have liked evidence on the compliance with international law on this point, and this should be explored.

Mr. Aldridge, lawyer for the Nisga'a, stated that everyone agrees with the fundamental principles of democracy, that no one is trying to oppress minorities.

That may be so, but history and contemporary times prove that democracies, as well as other types of regimes, have violated minority rights.

My most fundamental concern with Bill C-9 and the Nisga'a agreement is the manner in which it deals with the overlap situation. While proponents of the bill pointed out other agreements with outstanding overlap situations, these were in delegated power situations and were not necessarily good examples of dispute-resolving solutions in any event.

I question whether the federal government, and latterly the House of Commons, have discharged their fiduciary responsibility to the Gitxsan and Gitanyow nations. We will soon be doing the same in the Senate.

The protections for land claims in section 35(1) and inherent rights cover all aboriginals. The fundamental principle is that the government should not take sides when there is a dispute and an overlap occurs. While the disputing parties should be encouraged to resolve their differences and overarching bodies such as the B.C. Treaties Commission can lay out the ground rules for settlement in preparation for treaty negotiations, it would take a compelling case such as bad faith, et cetera, to upset this neutral balance. Minister Nault and Mr. Molloy defended their position by saying that if the Nisga'a acted in good faith, that therefore they should proceed to settle the disputed territory. The Gitxsan and Gitanyow also acted in good faith. They, however, did not adopt the same time frames and methodology as the Nisga'a, as is their right. Now, they are paying the price — a price that prejudices their claims. They do not have the full ability to negotiate with the Nisga'a and others. They are fettered now. Someone said that when you read sections 32 and 34, you read them down. In any event, in my opinion, this fetters the ability of the Gitanyow and Gitxsan to work in a neutral and independent environment. The federal government has taken sides.

By agreeing to the Nisga'a agreement, I believe the Government of Canada has clearly taken the side of the Nisga'a with no corresponding undertakings to the Gitxsan and Gitanyow. It is not just a case of the Nisga'a agreement being completed first. Minister Nault stated before the committee — and his comments were elaborated upon by Mr. Molloy — that the government accepted the Nisga'a claims. It took their side. It therefore deprives the others of a negotiated settlement and forces them to litigate or capitulate — costly in both money and in claims.

• (1440)

I have the greatest regard for the professionalism of Mr. Molloy, the chief negotiator. I do not believe he acted inappropriately. The government's removal of Mr. Molloy as negotiator for the Gitxsan and Gitanyow and placing him, midstream, as negotiator for the Nisga'a certainly appears unjust and prejudicial. I am not saying that it is; I am saying that it has that appearance. Justice is built on both pillars.

[Senator Andreychuk]

Minister Nault stated that Mr. Molloy was his best negotiator. Why would he not want him on the Nisga'a file? If that is true, and I believe it probably is, then the real question is: Why should the Gitxsan and the Gitanyow now get the second-best negotiator?

I will not reiterate the first four recommendations contained in the report on governance of the Aboriginal Peoples Committee, nor will I reiterate the committee's observations appended to its report on Bill C-9. They speak for themselves about the need for fairness and better government policy.

The government's policy in this case leads to the conclusion that the fiduciary duty to the Gitxsan and Gitanyow was not discharged appropriately. Bill C-9 is not about perfection; it is about a flawed federal approach and management that violates the Charter and the constitutional fiduciary responsibility to the Gitxsan and Gitanyow. It is to the credit of the Gitanyow and the Gitxsan who have said that they did not want to hold back the Nisga'a — they want only their rights.

The government has put Parliament, and more particularly the Senate, in an untenable position. To vote for the bill is to violate the rights and to not discharge the fiduciary responsibility we have toward the Gitxsan and Gitanyow. To vote against the bill would be to do the same to the Nisga'a. How unfortunate.

Some senators have stated that we owe the Nisga'a this agreement as a way out of past wrongs. However, we cannot correct the wrongs of the past by committing new ones. The aboriginal peoples and their rights and claims survived because they tenaciously held on to the concept of the rule of law, and we can do no less.

