

[Chairman: Mr. Stewart]

[7:01 p.m.]

MR. CHAIRMAN: Could the committee please come to order.

You have your agenda before you, and the first item of business is the consideration of evidence from Dr. Leslie Green. Dr. Green has joined us again to answer further questions from the committee, and I think I will merely ask Dr. Green whether you still consider yourself under oath.

DR. GREEN: Most certainly, sir.

MR. CHAIRMAN: Thank you. We'll move then to questions from committee members. Mr. Wright, I believe you had a question. You may go ahead then.

MR. WRIGHT: Thank you. Dr. Green, you said last time that

The difference between substance and form is significant . . .

And we are talking about the formal measures or activities of the Legislature, of course any Legislature, I guess.

. . . for it emphasizes that if there has been a formal failure to carry out the requirements of law -- for example, after the procedure in enacting legislation -- such a defect ought not to invalidate the legislation or even give the courts any authority to examine the formalities of the procedure followed. In other words, what purports to be properly legislated is to be accepted as having been properly legislated.

And you reiterate that, I take it.

DR. GREEN: Of course.

MR. WRIGHT: Yes. And the sort of thing you are talking about, are you not, is that you can't object afterwards if an Act has been passed that, for example, it didn't receive third reading or some formality like that?

DR. GREEN: But I do not regard the Royal Assent as being a formality that can be ignored, because that's what makes the Act an Act.

MR. WRIGHT: Yes. And in the case that we are examining of the Haultain resolution, the proclamation was the equivalent -- because it was to be made by the Lieutenant Governor -- of Royal Assent, is it not?

DR. GREEN: Well, Mr. Wright, I was afraid you would start off on the proclamation again, and I thought I'd bring *Black's Law Dictionary* with me.

MR. WRIGHT: Well, all right. Just a minute. Can you answer my question, though, please?

DR. GREEN: I said then that the proclamation in the form it was made was sufficient as a proclamation. I see no reason to change my view.

MR. WRIGHT: Exactly, but that part of it is the equivalent of the Royal Assent in legislation.

DR. GREEN: No, sir. A resolution of the House does not require Royal Assent. A motion of the House does not require Royal Assent.

MR. WRIGHT: All right. But going back to what you've been talking about, Dr. Green, namely the Royal Assent to legisla-

tion, that is essential isn't it?

DR. GREEN: That is part of the validation and the evidence that an Act has in fact been passed.

MR. WRIGHT: Yes. And you say that in respect of a resolution that requires by the statute proclamation embodied in a certain form, that is not the analogy?

DR. GREEN: Mr. Wright, it does not say that it requires a proclamation in a certain form. It said "by the Lieutenant Governor." That is not a certain form. That may be in any form whatsoever.

MR. WRIGHT: But it is something that has to be done after the resolution, according to the section.

DR. GREEN: The mere statement "That I grant you the privileges of the House," for example, is a proclamation. The failure to secure such a proclamation for a document -- and if the document were acted on, the motion were acted on consistently, then that failure, that defect if it be a defect, would in fact be remedied. That is what we mean by a convention.

MR. WRIGHT: Well, why not, if . . .

MR. CHAIRMAN: I've got to interrupt. We've had about five or six . . . I know you wanted to make your point, and I allowed that to go as much as I could. But I think in fairness to all other members, I have a number of other names on the list here, and then we'll come back to you later.

On next I have Mr. Musgreave, followed by Mr. Oldring.

MR. MUSGREAVE: Dr. Green, through the Chair, I just had two questions, and this arises more from discussions we've had since you were here. I'd like you to answer this question: is my privilege as a member of this Assembly being breached if a member asks a question in a language I do not understand?

DR. GREEN: Insofar as it is one of your privileges as a member to be able to fulfill your functions as a member, the failure by that member knowingly to ask you something that you would not understand would in fact interfere with your privilege to do your task correctly.

MR. MUSGREAVE: When you say the member is asking me the question, I'm suggesting that if he asked a question in French . . .

DR. GREEN: I'm sorry; if the member uses a language that he knows you do not understand.

MR. MUSGREAVE: The other question I have, Dr. Green, is: if an Assembly uses English in all its language of debate, in question period, publishes all its *Journals* and records in English, does this not establish a precedent that is pretty difficult to say, "It has no relevancy"?

DR. GREEN: Well, in my view it would be clear that in the practice of the Chamber that is the language of the Chamber and those are the proceedings they intend to adopt. And if they have done so consistently, it would imply that there is a hint that any change therein would require a direct decision by the Chamber

to depart from that practice.

MR. CHAIRMAN: Mr. Oldring, followed by Mr. Hyland.

MR. OLDRING: Thank you, Mr. Chairman. Dr. Green, I understand that you've had an opportunity to review some of the evidence given to us or provided to us by Professor Dawson. In your opinion is there presently a statutory right in Alberta to speak French in the Legislative Assembly?

DR. GREEN: No, there is no such statutory right to speak French in the Assembly.

MR. OLDRING: The other thing that I wanted to follow up on, Mr. Chairman, which was just brought up by Mr. Musgreave, is the language of the Assembly. We went at quite length with discussions with Professor Dawson on this, and Professor Dawson indicated that the language of the Assembly wasn't a matter of privilege, that perhaps it could be a matter of order, but that it was clearly not a matter of privilege.

DR. GREEN: In many ways one can argue that from the point of view of the Chamber, order is more important than privilege, because the Chamber is in complete charge of the orders under which it operates. A breach of order may amount to a breach of privilege, but a breach of privilege is not necessarily a breach of order.

MR. OLDRING: Thank you.

MR. CHAIRMAN: Mr. Hyland, followed by Mr. Wright.

MR. HYLAND: Mr. Chairman, my questions were asked by Mr. Wright.

MR. CHAIRMAN: Okay. Mr. Wright, followed by Mr. Gibeault, and then Mr. Fox.

MR. WRIGHT: And so, Dr. Green, we come really back to the point that the words in section 110, as follows:

... and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published the Lieutenant Governor in conformity with the law and thereafter shall have full force and effect

are surplus.

DR. GREEN: What do you want me to answer? You just read out a statement.

MR. WRIGHT: It comes down to the point that we agreed, I believe, last time -- I just want you to be perfectly clear on this -- that those words I have read out are all surplus.

DR. GREEN: That they may well be by virtue of the practice of the House, yes.

MR. WRIGHT: Are you saying they are or are not?

DR. GREEN: Mr. Wright, when the draftsmen drafted that document, they put them in in accordance with the normal drafting procedures. Going on from there, the Chamber can by its own acts have operated in a way that invalidates the effect of those words and renders what they're doing completely valid. I

have no reason to change my answer to you.

MR. WRIGHT: But your evidence to us, Dr. Green, is that because of the Speaker's petition, all this becomes unnecessary.

DR. GREEN: As in the way in which it worked out. That was what I pointed out to you last time.

MR. WRIGHT: So as far as you're concerned, on the Haultain resolution these words were surplus and unnecessary and have no part in the consideration.

DR. GREEN: In the way in which the House accepted that resolution, yes.

MR. WRIGHT: Why do you keep on putting this . . .

DR. GREEN: Because you're not going to trip me up, Mr. Wright.

MR. WRIGHT: But either they mean something or they mean nothing.

DR. GREEN: You know as well as I, Mr. Wright, from your own background, that it is not the first time that terms in a legal document fall into desuetude by practice.

MR. WRIGHT: But equally you will agree that legislation is never repealed by disuse.

DR. GREEN: But legislation becomes inapplicable by disuse. I seem to recall there is law in this province with regard to the smoking of drugs and with regard to liquor in public places. How does that operate during the Borden Park jazz concert and during Heritage Days in Hawrelak Park?

MR. WRIGHT: Are you suggesting, Dr. Green -- you, a lawyer -- that because people disobey the law, therefore it ceases to be law?

DR. GREEN: It may well be. It would not be the first time that law has fallen into desuetude, as you yourself know.

MR. WRIGHT: All right. Well then, are you saying that those words that I have read out, and I'll read them out again, but I think it's quite unnecessary. All the words that follow . . .

DR. GREEN: If it's unnecessary, let's not waste time. We're limited in time.

MR. WRIGHT: Right. "Were meaningful at the time but have fallen into disuse and therefore are to be disregarded," or "were meaningful at the time"?

DR. GREEN: They may have been meaningful at the time, but by the practice of the Chamber and its own operation, they have fallen into desuetude: they're no longer necessary in that context.

MR. WRIGHT: But in . . .

MR. CHAIRMAN: Mr. Wright, I'm very sorry, and move along to Mr. Gibeault, Mr. Fox.

MR. GIBEAULT: Dr. Green you've offered your opinion that if a member were to ask a series of questions in French, that may constitute a breach of the privilege of members who do not understand French.

DR. GREEN: The question was not "in French"; it was in a language that is not understood by the Speaker. It would be a general comment.

MR. GIBEAULT: If, in that case, a member were to speak a question in a language not understood by some members of the House but was to follow that or offer to follow that with an English translation, as was the case with Mr. Piquette, could anybody's privileges have been breached in that case?

DR. GREEN: It's not a question of privileges in that case. There is also the problem of the order of the House and the right, even if a member says, "All right, ask your question in double dutch and give me the answer or the translation of it immediately." It may still be a breach of the rules of order of the House regardless of the privilege of the member because the member may then say -- he may say -- "My privilege has not been breached." He may not regard it as a breach of his privilege or of his rights.

MR. FOX: Professor Green, we're dealing here with several matters of privilege that have been referred to this committee based on rulings that have been made, and now you're introducing or acknowledging that in fact some of them may be matters of order rather than matters of privilege? Or are the two interchangeable?

DR. GREEN: I have just said otherwise. If you reread my original statement, I think you will find I talked about the rules of the House as being rules of order.

MR. FOX: Well, I'm concerned about your answer to one of the member's earlier tonight when you said that a member's privileges could well be breached by another member asking a question in French and the aforementioned member not understanding that language. Would it then be incumbent on me as a member to make sure that every member would understand the words that I use in English in putting a question to them?

DR. GREEN: No, because you are entitled by the rules of the House or you are required by the rules of the House to speak in English even if it becomes necessary for every member of the House to sit with the Oxford dictionary on his knees while you are speaking.

MR. FOX: It seems to me that you're basing much of your contention on the fact that English has been generally used in this Assembly over a period of time. Would it be of any significance in your mind if French had indeed been used in the past on several occasions in this Assembly both in debates and in question period?

DR. GREEN: It might. It would depend on whether by the tolerance of the Speaker or the deputy, if in the Chair, that he had accepted without ruling that that was in accordance with the rules of the House.

MR. FOX: So precedents may have been established?

DR. GREEN: Yes, but a precedent requires consistency. The isolated incident is not necessarily a precedent to be followed.

MR. FOX: Dealing here with a matter of definition of time, whether over a period of years is consistency or over a period of ...

DR. GREEN: Generality of practice.

MR. CHAIRMAN: Thank you, Mr. Fox. Are there any other members wishing to address questions?

MR. WRIGHT: Well, I don't need to keep on putting my hand up, I take it, Mr. Chairman.

MR. CHAIRMAN: Thank you very much. I appreciate that.

MR. WRIGHT: Dr. Green, the essence of your statement with regard to the Haultain resolution is that the Speaker's petition, when granted by the Lieutenant Governor, as it always is, made the proclamation of a resolution such as the Haultain resolution automatic, as it were?

DR. GREEN: Yes.

MR. WRIGHT: Now, is that the Speaker's petition that was granted before the resolution or after?

DR. GREEN: I don't think it would make much difference, really, because the Speaker is asking for the confirmation of the traditional privileges of the House, which include the right to conduct its own proceedings. That is not only for the past proceedings but the proceedings of the coming session, the session thereafter, and so on.