Dr. Gosnell said, "Walk with us." I sincerely want to, but not into a blind alley out of which he and I will take decades to walk. I want to walk with the Nisga'a, the Gitxsan, the Gitanyow and all Canadians. My conscience and my fiduciary and constitutional responsibilities compel me to do no less.

Hon. Herbert O. Sparrow: Honourable senators, I wish to speak for a few minutes on Bill C-9 and to tell you that I believe we are making a mistake in bringing this type of agreement before the Senate in its present form. We are putting in place building blocks for a racist society in the future. We are legislating a separatist society that will only hold for further racism in the future.

Are we legislating for past injustices or for perceived past injustices? If we are, that will, without doubt, create more injustices and greater racism in the future. We cannot pay for past injustices. However, we can try to give opportunities for a better life in the future for all aboriginals, as well as for all Canadians.

For over 130 years, we have let the Department of Indian Affairs rule this problem in Canada. They have governed on the basis of keeping the natives quiet by keeping them secluded on their reserves and by paying them off so that the rest of society does not recognize the problem that exists. They hid the problem from our view for all those years.

Can we then trust the Department of Indian Affairs to prepare a treaty for the future? They have not served either the Indians or Canadians well in the past. I cannot see this particular legislation serving Indian nations in the future.

There is a saying about someone who went to an Indian reserve and came back the following day to say, "All Indians walk single file — at least the one I saw did." That is what we are looking at now, namely, a narrow, blind approach to what has taken place in the past and what we want to avoid in the future.

Honourable senators, I come from a part of the country where there is a great problem with the natives and their standard of living. I have lived with that for many years. No one can say that I am a racist in my attitudes.

Honourable senators, we are now saying to the nation and to all Canadians that whatever the department negotiates, regardless of how badly they dealt with the issue in the past, is just fine with us. We are not prepared to look at that issue in the parliamentary process, but we should look at it.

In the past six years, we have had five ministers of Indian Affairs and Northern Development. Does anyone really believe that in that period of time any minister — and the last one served but a few months — is more capable and more qualified than many other Canadians, including many in the Senate, to determine the value of that agreement?

For a long time in this country — and most certainly of late — we have been developing what can only be called an "Indian industry" — that is to say, an industry for the legal profession that has managed to keep in the forefront the issues without really bringing forward the need and the necessity to solve those problems. There is a desire within the profession to say that we will bring forth suggestions and let the courts decide. However, we know what that has meant in the past and we know what it will mean in the future. I refer not only to the terrible costs that have been incurred, but to the costs with which we will be faced in the future. Millions of dollars have been spent in this Never-Never Land, and many people are laughing all the way to the bank.

Those who show concern and worry about the repercussions of such agreements are not being racist. They are not being selfish. They have nothing to gain by taking a critical stand on the issues before us. Progress must be made in the negotiations dealing with the native people. There is a saying that goes, "We do not have blind opposition to progress, but we do have opposition to blind progress." That is, perhaps, what we are facing at this day, at this time.

• (1450)

In the Aboriginal Committee, the minister stated that there can be no changes made to the agreement. Why would we have an agreement brought forward where Parliament cannot make changes? What kind of nation do we have when we say that we do not have the final say on this issue?

Senator Lynch-Staunton: Hear, hear!

Senator Sparrow: The minister made it clear, not only in the House of Commons committee but also in the Senate committee. This is what the minister said in answer to Senator Christensen's question, which was:

> **Senator Christensen:** Is there any ability at this point for amendments to this act?
>
> **Mr. Nault:** If you amend the act, then we would kill the agreement. In fact, we would need to go back to the negotiating table because all three participants signed off on the treaty in good faith. The agreement must be accepted, and it is no different from Mr. Clinton signing a treaty with a foreign nation, or when we signed the free trade agreement. That was basically a take-it-or-leave-it relationship, and it is the very same with this.

The minister is trying to sell us on something. He would certainly know that even the Free Trade Agreement can be cancelled with six months of notice. However, this agreement cannot be changed. Why then do we allow, as parliamentarians, such action to be taken and brought forward and not be upset about this process?