MR. WRIGHT: Well, when was that Speaker's petition made that was applicable to the Haultain resolution?

DR. GREEN: I would have to check, Mr. Wright, whether in fact that was before or after the Act which confirmed that in the Alberta Legislature the privileges of the House were those of the British House of Commons in 1867.

MR. WRIGHT: So it could be a Speaker's petition granted at any time before or after?

DR. GREEN: Yes. The Speaker's petition relates to the traditional privileges of the House, which include the regulation of the proceedings of the House.

MR. WRIGHT: But is it not granted only for the session that it occurs in?

DR. GREEN: It happens at every session, does it not, Mr. Wright?

MR. WRIGHT: Well, not any more, of course, but did.

DR. GREEN: Because of the statute.

MR. WRIGHT: Yes, but did. It did happen.

DR. GREEN: It did. In fact, I was reading Professor Dawson's

transcript, and I saw his suggestions that the Speaker's petition was no longer necessary, and I had a vague feeling I'd either discussed this with Professor Dawson when he was here, or I had read it. I was rather interested when I looked it up to find that in fact there is confirmation in a chapter on privilege in a book entitled *Procedure in the Canadian House of Commons*, which asserts that the Speaker's petition is an absolute necessity unless replaced by statute, and that book was written by Professor W.F. Dawson.

MR. WRIGHT: All right, but we're talking about the situation in 1892 when in fact there wasn't, so far as we can tell, in the North-West Territories Act a statutory embodiment of this, the . . .

DR. GREEN: Then it would have been by the normal Speaker's petition.

MR. WRIGHT: And so there were the repeated Speaker's petitions. But they had to be repeated because, as it were, they ran out at the end of every session, didn't they?

DR. GREEN: Historically, the situation has been that in order to prevent prerogative or attempted prerogative interference with the proceedings of the House, before any other matter is undertaken at a session, historically the Speaker puts forward his petition.

MR. WRIGHT: Exactly. So it's applicable to that session.

DR. GREEN: I didn't deny that.

MR. WRIGHT: Right. Well, so presumably the Speaker's petition you must have been talking about here was the one that occurred before the Haultain resolution in the same session.

DR. GREEN: Well, obviously the Speaker doesn't get up in the middle of a session and send for the Lieutenant Governor and say, "I want to claim privileges that I forgot about."

MR. WRIGHT: Well, I wasn't suggesting that. It's customarily done at the beginning of the session, isn't it?

DR. GREEN: Yes.

MR. WRIGHT: And was done in this session?

DR. GREEN: As far as I'm aware.

MR. WRIGHT: Yes. So if it was done again in a subsequent session, that would hardly apply to the previous session, would it?

DR. GREEN: Oh, I do not agree with you at all, because he would then be saying: "The privileges that we have — we have made certain claims. I am merely reasserting my demand for the privileges of this House."

MR. CHAIRMAN: Mr. Wright, may I just move over to Mr. Fox.

MR. WRIGHT: Very well.

MR. FOX: I'm wondering, Professor Green, in terms of the Haultain motion, where it says:

That it is desirable that the proceedings of the Legislative Assembly shall be recorded and published hereafter in the English language only.

Am I correct in stating that it's your assertion that that means therefore that the proceedings ought to be conducted entirely in English?

DR. GREEN: The proceedings cannot be a record of what has happened unless they are in the language of what has happened. I would say that if it is said at that time that the proceedings shall be in English, it is because it is understood that the proceedings will in fact be in English.

MR. FOX: It doesn't say this proceeding shall be in English; it says "it is desirable."

DR. GREEN: It is desirable that they shall and the House agreed.

MR. FOX: "Shall be recorded and published."

DR. GREEN: Agreed. If you are recording and publishing the proceedings and they have been going on in Chinese, you wouldn't say that they were a recording of what had happened.

MR. FOX: It seems to me a logical inconsistency here, and perhaps you'll help me resolve this, that in the Haultain motion where it doesn't say that English shall be the language used in the Assembly, you make that assumption. Whereas in section 110 where it says that all of this "shall be embodied in a proclamation which shall be forthwith made and published" et cetera, we can somehow dismiss that because it was either poorly drafted or fell into disregard because it wasn't followed in practice in this Legislature. I'm just wondering: how do I resolve that? In one case it uses words like the "regulations shall be embodied" and "shall be forthwith" and in the other one it just says that "it is desirable," and I don't see how . . .

DR. GREEN: The House has acted in accordance with that [inaudible], in accordance with that "desire," and they have carried it into their practice.

MR. FOX: In spite of the fact that French has been used on occasion in this Assembly between . . .

DR. GREEN: It doesn't make any difference, as I said in reply to Mr. Wright, if the Speaker has allowed a particular instance to take place. If, for example, we were faced with a member who was deaf and dumb, it would be within the competence of the Speaker to permit a particular member to use sign language without necessarily saying that everybody can now start using sign language, Tahiti, or whatever language he desires.

MR. WRIGHT: Dr. Green, are you seriously telling us that if a proceeding occurs in German, it cannot be recorded in English?

DR. GREEN: It would not then be in accordance with the resolution that the proceedings of the House should be recorded in . . . And as you know, Mr. Wright, at the time that that resolution was made . . .

MR. WRIGHT: I'm just asking the general question: are you saying that the proceeding that occurs in one language cannot be recorded in another?

DR. GREEN: No, I'm not saying that. But what I am saying, is when you are referring, as Mr. Fox referred, to . . .

AN HON. MEMBER: Excuse me, Mr. Chairman, . . .

MR. CHAIRMAN: Let him finish please.

DR. GREEN: I am entitled to explain what my answer is. I think one has to look at the historic situation of the time, and with great respect, I think there has been evidence in this proceeding that too little regard is based on the history of the practice of the Chamber and the history of parliamentary government and practice.

MR. WRIGHT: Dr. Green, I am still asking for a simple answer to the question. But I think perhaps you do agree that it is possible to record in one language a proceeding that occurred in another language.

DR. GREEN: It depends what you mean by a resolution for the recording of the proceedings of the House.

MR. WRIGHT: Thank you. But will you agree . . .

DR. GREEN: You can't carry it out of its context, Mr. Wright. At least, I won't.

MR. WRIGHT: I'm sorry, Dr. Green. Please answer the question. It's my question. If it's out of order, there will be a ruling to that effect. My question simply is: do you not agree that it is possible to record in one language a proceeding that occurred in another language?

DR. GREEN: Mr. Wright, I had said to you three questions ago it was, but you have to look at the historic context.

MR. WRIGHT: I'm asking a question.

DR. GREEN: I've answered it twice.

MR. WRIGHT: With the greatest respect, Dr. Green, I am entitled to an answer.

MR. CHAIRMAN: With all due respect, Mr. Wright, I think that Dr. Green is here to give evidence as best he can in response to your questions.

MR. WRIGHT: If he's incapable of answering the question, that's fine, Mr. Chairman. We can record that.

DR. GREEN: I have answered the question.

MR. WRIGHT: So it is possible to record in one language a proceeding that occurs in another.

DR. GREEN: I have to answer the same question, Mr. Wright?

MR. WRIGHT: What's your answer?

DR. GREEN: I have answered you.

MR. WRIGHT: Then answer again then, please.

DR. GREEN: I have answered you. I have said that in recording an event, it is possible, but you cannot take that situation out of its context.

MR. WRIGHT: Very well. I agree there. Now, Dr. Green, in your evidence you said that you had little regard for an archivist that did not make the right inquiries, or something like that, and I believe that was in reference to the search that has been made for an actual proclamation. Are you telling us there really is such a proclamation somewhere?

DR. GREEN: I said that there was no need for a proclamation in a formal sense of that term.

MR. WRIGHT: That is true. You've said that. But you aren't saying there was an actual proclamation anywhere.

DR. GREEN: You and I differ as to the interpretation of the words "proclaim" and "proclamation," Mr. Wright.

MR. WRIGHT: I'm talking about one that's written down and published.

DR. GREEN: It doesn't have to be.

MR. WRIGHT: I understand that, but then you're saying that it doesn't matter whether there's one or not.

DR. GREEN: I'm saying that . . . No, I did not say that. I said that a proclamation may be oral.

MR. WRIGHT: Yes, I understand that, but you say you had little . . . We can find the actual words, but . . .

DR. GREEN: It might be an idea if we did, and I don't think that I said exactly what you're implying I said.

MR. CHAIRMAN: May I just interrupt for a moment here. It is almost 7:30. If there are any other . . . I've allowed Mr. Wright to carry on with supplementals because I have no one else on the list, but if there are any other members with questions, I will accommodate them prior to the expiration of the time. If not . . . I'm sorry. Mr. Russell.

MR. RUSSELL: Mr. Chairman, I'd like some clarification on how many times a member is permitted to ask the same question over and over.

MR. CHAIRMAN: Well, I do appreciate that that's, I think, true.

MR. WRIGHT: Until one gets an answer. The witness is being . . .

MR. CHAIRMAN: Well, I don't think we're in court, Mr. Wright, with due respect.

MR. WRIGHT: The principles are just the same. You're entitled to get an answer to a question. Anyway, I think we under-

stand the difficulty that the witness is in.

DR. GREEN: I mean, the questions you ask, you don't like the answers.

MR. WRIGHT: Well, that's your interpretation, Dr. Green. You said earlier on that Mr. Monk conceded that the language was abolished; that's to say, the French language as a medium of communication in the Alberta Legislature.

DR. GREEN: I was citing his answer.

MR. WRIGHT: Yes, so what?

DR. GREEN: What do you mean "so what?"

MR. WRIGHT: Well, if he was right, he was right. If he was wrong, he was wrong. And it doesn't alter whether the language was abolished or not, does it?

DR. GREEN: In the practice of the Chamber, yes, it does.

MR. WRIGHT: You mean, if people make a mistake about the rights, it affects the rights somehow?

DR. GREEN: I've always understood that even errors of right can be righted by practice, that they become -- what should I call them? -- entrenched.

MR. WRIGHT: That wrongs can be made right by repetition?

DR. GREEN: Certainly in the practice of the House which is controlling its own procedure and its own rules, if it accepts a particular practice over the years virtually without challenge.

MR. WRIGHT: Regardless of whether it is conforming with the statute or not?

DR. GREEN: But the statute itself can be interpreted, and if that interpretation is accepted in practice, that will be the interpretation of the statute.

MR. WRIGHT: But that would not be contrary to the statute then.

DR. GREEN: But it doesn't need to be in a formal sense in conformity or contrary.

MR. WRIGHT: Dr. Green, you will agree that if it's contrary to the statute, no amounts of use to the contrary will repeal the statute.

DR. GREEN: But insofar as it relates to the inner workings of the Chamber, the Chamber is in charge of its own procedures.

MR. GOGO: Mr. Chairman, on a point of order. I understood, Mr. Chairman, that you had suggested Dr. Green would be here till 7:30. I'm waiting with great interest to hear our next witness, and unless that clock is wrong, I would observe and would like a ruling from you. Is it in fact 7:30?

MR. CHAIRMAN: I believe it is, Mr. Gogo, and I was just . . .

MR. WRIGHT: If it is, I'll require the minute he used up to make that submission, Mr. Chairman. A final question then.

MR. CHAIRMAN: I'm sorry, Mr. Wright. It was in fact, I think, 7:30. I'm going to call it at that, and we'll move along in the agenda.

Dr. Green, I want to thank you again on behalf of all of the members here for coming again and sharing your evidence with the committee. I do thank you on behalf of all.

MR. WRIGHT: I thank you.