The minister goes on to state:

> Therefore, it is up to you to decide whether it is a job well done or not well done. If you throw the agreement back at me, then I must go back to the negotiating table because I have two other partners who would want to have a say as to why the Senate decided to change the treaty unilaterally. I do not have the right or the ability to do that.

I ask this question of all senators: What are we doing here as parliamentarians if we do not have that right?

Senator Lynch-Staunton: Exactly.

Some Hon. Senators: Hear, hear!

Senator Sparrow: Let me talk for a moment, then, about the Senate committee study itself.

Honourable senators, very few senators at the committee hearings were not actual members of the committee. That committee heard from 30 witnesses. Some comments were, "We listened to 30 witnesses and that was lots." However, we did listen to 130 witnesses on the gun control bill. At that time, we did not put pressure on to have that discussion stopped. However, here we have possibly the most important piece of legislation to come before the Senate, as the previous speaker said, yet the committee spent only 10 minutes on clause-by-clause consideration of the bill. There was no study in committee of the 250 pages in the Nisga'a agreement. There has been no study of the side agreements that are in the Nisga'a agreement.

Honourable senators, the only subjects that were touched on were the citizenship provision issue, the Charter of Rights and the constitutional amendment issue, and the issue of the paramountcy of Nisga'a laws. There were a few other discussions, perhaps, but no in-depth discussion took place on all the other provisions contained in the Nisga'a bill. Senators who were not at the committee may not even realize that these provisions exist. As well, there was no discussion or clause-by-clause study of the Implementation Act, the financing agreement, the taxation agreement, the harvest agreement, the own-source revenue agreement, the issue papers, or the appendices to the Nisga'a agreement. Those were not studied. Certainly, there would have been no opportunity to discuss them in the 10 minutes spent on clause-by-clause consideration of Bill C-9.

The minister, in regard to the study of these issues, made this statement before the Senate committee:

> **Mr. Nault:** Before I go, I again want to extend the invitation, that if there is anything we can give you as far as information is concerned, we will. I am of the same view as Senator Tkachuk that there is a need to have extensive discussion and to nitpick. We look forward to that, because we had a lot of difficulty in the other place in getting down to the facts of the treaty. We were very annoyed about the fact that we did not get to talk about the particular clauses and the chapters and what they mean in the other place. I think that was a disservice to Canadians and British Columbians. If there is anything we can do, the officials are at your disposal. We are prepared to give you everything except our legal advice. Thank you.

Honourable senators, the minister was indicating that the study pertaining to this bill was not done in the House of Commons committee. In fact, he was pleading that perhaps we could do a better job in our committee on that issue.

I should like to talk for a minute about what the minister referred to as "solicitor-client privilege." Why did the committee or this Senate not have access to the advice given by the Department of Justice to Indian Affairs? Senator Lawson asked the following questions in the committee and the minister responded.

> **Senator Lawson:** When Senator Comeau asked questions about constitutional opinions and so on, a reference was made to solicitor-client privilege. Who, may I ask, is the client in this case?
>
> **Mr. Nault:** The client is the Department of Indian Affairs and Northern Development.
>
> **Senator Lawson:** The solicitor acts for the Department of Indian Affairs and Northern Development and the minister.
>
> **Mr. Nault:** For the sake of argument, I get billed by the Department of Justice on a regular basis.

> **Senator Lawson:** They act for you and the department. Who do you act for?

• (1500)

> **Mr. Nault:** I act for the people of Canada.
>
> **Senator Lawson:** We may very well be the client, therefore whatever opinions you have, we have a right to have.
>
> **Mr. Nault:** No, you do not. The courts have ruled on that already, it would then not be client privilege at all. If I had to release every particular, I would then have to find someone else to give me an opinion.

Honourable senators, is he therefore suggesting that you can shop for the opinion you want? Surely the Parliament of Canada should have access to judgments by the Department of Justice. If we do not have access, to whom do we as parliamentarians go to find out what the legal opinion of the Department of Justice is on this agreement?

The Hon. the Speaker: Honourable senator, I regret to interrupt the honourable senator, but the 15-minute period allotted to speak has expired.

Are you requesting leave to continue, Senator Sparrow?

Senator Sparrow: Yes, honourable senators.

The Hon. the Speaker: Is leave granted for Senator Sparrow to continue?

Hon. Senators: Agreed.

Senator Sparrow: Honourable senators, there are legitimate concerns pertaining to this agreement. We make a serious error in judgment if those concerns are not vented honestly and forthrightly.

Very credible witnesses appeared before the committee, including Alex MacDonald, Q.C., a former member of Parliament and former attorney general for British Columbia. In his evidence Mr. MacDonald stated about this treaty :

> When you make it unchangeable except for a constitutional amendment or agreement, and agreements come at a price, then you have made a grave mistake, and what you have done is in violation of the Constitution.

I know that the agreement says that it is not changing the Constitution, but it is. It is allowing a sovereign entity to make laws. They may be minor or they may be sufficient to send someone to jail on breach of a bylaw, I do not know, but that is changing the Constitution.

It is the first time this has happened and it is almost unbelievable.

Mr. MacDonald continued:

> When Parliament makes a treaty by its legislation that gives power to a group of Canadians...and cannot retrieve that power because it is cast in constitutional stone under section 35, it is making a grave mistake.

Parliament can delegate their law-making powers. That happens all the time. However, you cannot abandon those powers.

Mr. MacDonald continued:

> As attorney general, I was charged with the administration of justice in the entire province....That mandate has now been clipped. The ability of police forces to go in and investigate is severely limited, if it exists at all.
>
> In any jurisdiction, when someone who was assaulted believes that the powers that be are not investigating the case properly, or are favouring someone, the attorney general has the responsibility to correct that....In the justice section, the ability of the attorney general to administer justice in the province has been severely clipped, and that is unconstitutional.
>
> This bill gives a body sovereignty to make some laws itself without the Queen's assent or Parliament's assent, without it being changeable, which is a violation of the Constitution of Canada and the Royal Prerogative.

Evidence before the committee indicated that it is establishing a third order of government. If that is the case, it is wrong to do so. Further testimony by learned constitutional experts indicates that the Nisga'a agreement and the statutory provisions concerning its ratification contravene the provisions of the Canadian Constitution and cannot, therefore, have the force of law.

At the very least, a third order of government will be created in Canada if the provisions are legal and constitutionally sound. If such is the case, 600 other Indian nations from across Canada may be clamouring for the same powers. How could we manage 600 sovereign nations in this country, all with 14 or more areas of paramountcy in their treaties?

There are those who say that this is the right thing to do. Maybe it is the wrong thing to do.

MOTIONS IN AMENDMENT

Hon. Herbert O. Sparrow: Honourable senators, in an effort to make the bill somewhat more acceptable, I move:

> That Section 3 of Bill C-9 be amended by adding the word "not" following the word "is" .

The amended clause 3 will therefore read:

> 3. The Nisga'a Final Agreement is not a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.

The Hon. the Speaker: Honourable senators, I have a problem. A hoist motion is presently before us, and according to all the authorities, a hoist motion cannot be amended. However, in the past, when operating under time allocation, the Senate has agreed to accept a number of amendments and vote on them all at the end of the process, which will be tomorrow at 3:15 p.m.

With agreement, we could consider this motion to be of that type, to be dealt with tomorrow along with any other motions that may be moved. It would be contrary to the *Rules of the Senate of Canada*, and our practices, but, by leave, of course, we can do so and we have done so in the past.

Honourable senators, is leave granted to proceed in that manner? If so, this motion would be voted on tomorrow, after we deal with the hoist motion.

Hon. Senators: Agreed.

The Hon. the Speaker: Therefore, the motion is before us and will be voted on tomorrow.

Senator Sparrow: Honourable senators, I move:

> That Section 27 of Bill C-9 be amended by adding the following:
>
> "which day shall not be earlier than the date upon which the Supreme Court of Canada pronounces on the validity of the Nisga'a agreement."
>
> The amended clause 27 will therefore read:
>
> "The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council, which day shall not be earlier than the date upon which the Supreme Court of Canada pronounces on the validity of the Nisga'a agreement."

The Hon. the Speaker: Honourable senators, is there agreement to treat this amendment in the same way as the previous one?

Hon. Senators: Agreed.