MR. CHAIRMAN: Moving to the agenda, item 3 is Approval of Agenda. May I have a motion? Mr. Oldring. All those in favour, say aye.

HON. MEMBERS: Aye.

MR. CHAIRMAN: Contrary? Declared carried.

Item 4, the Approval of Minutes of June 3, 1987, meeting. May I have a motion in that regard? Mr. Campbell. All those in favour, please say aye.

HON. MEMBERS: Aye.

MR. CHAIRMAN: Contrary? Declare the motion carried.

Now, number 5 is the consideration of the evidence of Dr. Eugene Forsey, who we are very pleased to have with us tonight.

I want to thank you for coming a long distance, Dr. Forsey, and being with us. I know that all members will look forward to your evidence.

Maybe just as a preliminary to that, I might explain to you that the committee has received a reference from the Assembly in the form of a motion of the Assembly, which sets out the terms of reference under which of course the committee is guided. And as a result of that specific authority granted to the committee, our limitations for the evidence that we are to hear from you are on the questions of privilege that are raised.

The Chair understands that you've had an opportunity to read that reference and hopefully will have become sufficiently familiar with it. At least you will have the guidelines with respect to the terms of reference, the questions in which they're to be contained.

The Chair should also advise you with respect to our format for the giving of evidence. We would ask you to give your submission to the committee for perhaps a half an hour or whatever around that time is suitable to you. Then we will ask our counsel to direct questions to you on behalf of all members, and then individual members will have an opportunity to address questions to you. Our procedure is that each member has a question followed by two supplementary questions, and then they go to the bottom of the list.

So with that I will now ask counsel to administer the oath.

[Dr. Forsey was sworn in]

MR. CHAIRMAN: You may commence any time, Dr. Forsey.

DR. FORSEY: Mr. Chairman and hon. members of the committee, it is a pleasure, an honour, and a duty for me to appear before you. I trust you are not expecting too much of me. I am not a lawyer. My knowledge of constitutional matters is often

overrated. I know a great deal about a few matters of constitutional law and practice, a moderate amount about some others, a little about still others, and nothing at all about the rest.

I am aware that what the committee has to consider are matters of privilege. But in this particular case, it is, I think, impossible to disentangle at least the first matter of privilege from a matter of law. I propose therefore, with your permission, to submit first some legal considerations which seem to me relevant.

To begin with I submit that if a statutory right exists, it cannot lapse through mere non-use, except perhaps over a very long period. I should be inclined on reflection to modify that by reminding you of something I was reminded of today. In England in the 19th century somebody invoked the right to have his case tried by ordeal by battle, and the courts were obliged to agree that though this statute had been disregarded completely for many centuries, it was still valid and the parties would have to prepare themselves accordingly. I think the matter was gotten over by a retroactive — Parliament getting rid of the thing.

Of course, the prerogative power of the Crown to create life peers and its power to confer seats in the House of Commons on boroughs both lapsed through non-use, but only after centuries. But those were not of course statutory powers. The point I'm making, however, is that it would require a very long period of non-use, in my judgment, to invalidate a statutory right. In fact, I doubt if it could be invalidated even by centuries of long disuse, as the ordeal by battle case illustrated.

Next, I submit that if a statutory right exists, it can be taken away only by statute or by virtue of a power conferred by statute. It cannot be taken away by a mere action of a Legislative Assembly, even by a standing order, much less by a ruling of a Speaker.

Now, I raise the question: is there a statutory right to speak French in the Legislative Assembly of Alberta? That there was such a statutory right in the Assembly of the Northwest Territories down to 1892 is indisputable. But in 1891 the Parliament of Canada in chapter 22 of the statutes of that year, section 18, enacted a new section 110 of the North-West Territories Act which gave the Assembly of the territories power after the next election to "regulate its proceedings, and the manner of recording and publishing the same." That is in direct quotation marks. The power to regulate its proceedings, I think, certainly included the power to take away the right to use French in the debates of the Assembly, a right set forth in section 110 of the Act itself.

But section 110 went on to stipulate that:

the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

On January 19, 1892, the new Assembly passed a motion:

That it is desirable that the proceedings of the Legislative Assembly shall be recorded and published hereafter in the English language only.

But this could have effect only if "embodied in a proclamation . . . forthwith made and published by the Lieutenant Governor." Diligent search has failed to discover even the preparation of any such proclamation.

Your Parliamentary Counsel, in a document which has been made available to me and which I presume you have before you, contends that no such specific proclamation was necessary, because when the Speaker, after his election, ordered in a new Legislature — though occasionally a new Speaker is elected because the old one has resigned or died — and asked the Lieutenant Governor for all the undoubted rights and privileges of the

Assembly and the Lieutenant Governor confirms them, that constitutes a proclamation.

Incidentally, the Parliamentary Counsel is in error in saying that in the Parliament of Canada this occurs, and I quote from the document I had, "at the beginning of each . . . session." He is also in error in saying that "In Canada's provincial legislatures, . . . has, for the most part, been abandoned." It takes place only after a new Speaker has been elected, not every session. It seems to have been abandoned in Quebec, but it was still in use in Nova Scotia, Manitoba, and Saskatchewan in 1982 and New Brunswick, Prince Edward Island, Alberta, and British Columbia in 1983 and Ontario in 1985. On Newfoundland I have not been able to find in the parliamentary library any information for any year after 1975, though I feel tolerably certain, being myself a fifth generation Newfoundlander, that the same thing is true of Newfoundland.

Therefore, the argument proceeds that when a Speaker of the Northwest Territories Assembly on December 10, 1891, made his claim for the Assembly's undoubted rights and privileges, the Lieutenant Governor's confirmation of those rights and privileges provided the proclamation required by the Act of 1891.

With respect, I do not think this argument will withstand examination. The Act of 1891 required something very specific that the regulations, which in this case consisted of the motion carried on January 19, 1892, "be embodied in a proclamation which shall forthwith be made and published by the Lieutenant Governor." I cannot see how a statement by the Lieutenant Governor on December 10, 1891, could embody a motion passed on January 19, 1892.

When the Assembly met for a new session on December 7, 1892, the Speaker had resigned, and it had to elect a new one. He made the usual claim of all the undoubted rights and privileges, and the Lieutenant Governor made the usual response. But even if this response can be accepted as the specific proclamation required by the Act of 1891, it most certainly was not made forthwith. An interval of almost eleven months had supervened. Parliament cannot be supposed to have used the word "forthwith" in a Humpty-Dumpty sense. You will recall that Humpty-Dumpty said, "When I use a word, it means just what I choose it to mean."

Furthermore, if the Lieutenant Governor's statement of December 10, 1891, or December 7, 1892, had been a sufficient proclamation, Parliament would certainly have been aware of that fact and would not have needed to say what it did.

Apart from all these considerations, there is the further fact that the motion of January 19, 1892, dealt only with the recording and publishing of proceedings. It said nothing whatever about debate or the oral use of any language.

I submit, therefore, that even the abortive resolution of January 19, 1892, did not touch the oral use of French in the Assembly of the Northwest Territories and that the right to use French in the debates of that Assembly remain unimpaired and with it the right to ask questions in French.

Were those rights carried over to the Assembly of the province of Alberta? The Alberta Act, 1905, section 16 says:

All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor . . . existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta, shall continue in the said province as if this Act and The Saskatchewan Act had not been passed; subject to the right of the Parliament of the United Kingdom or

the Parliament of Canada or the Legislature of Alberta, to amend, alter, or repeal such laws within their respective jurisdictions.

The requirement that

Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories

was, I submit, undoubtedly part of the law of the territories at the date of the passing of the Alberta Act. The Alberta Act provided that all laws in force in the Territories at that date

... so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor ...

were to continue in Alberta. The law on the use of French in debates was not inconsistent with anything in the Alberta Act, and the Alberta Act contains, so far as I can see, no provision intended as a substitute for that law. It would seem to follow that the law in relation to the use of French in the debates of the Assembly of the Northwest Territories was carried over into the law of Alberta.

It may also be relevant that section 14 of the Alberta Act says that:

Until the [Legislature of Alberta] otherwise determines, all provisions of the law with regard to the constitution of the Legislative Assembly of the Northwest Territories ... shall apply, *mutatis mutandis*, to the Legislative Assembly of Alberta.

The words of the Minister of Justice, Sir Charles Fitzpatrick -- afterwards Chief Justice of Canada -- and of Mr. Monk, a very able constitutional lawyer, in the debate on the Alberta Bill, June 27, 1905, seem to confirm that the legislation was intended to maintain the status quo in this respect. So do the words of the hon. Mr. Brodeur and of Sir Robert Borden in the same debate.

Section 16 of the Alberta Act of course provided also that any of the laws of the Northwest Territories which fell within the jurisdiction of the Alberta Legislature, that Legislature could repeal, alter, or abolish. And the Legislature did in fact abolish the use of French in the courts. It could undoubtedly also abolish its use in the debates of the Assembly, but I can find no evidence that it has done so.

The Revised Statutes of Canada, 1906, provided for the repeal of section 110 of the North-West Territories Act, but a further statute, chapter 44 of the Acts of 1907, excluded Alberta and Saskatchewan from this repeal.

I find it difficult to resist the conclusion that Mr. Piquette had the statutory right to put his question in French and that when the Speaker prevented him from doing so, there was a breach of Mr. Piquette's privilege. Perhaps I risk being cited for contempt for saying so, but I hope it will be noted that I was careful to say that I found it difficult to resist that conclusion. If I can be shown to have been mistaken, I shall cheerfully don a white sheet, repent, apologize, and accept whatever penalty the Assembly sees fit to impose on me. Meanwhile, I can only plead that anyone who asks for my opinion runs the risk of getting it.

I do not feel competent to comment on the other matters referred to the committee except for two points. The first is that I am surprised that Mr. Piquette's letter to the Speaker should have been considered a publication of the Assembly. The second is that I should have thought that any assertion in the House that the Speaker had erred on a ruling could be made only in the form a substantive motion.

MR. CHAIRMAN: Thank you very much.

DR. FORSEY: May I add, Mr. Chairman, that I am now, in the words of my great aunt in Moncton many years ago, "old and infertile and particularly very hard of hearing." I hope therefore the committee will excuse me if I find it difficult to hear and actually move over closer to the questioner so that I shan't have to ask him to repeat and then perhaps even say, "I'm sorry; I can't get it." So if you will allow me to be slightly itinerant ...

MR. CHAIRMAN: Thank you very much, Dr. Forsey.

DR. FORSEY: But I may have to go over there to hear what he has said. Some voices don't carry so well.

MR. CHAIRMAN: I was just ... Sorry.

MR. WRIGHT: You should point out that the microphone is right in front of him.

MR. CHAIRMAN: Yes, I was just going to do that, Mr. Wright. The microphone is right in front of you, as well as the speaker, and I'm sure the technician up there might be able to turn up the volume as well. Let's try it. If you have any difficulty at all, please let me know, Dr. Forsey, and we will certainly want to make sure that there's solid communication going both ways.

Just before I ask counsel to direct questions to Dr. Forsey, I feel I should advise the members of the committee that just a few moments ago, in fact at the beginning of Dr. Forsey's evidence, I was asked to approve the distribution of a paper that was submitted to all members by Dr. Forsey through the Chair -- asked by a Mr. Harvey to distribute that to the press.

I have not agreed to do that because I take it that this is a public meeting and is open to the public, and what is public is the evidence that Dr. Forsey actually gives plus any exhibits of this committee. In view of the fact I regard the document that you gave us, Dr. Forsey, as a committee document and the fact that it may not actually totally correspond with what you were about to give by way of your evidence, I declined. I would just wish the members of the committee to know that.

I will now ask counsel to direct any questions your way.

MR. RITTER: Thank you, Mr. Chairman. Dr. Forsey, I was very intrigued by your brief to us. Of course, you're quite right about my errors in the Speaker's petition. Of course, I guess that's one of the things we have people like you around for: to pay attention to the details that some of us do miss. Of course, I will gratefully acknowledge that correction, that the Speaker's petition was at the commencement of every Parliament as opposed to every session.

However, Dr. Forsey, a lot of the terms of the Speaker's ruling, which I assume you've read -- the Speaker's ruling itself when it related to Mr. Piquette's question ...

DR. FORSEY: The Speaker's ruling which?

MR. RITTER: Did you not receive the Speaker's ruling as part of the documents supplied to you, Dr. Forsey?

DR. FORSEY: Yes.

MR. RITTER: It dealt very little with the Speaker's petition. In

fact, the Speaker's petition was somewhat incidental to the Speaker's ruling that the question itself was decided on the power of the federal Parliament to enact something which regarded the conduct of proceedings within the Chamber of a provincial Legislative Assembly.

So if you don't mind, I would like to bring my questions along those lines, Dr. Forsey. Perhaps you will forgive me as well if I address some very elementary questions to you, but I think we will lead into some more substantive ones in a few minutes.

Could you tell the committee members, Dr. Forsey, what makes a constitutional statute different from an ordinary federal Act of Parliament?

DR. FORSEY: Well, I think that can be briefly answered by referring to the relevant sections of the Constitution Act, 1982, which says the Constitution of Canada, by which it clearly means the written Constitution, includes, and it gives a long list of statutes and four imperial orders in council as well which are part of the written Constitution of Canada. That does not, I think, exclude the possibility that there are other statutes which may be considered part of the written Constitution of Canada, but it is at least a partial answer to your question. I think it gives the general idea of what constitutes a constitutional statute.

MR. RITTER: I see. Thank you, Dr. Forsey. I'm going to take you before the situation of 1982, because of course we're all familiar that there was a great constitutional enactment which substantially changed the constitutional law in Canada. Could I ask: for the most part, who enacted or under whose authority was a constitutional statute made?

DR. FORSEY: Well, down to 1982 it was made under the authority of the Parliament of the United Kingdom and under the authority of the Parliament of Canada where so provided by statutes of the United Kingdom, the British North America Act and amendments to the British North America Act, including amendments to the British North America Act made by the Parliament of Canada by virtue of section 91(1) enacted in 1949.

MR. RITTER: Would it be fair to say then, Dr. Forsey, that a constitutional statute gained its constitutional status basically because the United Kingdom or the imperial Parliament said it should be a constitutional document?

DR. FORSEY: Yes, or by the fact that the Act of the United Kingdom had empowered the Parliament of Canada to enact something, notably of course the Manitoba Act, the Saskatchewan Act, and the Alberta Act. I think that covers it. Those Acts are undoubtedly constitutional Acts by virtue of the power granted by the Parliament of the United Kingdom in the United Kingdom [BNA] Act of 1871, which removed doubts as to the validity of the Manitoba Act of 1870.

MR. RITTER: In other words, Dr. Forsey, the Manitoba Act, the Alberta Act, and the Saskatchewan Act were Canadian documents but they were in fact ratified by the imperial Parliament, giving them constitutional authority.

DR. FORSEY: No, they weren't ratified. Excuse me. The power was given by the imperial Parliament, and certainly in the case of Alberta and Saskatchewan, the statutes of the Parliament

of Canada were enacted by virtue of the power given by the United Kingdom Act of 1871.

MR. RITTER: I see.

DR. FORSEY: The United Kingdom Parliament did not act ipso facto to validate the Manitoba and Saskatchewan Acts. It did, in the technical phrase, remove doubts about the Manitoba Act by the Act of 1871. I suppose therefore you could say in effect there that the Manitoba Act of 1870 was ratified, if you want to use that term, by the imperial Parliament in 1871, but that doesn't apply to the Alberta and Saskatchewan Acts.

MR. RITTER: So in the case of the Manitoba Act, 1870, Dr. Forsey, it in fact was originally enacted by the Parliament of Canada, but was it not the British North America Act, 1871, enacted by the imperial Parliament in London which retroactively from the date of proclamation in Canada gave the Manitoba Act its authority by constitutional . . .

DR. FORSEY: It certainly, in its own words, removed doubts.

MR. RITTER: And this was done retroactively?

DR. FORSEY: Yes.

MR. RITTER: Dr. Forsey, can either a province or the federal government unilaterally change a constitutional document?

DR. FORSEY: Only, I think, to the extent -- you say the Parliament of Canada, first of all?

MR. RITTER: The Parliament of Canada or the Legislature of a province.

DR. FORSEY: Well, only to the extent that certain parts of the Constitution of Canada can now be changed under section 44, I think it is, of the Act of 1982 by mere ordinary action of the Senate and House of Commons. Certain parts of the Alberta, Saskatchewan, and Manitoba Acts can be changed, I think, by the Legislatures of those provinces by virtue of the terms of the Acts themselves.

MR. RITTER: Yes, we are referring to the situation here, though again, Dr. Forsey, prior to 1982, because we know there have been many changes in 1982. The question I'm really asking is: can any province individually or the Parliament of Canada individually, unilaterally change any constitutional enactment that has been given authority by the United Kingdom Parliament without the United Kingdom Parliament's consent?

DR. FORSEY: Certainly. The legislative authority of the United Kingdom Parliament is at an end. As far as Canada is concerned, it's ended by the Act of 1982.

MR. RITTER: Yes, but I'm referring to before 1982, Dr. Forsey.

DR. FORSEY: Well, I simply come back to what I said before, that before 1982 there were certain things that the Parliament of Canada could change by virtue of section 91(1) of the British North America Act. There were certain things that the Legislatures of the provinces could change -- Manitoba, Saskatchewan

and Alberta -- by virtue of the Manitoba, Saskatchewan, and Alberta Acts. There are certain things there that could be changed and have been changed: the redistribution of seats, for example.

MR. RITTER: Yes. So in other words they were given a limited power by the imperial Parliament to change those things that the imperial Parliament thought they should be able to change unilaterally. Is that correct?

DR. FORSEY: Yes. Within the limits and subsequent area prescribed by the British North America Act, the Legislatures of the provinces and the Parliament of Canada enjoy, in the words of the judicial committee, "authority as plenary and as ample as the imperial Parliament in the plenitude of its power possessed and could bestow." You'll find alliterative Anglo-Saxon poetry about that.

MR. RITTER: Can you say that backwards, Dr. Forsey?

DR. FORSEY: I leave that to someone learned in the law.

MR. RITTER: Point well taken.

Can you describe for the committee members what the major statute is that exists in the Canadian Constitution that separates and enumerates federal versus provincial powers?

DR. FORSEY: Yes, of course, the Act of 1867 and the amendments thereto.

MR. RITTER: So you're referring to the British North America Act, now called the Constitution Act, 1867, as amended?

DR. FORSEY: Yes.

MR. RITTER: Could you tell me, Dr. Forsey: was the North-West Territories Act and section 110 contained within a federal Act of Parliament?

DR. FORSEY: Was it a federal Act of Parliament?

MR. RITTER: As opposed to an imperial Act of Parliament.

DR. FORSEY: The North-West Territories Act was an Act of the Parliament of Canada, to the best of my knowledge.

MR. RITTER: Are the two levels of government in Canada -- except for certain exceptions like the power of disallowance and that type of thing -- generally deemed constitutionally sovereign?

DR. FORSEY: In virtue, I think, of what I had just quoted from the judicial committee, I should say that the answer is yes, but that is of course subject, as you have already pointed out, to the power of disallowance of provincial Acts and the power of the Lieutenant Governor to reserve provincial Bills for the signification of the Governor General's pleasure.

MR. RITTER: Okay, now we're going to go into some different questions, Dr. Forsey. I'm going to be trying to make a number of analogies.

Can the Ontario Legislature pass an Act or a motion which obliges Ottawa's House of Commons or Senate to print laws in,

for example, Italian?

DR. FORSEY: No, of course not. It has no jurisdiction whatever.

MR. RITTER: Can Ottawa pass an Act on its own requiring the B.C. Legislature to debate in Cree?

DR. FORSEY: No.

MR. RITTER: Would you say that in the absence of any specific law to the contrary, proceedings within the Chamber are the sovereign right of every Parliament or Legislature to determine?

DR. FORSEY: I beg your pardon?

MR. RITTER: Dr. Forsey, would you say that for the most part, in the absence of any constitutional requirement otherwise -- and of course, I realize that what we're discussing here is whether or not section 110 had constitutional effect. Would you say that it is generally regarded as the sovereign right of every Legislature or Parliament to control the proceedings within its own Chamber?

DR. FORSEY: Subject to requirements in the actual Constitution. For instance, my position on this is that the Parliament of Canada could, if it wanted to, enact that henceforth all its proceedings should be in classical Greek, Hebrew, Gaelic, or anything you like. It could not, however, knock out French and English. They would have to be in French and English, but otherwise it can do what it likes.

I think that similarly the Legislature of New Brunswick and the Legislature of Manitoba could enact that any number of languages should be official languages of the proceedings of the Legislatures. Again, however, they would be obliged to pay attention to the guarantee of the English and French languages. But there's nothing to my mind to prevent any provincial Legislature, apart from those specific exceptions, declaring that any language shall be exclusive or one of the languages of the proceedings. If the Legislature of Nova Scotia wanted to make Gaelic a sole official language of Nova Scotia, in my judgment they could do it. If the Legislature of Alberta wanted to make Ukrainian the sole official language of Alberta, it could do it. I don't see any obstacle at all. In fact, I intimated as much here that if the Legislature now wants to pass a statute saying "Henceforth no French," it can do it.

MR. RITTER: Thank you, Dr. Forsey. We have already discussed some of this, but in other words, New Brunswick, the Parliament of Canada, Quebec, and now of course Manitoba are obliged to operate bilingually in English and French because a constitutional statute as opposed to an ordinary statute obliges them to.

DR. FORSEY: Yes.

MR. RITTER: Now, I will ask you again. We've already established that the Alberta and Saskatchewan Acts were Acts of Ottawa rather than London itself. But you also say that the Alberta and Saskatchewan Acts, Dr. Forsey, had constitutional authority because they were enacted with the consent of London. Is that correct?

DR. FORSEY: Consent of what?

MR. RITTER: Of London, of the imperial Parliament.

DR. FORSEY: No, no. The imperial Parliament wasn't asked to consent. The imperial Parliament had given the power and it was exercised. There's no question of consent about it. The imperial Parliament never heard of them.

MR. RITTER: All right. So they basically said by an Act of the imperial Parliament that the Canadian Parliament shall be empowered to enact the Alberta and Saskatchewan Acts and create new provinces. Correct?

DR. FORSEY: Yes.

MR. RITTER: Now, at that time, Dr. Forsey, did the Canadian Parliament have the unilateral power to supersede the terms of the Constitution Act, 1867, and to that I refer to the division of powers between the federal and provincial governments?

DR. FORSEY: You are going too fast for me.

MR. RITTER: I'm sorry, Dr. Forsey. Did the Canadian Parliament have the unilateral power when they were creating these Alberta and Saskatchewan Acts to supersede or ignore the terms of the Constitution Act, 1867? I specifically refer to the division of provincial versus federal powers.

DR. FORSEY: No, of course not.

MR. RITTER: So in other words, the assumption was that when they were given authority to create Alberta and Saskatchewan in 1871 by the imperial Parliament, there was still the assumption that they had to obey the other Constitutional Acts already on record relating to the provincial and federal powers. Is that correct?