The Hon. the Speaker: Therefore, honourable senators, this motion will be voted on tomorrow in the same sequence.

• (1510)

Hon. Gerry St. Germain: Honourable senators, will the Honourable Senator Sparrow accept a question?

Senator Sparrow: I will accept a question, although I may not give my honourable friend an answer.

Senator St. Germain: My question of the Honourable Senator Sparrow is with respect to the hoist motion that I have before the Senate. I gather he is not comfortable with it because he has come forward with two other amendments. Can he not see that my motion would facilitate what he is trying to achieve, or does he not feel my motion goes far enough?

Senator Sparrow: Honourable senators, I will let the Senate decide which of those motions might be more relevant to the issue at hand. The honourable senator's motion to suspend for a period of time does not give the reason as to why the bill should be hoisted. My specific amendments state the reason for such a move.

Hon. Anne C. Cools: Honourable senators, I premise my question by laying out before honourable senators that I really know very little about native affairs and aboriginal questions. However, I do know a little bit about racial questions and about the racism that lives in the recesses of people's minds where legislation cannot reach.

Senator Sparrow, in his remarks, essentially told us that he believed that the track record of the Department of Indian Affairs in these matters did not properly lend itself to the department bringing forth a treaty for the future. What Senator Sparrow essentially said is that the past did not yield harmoniously to the future.

My question of Honourable Senator Sparrow is this: In the committee study, was any attention paid to what I would describe as the ghettoization of society, the ghettoization of communities? We all know that the doctrine of "separate but equal" began in the United States of America as a worthy and well-intentioned notion. We all know very well that apartheid in South Africa began with the well-intentioned notion that by the creation of separate communities, somehow or other those communities would be endowed with a special set of skills.

All of us in this chamber want to see the plight and the conditions for native peoples greatly improved. I think I heard from Senator Sparrow — I am not sure, and if I am wrong, he can correct me — a niggling concern that, somehow or other, in going forward in this way, the government may be creating, if not ghettos, the possibility for a form of apartheid or a form of ghettos. In answering that question, can Senator Sparrow tell me whether the committee considered the possibility that we may be creating such potential in the future?

Senator Sparrow: Honourable senators, the answer is no. To my knowledge — certainly any time that I was in committee — the discussion on that particular issue did not come up. Personally, I have the concern that we may be setting up additional ghettos, not only there, but, as the treaty process progresses, across the country.

Honourable senators, we have Indian reservations across the country. We certainly have them in Saskatchewan, and only in Saskatchewan did they bring in what they call a land entitlement act. We are creating new and expanded Indian reservations. We have expanded them into the urban communities. We have urban reserves within the urban communities, and already one can see the backlash and the racism created by that situation. It is a very disturbing move, and I think it augurs poorly for good race relations and the absence of racism in the future.

Hon. David Tkachuk: Honourable senators, the examination of Bill C-9, our committee's study and the debates in this chamber have inadvertently turned into an examination of the very concept of self-government for Indian people in this country. Inadvertently as well, this has turned into an examination of ourselves as parliamentarians, which we are. If there is any place that citizens in this country can come and expect redress, or expect that the law will be properly served, and expect that the Constitution will be upheld, and expect that we will be all treated equally, it is in this place. If not here, then where?

This is a troubling thing that we are doing here.

Honourable senators, I should like to read into the record a portion of a letter from Ms Wendy Lockhart Lundberg. I think all honourable senators received a copy of this letter. She is a status member of the Squamish nation, one of 50 bands negotiating treaties in British Columbia. She was not able to testify before us, but she submitted her brief, and it is included with our other evidence. Her letter states, in part:

> After reading the material I obtained, I find that my primary concern is that the language of Bill C-9 asserts collective rights over the rights of the individual. I am concerned that this is a further erosion of native women's rights. It is ironic that self-government initiatives are often referred to as 'modern day treaties'. I find that these initiatives do not advance native women on the path towards equality but rather they are draconian in their present form, relegating native women to the Dark Ages.

She goes on to say:

> Although it was stated that British Columbia's Family Relations Act will determine the division of matrimonial property under Nisga'a law, I have found no reference to this statute in my reading of the documents that I possess... And how, under Nisga'a law, will property rights apply to native women as regards inheritance and expropriation?

All senators should read this brief before we vote tomorrow because she is asking us for assistance and she is asking us for redress.

• (1520)

It is appalling that this discussion did not take place prior to the debate about how we would negotiate treaties. That is why we find ourselves with a minister who comes before us and says, "You are the Parliament of Canada, but you cannot change anything. It is yes or no, because how am I to take the bill back to my department and tell them that it did not pass the Senate?" Of all places, the Senate might have something to say about this treaty and about this bill.

Honourable senators, we should have hammered out certain principles to guide federal ministers in this negotiation with the First Nations people. Once that had been accomplished, the federal government could then have proceeded knowing that there was some consensus in this place and in the other place, rather than subjecting the Nisga'a to a debate not of their making.

The Nisga'a know what they want. They even held a referendum. We are a long way from that particular vehicle. The people of British Columbia are asking for a referendum, but we are saying no to them, as the B.C. government said no to them. In our referendum on the Charlottetown Agreement, a great majority of people — 60 per cent or more — rejected the proposal for aboriginal self-government. There was enough opposition to breaking up the country, according to the people on the other side, but not enough to prevent this bill.

A number of troubling issues have been raised, such as the overlap situations; the constitutional issues that Senator Andreychuk spoke about and on which I will speak later; and the institutions that we are creating, namely, a third order of government, or, as Senator Austin would say, an aboriginal government.

At committee, we heard from two professors of law from Osgoode Hall, Dr. Bruce Ryder and Dr. Kent McNeil, who brought forth the Monahan doctrine of the growing tree, or the Osgoode Hall doctrine of the growing tree. As a simple man, I am not intimidated by judges, lawyers and constitutional professors. The same people who throw me in jail for smoking in a restaurant allow pornographic materials about children to be viewed in a person's house. However, these are the people who came before us. As a simple person, I want to get along with everyone. Yet, here these people are telling us what the Constitution means. I will spend a few moments quoting them so that all honourable senators can become acquainted with the nonsense we had to put up with as we listened to these two professors from Osgoode Hall, the very professors to whom the Government of Canada is listening, including Senator Austin.

Senator Austin says that there is no third order of government. We will get to that issue later.

If we look at the Nisga'a powers that that have been discussed, such as citizenship, culture, language and property, federal and B.C. laws will be rendered inoperative to the extent that they conflict with Nisga'a law. I am speaking of concurrent powers. This concept is perfect for Quebec separatists. If we recognize concurrent powers for the Nisga'a, why cannot we recognize the concurrent powers of federal law for Quebec? We are talking about the growing tree here.

In committee, I asked Mr. Ryder this question:

> **Senator Tkachuk:** You are saying that in 1867, when they were drawing up the Constitution, lurking in the background was another power. It was almost like another power that they never considered at the time, but in 1983 or 1982 it was considered and has evolved over the last 18 years into this creature that we now have, called the Nisga'a agreement. You seem to be describing a third order of government here — that is, another level that we had not considered.

Professor Ryder from Osgoode Hall replied:

> **Mr. Ryder:** It is appropriate to describe a third order of government.

Senator Austin, you should be listening to this; these are your own lawyers. Professor Ryder went on to say:

> When we say "third order," we already have municipal government. I mean a third order of government that has constitutional status.

Therefore, we will have to rework this thing that we send out to the children in all our schools, where we actually have a diagram about the institutions of our federal government — that is, the Senate, the House of Commons, the Queen and Canada's parliamentary system. We will be adding another order of government with this bill. No amount of talking around the edges will say that we are not doing that. Let's just admit it. Maybe it is something that we should do, but we should not deny that we are doing it. That is what they are doing in the other place. They are amending the Constitution through the back door.

Professor Ryder goes on to state:

> I did not mean to take issue with other witnesses who have suggested that the treaty gives constitutional protection to a third order of government, that is true. All I meant to suggest was that it is not new in doing so.

I then said:

> It is new to me and new to most of us.

Professor Ryder then says:

> ...there is still room for debate — and senators have been fully exposed to the debate — that the aboriginal right of self-government is already recognized in clause 35(1).