DR. FORSEY: Yes, the Alberta and Saskatchewan Acts, to the best of my recollection, say that the British North America Act, 1867, and amendments shall apply except with the normal exceptions -- I've forgotten the exact words. And of course, there were specific exceptions made, because in the case of all three prairie provinces the public lands were withheld.

MR. RITTER: Now why is it, Dr. Forsey, that it was a constitutional right of Ottawa to ensure that Manitoba, when they were creating the Manitoba Act, should be obliged to operate in both English and French?

DR. FORSEY: Yes.

MR. RITTER: Could you perhaps tell us why. I mean, was Ottawa empowered on its own to impose English and French on the Manitoba Legislature?

DR. FORSEY: I have never before heard it suggested that there was any doubt of it, and I am astonished to hear any question on the subject. I should have thought it was beyond question.

MR. RITTER: I'm very glad that you say so, Dr. Forsey.

Now, can you tell me, did Ottawa have the right to regulate the proceedings of any other provincial legislative Chamber at

the time they created the Alberta and Saskatchewan Acts?

DR. FORSEY: I don't see why not. If they could do it for Manitoba, they could do it for the others.

MR. RITTER: But, Dr. Forsey, wasn't there a difference with the Manitoba Act of 1870? Was the Manitoba Act not specifically recognized to remove all doubt, as the Act puts it, and given imperial authority as a constitutional document?

DR. FORSEY: Yes, but it was a general Act giving the power to create provinces, and as far as I can see it would apply equally to the creation of other provinces.

MR. RITTER: Dr. Forsey, wasn't there a subtle distinction between the authority to create Manitoba and the authority to create Saskatchewan and Alberta? Was not the Manitoba Act already enacted in Canada and specifically adopted or ratified, in spite of the fact that you don't like those terms, by the imperial government in its entirety?

DR. FORSEY: That's a point you could make. I don't think it's a valid one.

MR. RITTER: Well, Dr. Forsey, I'm going to ask you: the imperial Parliament retroactively gave the Manitoba Act its authority as a constitutional document. When the Manitoba Act was enacted originally by the Canadian Parliament, was there the possibility that it was ultra vires when it was first enacted by Canada?

DR. FORSEY: There was a possibility, yes, and the imperial Parliament removed the doubt.

MR. RITTER: And they did this retroactively, did they not, Dr. Forsey? Did they do the same for Alberta and Saskatchewan? Or was that in fact anticipatory legislation in 1871?

DR. FORSEY: I have always assumed that it was anticipatory legislation. I never heard any question of it before.

MR. RITTER: So in other words, with the Alberta and Saskatchewan Acts, the Canadian Parliament never first enacted the Alberta Act and the Saskatchewan Act and then went to the imperial Parliament for ratification. They in fact did it under the authority of the Act of 1871, which gave them the right in future to enact Alberta and Saskatchewan Acts. Is that correct?

DR. FORSEY: Well, I don't think I can add anything to what I have already said in my answers.

MR. RITTER: Was there any provision, Dr. Forsey, of the 1871 Act which gave Ottawa the right to supersede the division of powers when they were creating Alberta and Saskatchewan?

DR. FORSEY: No. But they didn't supersede the original powers. Look, there are special provisions in the Alberta and Saskatchewan Acts with regard to education. There are special provisions with regard to public lands.

MR. RITTER: Dr. Forsey, if Ottawa had no right to legislate what would occur within the Chamber in, let's say, Toronto, what gave them the right to decide what would occur within the

Saskatchewan Acts with regard to education. There are special provisions with regard to public lands.

MR. RITTER: Dr. Forsey, if Ottawa had no right to legislate what would occur within the Chamber in, let's say, Toronto, what gave them the right to decide what would occur within the Chamber in Edmonton and Regina?

DR. FORSEY: Well, I think the answer to that is that they didn't create the Legislature of Ontario and they did create the Legislatures of Manitoba, Saskatchewan, and Alberta.

MR. RITTER: Did they not create the Legislature of Manitoba... Let me rephrase that. Was the Manitoba Act, 1870, not ratified by the imperial Parliament though, once it had already been enacted?

DR. FORSEY: Well, I don't like the word "ratified." I don't think it's a proper use of the term. The doubts of its validity were removed. That is the term that was used, and I think it's the proper term. Ratification, to my mind, has a specific meaning such as the ratification of treaties by the Crown. I don't think an Act of the Imperial Parliament retroactively removing doubts about the validity of a Canadian statute can be regarded as ratification. However, that may be a quibble. It may be a quibble.

MR. RITTER: I'm going to move on. I'll come back to this point in a moment, Dr. Forsey. Did Ottawa have the right to regulate the proceedings of a territorial Legislature Chamber as opposed to a provincial Legislature Chamber?

DR. FORSEY: Well look, I don't think it did anything to regulate the proceedings in the Legislature. What it did in effect, in my submission, is to say, "Look, section 110 of the North-West Territories Act is carried over into the Legislatures of Saskatchewan and Alberta subject to the power of those Legislatures to do what they want to do with it." They can abolish the whole thing. They can repeal it. They can amend or repeal it. The power of the Legislature was not interfered with in any way. It merely said, "This is carried over and subject to the plenary power of the Legislature to do what it wants with it."

MR. RITTER: Dr. Forsey, I'm going to ask you today: does Ottawa have the right to tell Whitehorse or Yellowknife that it shall speak French, Greek, Cree, Ukrainian in its Legislative Chamber?

DR. FORSEY: Yes, I should think it certainly has.

MR. RITTER: Does it have the right to do the same with Edmonton or Regina?

DR. FORSEY: No.

MR. RITTER: Ottawa does not have the right to legislate a language to be used within Regina or Edmonton. Is that correct?

DR. FORSEY: Certainly. No right whatever. It's totally beyond its jurisdiction.

MR. RITTER: What made the situation so different then, Dr. Forsey, in 1905, where Ottawa did legislate or attempt to legis-

late to carry forward the effect of a French and English provision in the Legislative Assemblies of Alberta and Saskatchewan?

DR. FORSEY: Merely a transitional provision had left the Legislature entirely free to do whatever it saw fit to do about languages.

MR. RITTER: I'm going to rephrase this, Dr. Forsey. If I understand you correctly, it was constitutional for Ottawa to regulate the proceedings within a legislative Chamber of a territory.

DR. FORSEY: Yes.

MR. RITTER: Does Ottawa exercise that same right with regard to a province?

DR. FORSEY: No.

MR. RITTER: If it is an unconstitutional provision -- in other words, if Ottawa tried to tell Whitehorse or Yellowknife that you shall conduct your proceedings within the Chamber in such and such a way, that would be constitutional. But if they did it with regard to a province, that would not be constitutional. Could you tell the committee members why, Dr. Forsey.

DR. FORSEY: Oh dear. Surely an elementary thing like this hardly requires any explanation. The power of a Parliament of Canada over territories is absolute. As far as I can see, they can do what they like. The power of the Parliament of Canada over provinces is not. That's all. The Parliament of Canada could say that the legislative council, or whatever it's called technically, of the Northwest Territories or of Yukon must conduct its proceedings entirely in Choctaw or Hebrew or Greek or Gaelic or anything else, and that's it. It can't do that with a province; it would be completely beyond its power, and that's that. I don't get the purport of these questions. It seems to me you're asking me again and again to say what I have said again and again, and I don't know how long I can go on repeating it.

But I'm in the hands of committee. If that's what it wants, I can go on a thousand times saying Ottawa has no power, the Parliament of Canada has no power to interfere with the proceedings of the Assembly of any province, but it can do exactly what it likes with the Assembly or council of the territories.

MR. RITTER: I appreciate that, Dr. Forsey. What I am trying to get at is if a provision is clearly constitutional with respect to a territory and becomes unconstitutional with respect to a province, why can an unconstitutional provision be carried forward, Dr. Forsey? When the North-west Territories section 110 was carried forward into provincial law, why did that retain its constitutionality?

DR. FORSEY: Well, as I said, it was a transitional provision, and I think in a statute of this sort you have to have transitional provisions. What they wanted to do was maintain the status quo in regard to language until the Legislature, in the possession of its power to repeal, alter, and amend, had changed it.

MR. RITTER: So in other words, Dr. Forsey, because section 110 was transitional, what would have been a blatantly unconstitutional provision enacted by Ottawa became constitutional?

DR. FORSEY: Well, I don't think I can make it any clearer than I have. I've made my point; you disagree with it, clearly. That's entirely your business.

MR. RITTER: Yes. Well, it is no secret, Dr. Forsey, that I do tend toward a certain interpretation, but the committee members are certainly here to hear the evidence you have to adduce, and if you can clarify anything further, if I'm putting a wrong slant on your views, Dr. Forsey, please correct me.

DR. FORSEY: Sorry. May I add one thing, the idea that they were preserving the status quo, where incidentally they seemed to have thought that the Haultain resolution had been carried into law, which of course I question. But the idea that they were maintaining the status quo and carrying over transitionally the provision with regard to languages was held explicitly by Sir Charles Fitzpatrick, the minister of justice, who was a pretty considerable constitutional lawyer, and supported by Sir Robert Borden, who was one of the best constitutional lawyers this country has ever had. I venture to think that the opinion of both of those gentlemen is of some weight. I am not producing this out of my own air of consciousness; I am producing it with the backing of Sir Charles Fitzpatrick and Sir Robert Borden. I don't think anybody can say that they were mere ignoramuses.

MR. RITTER: Oh, absolutely not. As a matter of fact, Dr. Forsey, I'll be coming to Sir Robert Borden and Mr. Monk in a few moments. Also, I don't wish to give the impression that these are ideas which are coming completely out of my mind, because I don't know if I'd be capable of them on my own, quite frankly.

I will read to you, Dr. Forsey, an opinion of Sir Wilfrid Laurier in 1905 during the debates at which they were discussing the possibility of carrying forward the unreversed bilingual effect of section 110. Sir Wilfrid Laurier said:

I am now coming to the principle expressed by the hon. member for Labelle -- and I trust he will recognize it as I do on all occasions -- and that is that the rights of the provinces are absolute within the limits of the constitution, and that among these rights there is the freedom to legislate as regards the language to be used in the courts and the legislative assembly.

Now, if the House agreed to that amendment . . .

And the amendment they're referring to here is to put back in the Alberta and Saskatchewan Acts the bilingual provision.

. . . as desired by the hon. member for Labelle, and if we inserted it in the constitution which we are enacting for the province of Alberta and for that of Saskatchewan, we would be interfering thereby with one of the rights of these provinces, that of deciding in what language the proceedings will be carried on in the legislatures.

You referred to Mr. Monk, Dr. Forsey, and I would like to just read his analysis. He was referring again to the attempt of Parliament to enact things for a province or continue to carry over provisions for a province which he regarded as clearly unconstitutional. Mr. Monk says, and this is March 23, 1905:

My hon. friend from East Grey (Mr. Sproule) asks me if I consider the words 'establish, constitute, coming in,' to be all synonymous. My interpretation of section 2 of the Imperial Act of 1871 is that that Act clearly gives us the creative power. It enables us to decree the establishment of a province, to constitute it by defining its limits and entering into other details which are absolutely necessary for the purpose of such creation, but the moment that act has been performed our power is exhausted and the new province comes under the control of the different clauses of the Act of 1867, and these clauses apply in their entirety to it. . . . We are legislating ultra vires, we are decreeing what we have no right to do; and not only as an act of policy, as a political act, but as a constitutional act, those

Bills are absolutely in violation of the constitution.

Another member, Mr. Belcourt, then asked him: They did the same with the Manitoba Act. Was that ultra vires? Mr. Monk said:

As I stated a moment ago, the Manitoba Act itself was ultra vires -- was so considered by the legal advisers of the Crown in England -- and in order to make it valid it was necessary to pass the Imperial Act of 1871.