That would be a big surprise to Senator Buchanan and to all the premiers who were there, as well as the Prime Minister himself.

Professor Ryder then goes on to say something interesting:

> What we are trying to do now — and what we have been trying to do for many years — with the 1982 act —

He clearly stated "What we have been trying to do" — not us, but them, at Osgoode Hall. He goes on to state:

> — and the process of treaty making is reconcile the assertion of sovereignty that did not take into account the prior sovereignty of aboriginal peoples. We have, in a sense, rediscovered their rights.

It is like that Steve Martin album — "I forgot." He is saying that we have this Constitution and, whoops, 130-some years later, we forgot about those aboriginals. We forgot! In my way of thinking, when someone forgets to do something, they have to fix it — especially if they forget to do something important. They have to fix it in the way that the document says that they have to fix it because all kinds of bad people could come up to you and say, "You forgot that, too, so you have to fix that through the back door. Let's work this Constitution up real good, but let's not tell anyone about it, because if we bring all the premiers together and we bring all the people into this debate, there may be a problem. They may not like it, and we cannot have that. We have to bring it through the back door." That is exactly what they are doing here — just in case they do not like it. That is not the country I came to. If we forgot, honourable senators, we have further problems.

Professor Ryder then goes on to say, and this is very important:

> We made the decision in 1983 to embrace treaty rights that were concluded in the future.

I do not deny that. He then states:

> From the aboriginal perspective, however, those limitations on Canadian governments' powers ought to have been recognized because of their inherent rights of self-government grounded in the prior sovereignty and prior occupation of the land.

I maintain that if those premiers and the Prime Minister at that time knew that section 35 meant the Nisga'a bill — self-government, constitutionally protected — we would not have had a section 35.

• (1520)

The Hon. the Speaker: Honourable Senator Tkachuk, I regret to interrupt you, but under the order of the house, I am obliged to do so at 3:30.

Hon. Dan Hays (Deputy Leader of the Government): Honourable senators, I propose that we give leave for Senator Tkachuk to continue to the conclusion of his remarks, including comments and questions, and that we not see the clock until that has occurred. I propose as well that we give leave to any standing committees of the Senate that have arranged meetings for 3:30 to sit even though the Senate is now sitting.

Honourable senators, I might comment that I had asked to revert to the adjournment motion later this day. I no longer wish to do so.

Hon. Noël A. Kinsella (Deputy Leader of the Opposition): Honourable senators, we think that is a practical proposition and we would grant leave.

Senator Cools: Honourable senators, I, too, am prepared for us not to see the clock. However, at some point we should get a clarification. If an order of the Senate was made that we should cease sitting at 3:30 and that the Speaker should rise, I wonder if we can remove such an order just by saying that we will not see the clock. This is a very important point. At six o'clock in the evenings when we agree not to see the clock, we are acting under a particular rule of the Senate. However, in this case a specific order was made. At some point, we should visit the question of whether we are acting properly.

Hon. Douglas Roche: Honourable senators, as a point of clarification, is the intent of Senator Hays' statement that the Senate would adjourn following Senator Tkachuk's remarks and that the rest of the Order Paper for today would not be addressed?

Senator Hays: Honourable senators, in answer to that question, we have an order of the Senate from yesterday that at 3:30 we would adjourn and that all the remaining orders on the Order Paper would stand in their place.

I am asking now, and Senator Kinsella has commented favourably, that the Senate continue to sit to the conclusion of Senator Tkachuk's remarks on Bill C-9, following which, by operation of the order to which I referred a moment ago, we would automatically adjourn.

On the point of Senator Cools, under the rules or by virtue of order of the chamber, we have a well-established practice of not seeing the clock. I do not think there is much question of leave being the appropriate way of doing that.

Hon. J. Michael Forrestall: Honourable senators, I have a brief question for clarification. I get nervous and edgy when a senator stands up and says, "Leave having been given, I no longer want to do what I previously wanted to do." What is behind that practice?