To which Mr. Lemieux said, "To remove doubts." Mr. Monk said:

That is the preamble that my hon. friend (Mr. Lemieux) is citing. But, if he will go to the sources, he will find that there was a very strong opinion in England and also here -- I believe it was shared by Mr. Blake -- that we had no right. It validated the section to which my hon. friend from Ottawa . . . has referred.

Now, Dr. Forsey, I'm only giving you these readings to illustrate the point that it was very much the concern -- even if Mr. Monk, who you quote, is a very able constitutional lawyer, and Mr. Monk, I think you will agree, was very much in favour of implementing French language rights in Alberta and Saskatchewan in the Legislatures. But everyone . . . I'm not going to say everyone, Dr. Forsey. That would be incorrect. A great many constitutional lawyers, including Sir Robert Borden, believed that if the Alberta and Saskatchewan Acts attempted to do any more than create a province and attempted to legislate in something that was given by the Constitution provincial authority, that Act itself would be unconstitutional, and to carry forward terms that are clearly constitutional with relation to a territory would be unconstitutional the minute it was carried forward with relation to a province. Do you not agree with these parliamentarians at the time, Dr. Forsey?

DR. FORSEY: Well, I've referred to what Mr. Monk, Sir Robert Borden, Sir Charles Fitzpatrick and, as I mentioned in my document here, Mr. Brodeur said about carrying over section 110. That was the specific thing I was referring to and I gave the specific references. The business about the courts and so forth and section 2 of the Manitoba Act and so forth and what Mr. Monk said about that, I think are not germane.

MR. RITTER: Dr. Forsey, both the Northwest Territories Assembly and the House of Commons were filled with parliamentarians at that time, and by your own admission, amongst them many very able constitutional lawyers. We are talking about literally hundreds of people on both sides of the question. Can you tell me perhaps why it was that in something as simple, for example, as the proclamation of section 110, which you assert was required but never given, no one, including some of the most experienced and expert constitutional lawyers in the land, ever twigged onto the fact that there was a fundamental and major defect, and why they all accepted it as being perfectly lawful?

DR. FORSEY: Why they all what?

MR. RITTER: Why they all accepted Mr. Haultain's motion as being perfectly lawful.

DR. FORSEY: I can't understand why they did accept. I don't know that they did accept it. I don't know anything that was . . . Oh yes, I know what you mean. I said that they apparently were not aware that the proclamation had not been issued.

MR. RITTER: I'm going to just for the record, Mr Chairman, with your indulgence, read one particular section, if I can find it.

AN HON. MEMBER: And if it's short.

MR. RITTER: And if it's short, Mr. Chairman, of course.

It is just that Mr. Brodeur and Mr. Monk are having a debate in the House of Commons and Mr. Brodeur says:

I suppose I may discuss the motion of my hon. friend. What I find is that it is simply repeating word for word the resolution which was adopted in 1892, which gave to the legislative assembly of the Territories the right to abolish the French language, and he knows well that it did abolish that language.

Mr. Monk said:

I am ready to forego that part of it.

Now, from 1892 to 1905 a number of years have elapsed, Dr. Forsey, and some of the greatest constitutional lawyers which were opposed to Mr. Haultain's motion were discussing it in the House, yet none of them seemed to realize that there was a fundamental defect of law, which is your assertion. Can you venture any guess as to why no one picked up on that fact?

DR. FORSEY: When Dr. Johnson was asked why he had given a wrong definition of a certain term in his famous dictionary, he replied, "Ignorance, madam, pure ignorance." Well, I think that was the case in this instance.

MR. RITTER: So in other words, Dr. Forsey, virtually the hundreds of parliamentarians of that day were ignorant and we have only just received the benefit of some academics' assertion that, "Aha, we have discovered a great error."

DR. FORSEY: They were ignorant of this particular thing. They may have been ignorant of a great many other things. Very eminent constitutional lawyers may be ignorant of certain developments. Nobody is omniscient. These were very able constitutional lawyers, but they were apparently not aware of what had happened in the Assembly of the Territories. It may have been culpable ignorance, if you want to put it that way. But they were ignorant; I think they simply did not know.

MR. RITTER: Mr. Chairman, I have a number of questions, but I won't go into them. I'll open it up to the committee. I only have two more, Dr. Forsey.

Your final statement about Mr. Piquette's personal privileges being breached -- could you tell me on what authority you base that analysis?

DR. FORSEY: Simply that I think if a member has a statutory right and it is denied him, his privileges are being breached. I feel perfectly confident that if, for example, somebody rose in the House of Commons nowadays and said, "I object to the hon. member asking his question in French," he would get the raspberry, the Bronx cheer, and a good deal of heckling, and the Speaker would undoubtedly say, "The hon. member under the law has the right to ask his question in French." I don't think there would be any question about it at all. It seems to me that if a member has a statutory right and it is denied him, then his privilege is being breached.

MR. RITTER: Dr. Forsey, last week we had the pleasure of hearing from Professor Dawson, who I know you've met on a number of occasions. His assertion to this committee was: surely a matter of language is a question of law, it is a question

of order, but it could never be considered a question of privilege. Could I have your comment on that statement?

DR. FORSEY: No, I don't feel competent to comment. The law of privilege is an extremely complicated matter on which I do not profess to have any particular expertise. I thought the evidence of Dr. Dawson was extremely well done. But I venture to go so far as to say that a statutory right belonging to a member is necessarily a question of his privilege and I think would certainly be so held by the Speaker of the House of Commons if the matter arose there.

MR. RITTER: Thank you, Dr. Forsey. I'm being cut off by the Chairman, so I can only thank you for your assistance and I'll turn the questions over to members of the committee.

MR. CHAIRMAN: Thank you. I have Mr. Gogo, Mr. Musgreave, Mr. Wright, and Mr. Fox on my list so far. Mr. Gogo.

MR. GOGO: Thank you, Mr. Chairman. Dr. Forsey, welcome to Alberta, sir. You're reputation pretty well precedes you. I've watched you for years commenting on the Canadian Constitution and other matters.

I wanted to ask you, Dr. Forsey, about the presentation or brief I have before me, which is undated and unsigned, and you apparently read from it. I received it from the secretary of the committee. Could I ask you first of all, Dr. Forsey: when was it prepared? Do you have a date?

DR. FORSEY: I think it was prepared probably about the middle of May.

MR. GOGO: Could I ask you, Dr. Forsey, as well whether you have either met or had discussions with any members of this committee or their staff prior to tonight?

DR. FORSEY: This afternoon, after I arrived, I met a number of the members of the committee and we discussed various matters. They were in possession of what I proposed to say, and I mentioned one or two things and even elaborated a little bit on one or two things.

MR. GOGO: Dr. Forsey, could you advise me as to which members? Can you recall offhand which members, or was it their staff?

DR. FORSEY: They were the New Democratic members of the committee. They were the only ones that invited me to see them, and I accepted the invitation and that was it.

MR. GOGO: Oh, I had thought the Chairman had invited you. I'm sorry. Thank you, Mr. Chairman.

MR. CHAIRMAN: Okay. Mr. Musgreave.

MR. WRIGHT: May I make a point of order here that the last member's questions implied there was perhaps something irregular or wrong about speaking to a witness before he gave evidence. As the Chairman, I hope you will disabuse all members of the committee of any such thought, if that was the implication.

MR. CHAIRMAN: Well, I think there were similar questions that came from committee members in respect to at least, I believe, two other witnesses before the committee.

MR. WRIGHT: Exactly. So I thought I'd speak up though, finally.

MR. CHAIRMAN: Very good. Mr. Musgreave.

MR. WRIGHT: Well, maybe [inaudible] certain on that, please, Mr. . . .

MR. CHAIRMAN: Well, what is your point again? I'm sorry.

MR. WRIGHT: The point that there is nothing at all wrong in members of the committee speaking to a witness beforehand.

MR. CHAIRMAN: Mr. Gogo, do you want to respond to that?

MR. GOGO: Well, no, other than to say I think it's perfectly normal to put the question because I had put the question to previous witnesses. I'm interested as to who the witness had met with. I had thought the Chairman had invited the hon. witness, and the witness suggested the only members to invite him were members of the, I think he said, New Democratic Party. That's all. [interjection] Well, dinner wasn't mentioned, with respect, Member for Edmonton Strathcona.

DR. FORSEY: Mr. Chairman, it has been suggested that I was being primed or instructed, and that is completely untrue. Everything I've said is entirely my own. There is only one exception I would say to that. One member of the committee did, in conversation, remind me of that business about the ordeal by battle, which had escaped my memory. I've known it for, I suppose, 50 years, but it had inextricably escaped my memory. It was one of these lapses that you find in old men.

MR. CHAIRMAN: I don't think anybody is imputing those sorts of things at all. I think really the point, as I understand Mr. Gogo, is that once you are approved by the committee as a witness for the committee, you are a witness of the committee. You belong to all members. I think that's the only point he is making. Is that right? Mr. Horsman.

MR. HORSMAN: Well, I was going to speak to the point of order, and that was a matter of concern. I unfortunately had to miss the last few meetings, but I do recall being present when the motion moved that the committee invite the witness, not the New Democratic members of the committee only, and that the opinion supplied by the witness should therefore have been supplied to all members of the committee and not solely to the New Democratic Party caucus -- which I understand was the case -- until such time as the Chairman asked for and obtained a copy of that committee from the New Democrats.

So I suggest that the point of order that was raised by the hon. Member for Edmonton Strathcona is not a point of order. But I think it should be on the record that the circumstances surrounding the appearance of this witness are clearly under those circumstances and should be recognized as such.

DR. FORSEY: May I, Mr. Chairman, offer an explanation? I was originally scheduled to come out some time ago. Then I had some trouble with my angina; I couldn't come. I've been

communicating. I've had word from Mr. Harvey. I don't recall having any word except, incidentally, from some official after that. And I wrote him and said, "Look it's possible that I shan't be able to come out at all. It's possible therefore that you would like to have" -- I meant really the committee would like to have, but I assumed the members would forward it -- "what I have written out, so if it's any use to them they can have it if I'm not there." Then I had a conversation, I think with you, on the telephone, and you said you would like to have this. I said, "Well, I think the quickest way to get it" -- this was very recently, a few days ago -- "would be to get it from Mr. Harvey," to whom I gave a copy in the circumstances I mention. I said I could send it to you by mail, but knowing what the mail service is it might reach you by November or December, if then. So I suggested that the quickest way for you to get it for the use of all the members of the committee was this.

Now, I may have been guilty of inadvertent improprieties there. I'm very sorry if I was. I was merely trying to think of the most convenient and quick way to get it into the hands of the members of the committee if I were unable to be here at all. Whether the committee would then have wanted to have it is another question again; probably not. But I thought they're entitled to whatever I was able to say, or would have been able to say had I been there.

MR. CHAIRMAN: Thank you. In view of the limited time that we have with Dr. Forsey, I would certainly like to press on with his evidence and allow every opportunity for questions to be directed his way by members.

Mr. Fox, you wanted to speak on this point?

MR. FOX: Well, I just wanted to point out that indeed it was our idea that the committee ask Dr. Forsey to appear, knowing his background and eminence in this field. And with respect, were it up to others members of the committee, we might not have had any witnesses appear before us. We had to urge and suggest that several people with expertise in specific fields be approached and asked to grace this committee with their opinions.

The question that Mr. Gogo just asked grew out of a question that I asked Dr. Green, and I wasn't referring to any prior discussion or contact between members of the committee and the witness. I was questioning whether or not there was collaboration between Parliamentary Counsel and Dr. Green, and when I did that I wasn't imputing any motives or implying that there would be anything wrong with that. I was merely trying to establish if Dr. Green had had some substantial input into the drafting of documents that Parliamentary Counsel had presented to us. Two quite different things.

MR. CHAIRMAN: Mr. Bogle, followed by Mr. Wright, and then I think we must move on.

MR. BOGLE: My question is to get on the speaking list.

MR. CHAIRMAN: Okay. Mr. Wright.

MR. WRIGHT: I very much resent, with the greatest respect, Mr. Chairman, the Attorney General's imputation that there was anything at all irregular about recruiting Dr. Forsey, finding out in advance what his testimony was likely to be, and being in possession of it. It's just very normal procedure.

MR. HORSMAN: Well, [inaudible] I'm not going to pursue this matter. The fact of the matter is that the record is quite clear now that the committee accepted the motion to call Dr. Forsey. Dr. Forsey then supplied an opinion only to certain members of the committee, and subsequent to that time the chairman had to request that the copy be made available to other members of the committee. That is a fact, and now we should proceed from there to deal with the questions that have been raised.

MR. WRIGHT: Even though that's not a fact. But that's not the problem.

MR. FOX: Do we all dare say a collective "So what?"

MR. CHAIRMAN: Okay, I think that with all due respect the matter has been fully put on the record by all members, and I think we should proceed.

DR. FORSEY: [Inaudible] with counsel, and I found it a most interesting and valuable discussion . . .

MR. CHAIRMAN: Yes. The point is that a committee witness. . .

DR. FORSEY: . . . and I think it has been proven that there isn't anything improper about that.

MR. CHAIRMAN: No.

DR. FORSEY: I may add that when I met with the New Democratic members of the committee this evening, most of our conversation had to do with other matters altogether: reminiscences of mine about parliamentary affairs and talk about Sir John Thompson and Sir Robert Borden and the Meech Lake accord, and a variety of things. We spent a relatively small amount on anything connected with the proceedings of this committee.

MR. CHAIRMAN: Yes. Well, once you became a committee witness, I instructed our counsel to contact you right away in order to make arrangements, et cetera.

All right, we'll move on. Mr. Musgreave, followed by Mr. Wright.

MR. MUSGREAVE: Dr. Forsey, if I understand what you were saying, you said that because the law was not proclaimed -- if I understand you, you said the law was not proclaimed -- therefore requirement to work in English has not been law. Yet for 82 years, with the exception of some very rare occasions, English is the language used in this Assembly, in the documents, records, and publications. My question is this: are you saying that in all those years this Assembly was acting illegally by breaking the law that was created by the federal government for the conduct of business by the Northwest Territories?

DR. FORSEY: No, it wasn't breaking the law. It wasn't doing what it might have done if it had wanted to do it. If it chose to conduct the proceedings -- and nobody objected -- entirely in English, I think it had a perfect right to do so. But this does not invalidate the right of a member to use the French language. That is my point, and the mere non-use over that period, it seems to me, did not invalidate the right.

MR. MUSGREAVE: That brings me to my next question, Dr. Forsey. You mentioned in the latter part of your presentation that when the member put his question in French, you felt there was a breach of his privilege. Now, you mentioned the fact that in the House of Commons there would be a real ruckus if somebody objected to a question being posed in French or English. But I do point out to you that there is an immediate translation, so everybody's aware of what's being said.

My question is this. If Mr. Piquette's privilege was being breached by his not being able to present his question in French, what happened to my privilege in not being able to understand his question in French?

DR. FORSEY: It could have been very easily adjusted by what Sir Robert Borden, in a phrase of his that I am very fond of, called "the exercise of the commonplace quality of common sense." I think you could, if you felt your privilege was being breached, have asked Mr. Piquette to repeat what he said in English, or the Speaker could have asked him to. This would have been the commonsense way of doing the thing. And it seems to me that . . .

MR. MUSGREAVE: [Inaudible] after that, Dr. Forsey, common sense tells us the world is flat, but we know it isn't.

DR. FORSEY: How does it? It doesn't tell me that.

MR. MUSGREAVE: I suggest when you go out of the building here tonight and look to the horizon, you'll think it's flat.

DR. FORSEY: A novel view to me. When I was a very small boy, I had it pointed out to me that the horizon was always round. I remember reading that in a book called *High Roads of Geography* before I was out of elementary school. However, that is scarcely germane.

MR. CHAIRMAN: Mr. Wright, followed by Mr. Fox.

MR. WRIGHT: Yes, do you see any contradiction between the obligation to record only in English and the fact that French might be spoken?

DR. FORSEY: None whatever. In fact, they're two quite distinct things, and the resolution, which in my judgment was entirely abortive because of the failure to have the proclamation -- even if it were not abortive -- applied only to recording and publishing.

MR. WRIGHT: So even if the Haultain resolution had been good, it would still have carried the right to speak French in the Legislature into the new government of the new Legislative Assembly of Alberta?

DR. FORSEY: That is my view. Incidentally, may I just interpolate here the idea that these words about "embodied in a proclamation . . . made and published forthwith by the Lieutenant-Governor" are mere surplus verbiage. I simply cannot accept that Sir John Thompson, the Minister of Justice at that time, allowed to go into an Act mere surplus verbiage. It tries my credulity too high.

MR. FOX: Dr. Forsey, I'd like to follow up on another hon. member's question about matters of privilege that surround the

asking of a question by Mr. Piquette or indeed any member in French. You say that by his being denied the right to put a question in French, his privileges were being breached. Is that because there is in your mind clearly a statutory right for a member to ask a question in French in the Legislature? So that would be clearly different from a member in the Assembly not being able to understand a question put in French. There's no statutory right that says a member shall understand everything that other members say in the House; therefore, there certainly is no breach of privilege there.

DR. FORSEY: In the House of Commons and the Senate in Ottawa before the advent of simultaneous translation, there may have been many occasions when questions were asked in French that English-speaking members didn't understand, and vice versa. As a matter of fact, of course, most of the French-speaking members did speak enough English to ask their questions in French. I don't know how often they bothered to do it. But there were plenty of people who came into the House of Commons from French Canada who didn't understand a word of English and had to learn it with great effort, and who must have had difficulties before the advent of simultaneous translation. I don't know how they handled the thing, but presumably if they had raised any question, the answer would have been, "Well, let us have a translation. Would the honourable gentleman be kind enough to repeat his question in the other language?"

MR. FOX: So then in your opinion there was no inconsistency in the testimony given by Professor Dawson last week when he said matters of language are within the realm of law or order but not matters of privilege. Because what you're saying in your contention here is that Mr. Piquette's privileges have been violated because we're dealing with a statutory right to speak in either official language in the Assembly.

DR. FORSEY: Yes. There are various experts on privilege who might challenge that. I feel confident that it would be upheld in the House of Commons, but I may easily be mistaken.

MR. HORSMAN: Mr. Chairman, Dr. Forsey, section 110 of the North-West Territories Act states, and I quote:

Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages.

There appeared to be four separate items contained in Section 110: debate, courts, journals, and records or ordinances which could be interpreted as laws.

Now, in your opinion, is section 110 severable into four parts, so that one or more or less than the full four are now in place as the law of Alberta and legally binding upon this Legislature?

DR. FORSEY: Only to the extent that they've not been repealed by the Legislature of Alberta, as in fact I think they all have, except the one that we're dealing with.

MR. HORSMAN: How have the other three portions of that section 110 been repealed by this Legislative Assembly? Can you point to any Acts where that in fact has been done?

DR. FORSEY: Well, my reading, which I admit was actually

somewhat cursory, of the statutes seemed to me to indicate that they had been. The Interpretation Act came into it, I know, and I think the Acts setting up the courts of Alberta. I didn't go into that part of it at all carefully, because it didn't seem to me to be of any particular importance. We were dealing here with the Legislature, and I didn't bother much about the courts. But I am certainly under the impression that all the other matters have been dealt with, in fact, by Acts of the Legislature of Alberta. I stand open to correction on that, of course.

MR. HORSMAN: You have indicated in your answer to your questions to Counsel and I am absolutely clear that your view is that the Legislative Assembly can now, should it choose to do so, pass an Act of this Assembly that would make English the sole language of this Assembly. So I understand that quite clearly that is your opinion.

DR. FORSEY: Yes.

MR. HORSMAN: But the other aspect of this matter is that there are certain cases now before the courts of Canada, including a case, *Regina v Mercure*, a case which arose in the province of Saskatchewan which questions whether or not section 110 is now in force in that province and, ipso facto, in force in the province of Alberta. Is it your opinion that the Supreme Court of Canada in interpreting the Alberta and Saskatchewan Acts and the North-West Territories Act, could also, in addition to this Assembly by an Act of the Assembly, bring about a judicial interpretation which would clarify the issue and perhaps abolish the use of French or indicate that the use of French in the Assembly was also abolished by virtue of either non-usage or whatever means? In other words, it can be done both by this Assembly. Can it also be done by the courts?

DR. FORSEY: Oh, yes. I should think the Supreme Court of Canada can interpret any part of the law in any way it sees fit.

MR. HORSMAN: Thank you.

MR. CHAIRMAN: We'll move on to Mr. Bogle.

DR. FORSEY: [Inaudible] the matter is brought to it in a case or, for that matter, on a reference. I don't see why it couldn't.

MR. CHAIRMAN: Mr. Bogle, followed by Mr. Wright.

MR. BOGLE: Mr. Chairman, to Dr. Forsey. In the latter questions put by Parliamentary Counsel to Dr. Forsey, there were in the responses at least two times when references were made that a Speaker in the House of Commons would not violate a member's privilege by denying that member the use of either French or English in the House or, I presume, in the Senate. I note by the British North America Act of 1867 that the rights of members of the House of Commons and the Senate and members of the Quebec Legislature to speak either of the languages is guaranteed. I further note in the Constitution Act of 1982 that this is reaffirmed for the House of Commons and the Senate, and the province of New Brunswick added its approval to that process.

Coming back specifically to the examples used by Dr. Forsey, whereas we are talking about a member's privilege in the Legislative Assembly of Alberta -- not in the House of Commons, not in the Senate, not in the Quebec National Assembly

or in the Legislature of the province of New Brunswick -- is Dr. Forsey suggesting that the same rights and privileges exist in this Legislature as exist in those previously mentioned Houses?

DR. FORSEY: No, I'm not suggesting that section 133 applies in any way to this province or Saskatchewan or indeed most of the provinces. It applies in set terms only to the Parliament of Canada and the Legislature of Quebec, and there are other constitutional statutes which apply to New Brunswick and Manitoba.

What I am suggesting is that there is a statutory right here. The statute is not the same statute. It's not a statute of the imperial Parliament. It's not one of those statutes down in the list -- and I think it's section 52 of the Act of 1982 -- but it is in my submission a statutory right. And therefore it seems to me that my suggestion that the Speaker here might quite well take the same line that a Speaker would in the House of Commons -- this is a statutory right. In that case you would say a constitutional right, but it is still statutory by virtue of the Act of 1867. My contention is that a Speaker here could perfectly well say: this is a statutory right, the Legislature not having seen fit to abolish it.

MR. BOGLE: We're very clear, Mr. Chairman, then. We're down to the very narrow view that the amendment put forward, the motion passed in 1892 in the Northwest Territories, as put forward by Mr. Haultain, which there is question as to whether or not it was proclaimed -- I think to paraphrase Dr. Forsey: there is no evidence; therefore we must conclude. We're down to that narrow fact in Dr. Forsey's mind, that if the motion was not proclaimed, then indeed those rights continue to flow. Is that correct?

DR. FORSEY: Yes. You call it a minor fact? I call it a major fact.

MR. BOGLE: I'd say minor.