Senator Hays: As honourable senators know, we have an order to vote on Bill C-9 at 3:30 tomorrow. My concern at one point was that we might not have adequate time for all senators who wish to speak to Bill C-9 to actually be able to do so. I discussed with the Deputy Leader of the Opposition the possibility — although we did not conclude our discussion — that instead of adjourning to 2 p.m. tomorrow, we would adjourn to 1:30 p.m., or perhaps even earlier, to allow time for all senators who wish to speak to Bill C-9 to do so.

Hon. Lowell Murray: Why not do that? You can always do what you have just done and simply ignore the order of the house and, by unanimous consent, waive the order of the house and move on.

Senator Hays: At 2 p.m. tomorrow, obviously it would be too late to get unanimous consent to sit at 1:30 p.m.

The Hon. the Speaker: Honourable senators, the proposal is that, with leave, I not see the clock and that we proceed to hear Senator Tkachuk and any questions or comments that arise from his speech. I would then see the clock and leave the Chair.

Meanwhile, it has been proposed that committees which were scheduled to sit this afternoon have leave to sit. I believe it would be cleaner for the purposes of the Senate if there were a motion to that effect so that there would be an entry in the official record. If it is agreeable, I suggest that Senator Hays might move, seconded by Senator Kinsella:

> That, with leave of the Senate and notwithstanding rule 58(1)(*a*), all Senate committees scheduled to sit at 3:30 p.m. today have power to sit while the Senate is sitting and that rule 95(4) be suspended in relation thereto.

Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

Motion agreed to.

The Hon. the Speaker: Honourable Senator Tkachuk, please proceed.

Senator Tkachuk: Honourable senators, I wanted to read these excerpts from the testimony we heard to show how illogical it seemed to me.

We are set to buy a theory of constitutional law. It is not like all the participants are dead. It is not like the law was made 100 years ago and people write about it in a book, saying that this is what they really meant and that there is no one to argue with them because they are all gone. Constitutional lawyers do that all the time and courts do that all the time. They make decisions about what people thought 150 years ago because those people are not there to defend themselves. However, they cannot do that with this growing tree because it is still very young. It has not even sprung from the ground. We are expected to buy this theory of the growing tree.

Honourable senators, we are talking about 1982 and 1983. Every premier, as far as I can tell, knows that what was said happened did not really happen. If they knew that it was going to happen, I know for a fact that they would never have put section 35 in the agreement. They would never have put section 35 into the Constitution. We have a real problem here.

Honourable senators, another thing bothers me. If we constitutionalize something, there is no turning back. This tree will grow. There are 600 of them.

Senator Cools: It is a forest.

Senator Tkachuk: It will be a situation with which our children must deal. I do not look forward to that, and I do not look forward to that for them.

Who was here first? I do not know who was here first. I really do not. The First Nations say they were here first. They even say the Inuit came after them, but we really do not know that for sure either. The First Nations say they were here first, and so they get a set of rights. Then we have the Inuit, and they get a set of rights. Then, of course, along came the French. They came to Quebec 500 years ago. They have a set of rights. They have special rights, too. They want language rights. We are developing layers of rights based on race and ethnicity.

That is what my grandfather, a 15-year-old Ukrainian who ran away from Ukraine, thought he was trying to run away from. We know the problems that rights based on race and ethnicity have caused over there, and we all see it. Our peacekeepers are still trying to deal with those problems. The beauty of this country, at least as my grandparents told me, was that we were all here and we would all be equal. We would all be the same and we would all be governed by the same laws.

Honourable senators, we have not yet had this debate in our discussion of the Nisga'a bill. We will have layered rights in this country.

The situation of the Cree is interesting because they are not indigenous to the Prairies. They came from Ontario and Quebec with guns, and they cleaned out the people who were indigenous to the Prairies. We have all those issues, too. Do we bring back the Bloods and say that they were on the Prairies first and chase the Cree back to Ontario and Quebec? That way of thinking has no end.

I ask honourable senators to support Senator St. Germain's amendment to hoist Bill C-9 in an effort to allow it to be properly examined. Otherwise, it will be in the courts for a long, long time, and it will hold up further issues and further negotiations that must take place.

On motion of Senator Kinsella, for Senator Lynch-Staunton, debate adjourned.

The Senate adjourned until tomorrow at 2 p.m.

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