DR. FORSEY: It seems to me vital, and I entirely reject the argument of counsel and of Dr. Green that the Speaker's petition and all the rest of it disposed of the thing. I don't think this will hold water for a moment. I think it's preposterous, perfectly preposterous. I'm using very strong language, and I do so without hesitation to say that the Speaker's petition on December 10, 1891, or December 7, 1892, is a proclamation embodying the resolution of January 19, 1892, and made forthwith by the Lieutenant Governor.

MR. BOGLE: Notwithstanding the fact, Mr. Chairman, that . . .

DR. FORSEY: I think it's structuring the English language to argue the contrary.

MR. BOGLE: Are you quite through, sir?

DR. FORSEY: It's very rude and very disrespectful, but I'm afraid my Newfoundland west country temper at this point got the better of me.

MR. BOGLE: Are you quite through, sir? Are you quite through, sir?

AN HON. MEMBER: Don't be rude.

DR. FORSEY: Quite sure?

MR. BOGLE: I beg your pardon.

AN HON. MEMBER: I said don't be rude.

MR. BOGLE: I am not. I'm trying to find out whether the gentleman is through so I can ask my next question. You're the last person in this Assembly to talk about rudeness.

The last point. Notwithstanding the fact that Sir Wilfrid Laurier in the debates in the House of Commons in the Alberta Act in 1905 made specific reference to provincial rights, the references made by both Sir Robert Borden and Mr. Monk, our guest Dr. Forsey clings to the view that they've obviously missed the important point that the motion of the Northwest Territories was not proclaimed.

DR. FORSEY: Yes.

MR. CHAIRMAN: Just before we go on, I would like to suggest, with the consent of the meeting, that we have a brief adjournment. Dr. Forsey's been on the go here for some time, and I think if we adjourned until 9 o'clock and resumed at that time -- is the committee agreed?

HON. MEMBERS: Agreed.

MR. WRIGHT: In that case we add seven minutes if necessary to 10 o'clock, Mr. Chairman.

MR. CHAIRMAN: If that is the consent of the meeting.

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Okay. We'll adjourn until 9 o'clock.

[The committee recessed from 8:53 to 9:02 p.m.]

MR. CHAIRMAN: Would the committee please come to order.

I have on my list Mr. Wright, followed by Mr. Gibeault, Mr. Musgreave, Mr. Horsman, and Mr. Fox.

Mr. Wright.

MR. WRIGHT: Thank you, Mr. Chairman. Dr. Forsey, counsel asked you about the difference of the treatment of a territory on the one hand and a province on the other by the Parliament in Ottawa. In respect of the creation of a province, would this analogy be correct, in your opinion, that it's rather like a ship, that before the province was created, the Dominion Parliament, as it was then called, had the right to build the ship and furnish it, but once it was completed by the passage of the Act, then the ship was on its way, turned over to new owners, and it had no more right to interfere internally within the ship, but up to that point it had complete right?

DR. FORSEY: That seems to me rather a happy metaphor.

MR. WRIGHT: Reference was made to the improbability of such eminent persons as Sir Robert Borden and Sir James Fitzpatrick, is it?

DR. FORSEY: Charles Fitzpatrick

MR. WRIGHT: ... and Mr. Monk being ignorant in point of the Haultain resolution. But their ignorance, if you can call it that, was of facts rather than of the rules, correct?

DR. FORSEY: Oh yes, entirely of facts.

MR. WRIGHT: Yes. And that can happen to the best of us, can't it, obviously?

DR. FORSEY: Yes, indeed; it can happen to very good lawyers even.

MR. WRIGHT: Yes. And indeed for the best part of this century was it not the case that good constitutional authorities considered that the use of French had been abolished in Manitoba in official documents and places?

DR. FORSEY: I suppose a good many did. I wonder how good constitutional authorities they were. I always object to being called a constitutional authority myself, or an expert, because there are so many people who get this title who in my judgment are humbugs.

MR. GIBEAULT: Mr. Chairman, when a number of the witnesses have appeared before the committee, some members of our committee have repeatedly wondered if their privileges as members of the Assembly might have been breached if a question was put to them in a language other than English which they couldn't understand, and of course the situation that is before us here is with the French language. So I would like to ask Dr. Forsey two questions about that.

In the specific instance that is before us, which is the French language, in the text from *Hansard* on page 631 of April 7 it seems fairly clear that Mr. Piquette was not allowed to finish making his statement or his question, so we don't know if he was planning to give a translation in English following the French question or if he would not have offered to do so if asked. So I wonder, Dr. Forsey, in your opinion, since that is the case in this particular instance that has been referred to our committee, that Mr. Piquette didn't have an opportunity -- he was ruled out of order before asking his question -- could there be any reasonable question of other members' privileges being breached? Could we even determine that, do you think?

DR. FORSEY: That's a nice point. If he didn't succeed in actually asking the question, somebody else's inability to understand the question he might have asked hardly arises. It's a little bit like the passage in one of Wodehouse's books where the little girl says, "I thought that if I didn't have none, it would be all right his having had what I would have had if I had have had."

MR. GIBEAULT: Thank you, Dr. Forsey. To go to the more general situation then, if oral questions asked in French were followed by an English translation, would that, do you think, satisfy any question of privilege of the other members of the Assembly?

DR. FORSEY: Well, I should think so, yes, unless there was some reason to suppose that the translation was highly faulty, whether by inability to give a correct translation or by a desire to mislead, but this is pretty farfetched. If there were some reason to suspect that, I should think it wouldn't be very difficult to clear up.

MR. GIBEAULT: Thank you, Dr. Forsey.

MR. MUSGREAVE: Dr. Forsey, just on the point that the hon. member just raised, if the fact of the rules of the House prevented the hon. members from asking questions, then obviously they're at a disadvantage, are they not?

DR. FORSEY: But the laws of the House, to my mind, are subject to the statutory rights. I'm not sure if I quite caught your question. It's a perfect nuisance to everybody, myself included, that I miss things because I'm so deaf.

MR. MUSGREAVE: What I was saying, Dr. Forsey: if the person that asks -- like in the rules of our House, an ordinary member is not allowed to ask a question unless he is recognized by the Speaker. And when a member starts to speak in French, another member cannot get up and say, "I can't understand what he's saying unless I'm sure I'm going to have a translation in English." So I mean, I think it begs a question.

DR. FORSEY: When the Speaker denies a member the right to ask a question, I suppose under your Standing Orders -- I gather that under your Standing Orders the Speaker can say that you can't ask a question in English, French, German, Italian, Spanish, Greek, Chinese, Hebrew, Gaelic, or anything else.

MR. MUSGREAVE: What I'm saying, Dr. Forsey, is that we have a procedure that has been developed with the agreement of the House leaders of the various parties that a question can be asked and two supplementaries and then other members of the other opposing parties of the House can ask the questions, which in effect prevents an ordinary member from getting up and asking a member who is speaking out to please provide a translation. That's the point I'm trying to make.

DR. FORSEY: Well, I think it would be stretching any standing orders to say that a member asking for a translation of something he hasn't understood would be out of order. This seems to me to be an extraordinarily esoteric conception.

MR. MUSGREAVE: Dr. Forsey, have you had the opportunity to examine our Standing Orders?

DR. FORSEY: No, I haven't.

MR. HORSMAN: Dr. Forsey, I want to ask you whether or not you're familiar with the work entitled *The Law of Languages in Canada* by Claude-Armand Sheppard?

DR. FORSEY: I've read the document that was provided to me on that subject, which I understand has been before you. I think it's an excerpt from something he put into the bilingualism and biculturalism commission. Yes, I've read it.

MR. HORSMAN: In that particular document, with reference to the subject of the use of languages in the Legislative Assembly both in terms of the statutes, the laws, the use of French in the Assembly, he concludes a section by saying, and I quote from page 89:

It is obviously impossible to be categorical and we limit our opinion to the guarded statement that the legal situation is far from clear.

But you go beyond that and categorically state that the legal

situation is absolutely clear. Is that correct?

DR. FORSEY: Yes. I disagree with Mr. Sheppard. He may very well be right and I may be wrong, but I disagree with him for reasons which I set forth as succinctly as I could. But I freely admit that I may be as wrong as it's possible to be.

MR. HORSMAN: Are you also familiar with the article entitled *Official Bilingualism in Alberta* by Kenneth Munro of the Department of History at the University of Alberta?

DR. FORSEY: I've read his evidence here also.

MR. HORSMAN: Have you come to the conclusion that Dr. Munro, when he alleges that all parts of section 110 are part of the Constitution of Canada -- do you agree with that?

DR. FORSEY: No, I disagree with him there, because it seems to me that the Alberta Act is part of the Constitution of Canada. But in my judgment the Alberta Act gives the Legislature of Alberta complete power to say anything it wants to about languages, anything under the sun.

MR. HORSMAN: I know my supplementaries are up, Dr. Forsey, but I did want to conclude my question. I think you've answered it. You disagree then with Dr. Munro's opinion that . . .

DR. FORSEY: On that particular point, yes.

MR. HORSMAN: Thank you.

DR. FORSEY: I would rather like to agree with him, but I think he's wrong. I'm sorry. I've tried to give my honest opinion on these various things, misguided as it may be, and it probably is, in the opinion of many members of the committee, even when it's an opinion which I would rather not have had to come to. I've got certain prejudices, but I've tried to rule them out and say that I might have liked it if the law had been different; I might have liked such and such. That doesn't matter; that's neither here nor there.

What I'm here to do is to give the best opinion I can, the most honest opinion I can, of what the law is. Being sort of a once-a-week, honorary French-Canadian, shall I say, because I am an active member of a French language United Church, I should rather like to be able to say, "Look, the Alberta Legislature cannot prohibit the use of French in the Legislature," but I think it can. My prejudice as a once-a-week, honorary French-Canadian doesn't enter into the question. I just think the Legislature can do it, and if the Legislature wants to do it, that's the Legislature's right and the Legislature's business, but they haven't done it yet.

MR. CHAIRMAN: Mr. Fox

MR. FOX: Thank you, Mr. Chairman. I'd like to pursue that a little bit. I think, Dr. Forsey, your opinion is in concurrence with opinions offered by other learned witnesses, and that is that this Assembly clearly has the right to decide what happens from this point onwards respecting the use of French, whether it's allowed or disallowed or allowed with certain provisions. But what we need to deal with is what was in existence in the past in order to determine whether or not these matters of privilege before us are valid or not. The two points on which to me there

seems to be disagreement between Dr. Green and basically the rest of the learned witnesses that have appeared, including yourself, centres around whether or not the Haultain motion that dealt with things being recorded and published in the English language was sufficient to have extinguished the language rights that were embodied in section 110. I guess that's what we'll have to decide, based on testimony here.

Now, in terms of people, these learned constitutional experts that Parliamentary Counsel referred to having not picked up on the fact that the Haultain motion hadn't been proclaimed in any substantive way, would it be fair to say that they just assumed that it had been proclaimed because to assume otherwise would have been highly unlikely?

DR. FORSEY: Well, if you're referring to people in the House of Commons in 1905, yes, I think they were unaware of what had actually happened. It's rather astonishing that they were, but I suppose the probability is that they had not been keeping as careful track of what had gone on in the Assembly of the Northwest Territories as they should have. I don't know why. It seems to me extraordinary and in fact rather careless.

MR. FOX: But you would think, had they been aware of that fact, their opinions likely would have been much the same as yours, that the Haultain motion had not in fact been proclaimed as laid out in section 110?

DR. FORSEY: I'm absolutely positive of this, I think, absolutely positive that Borden, for example, would have said that that language was put in there by Sir John Thompson for a specific reason and it meant something and it was not superfluous verbiage. Sir John Thompson was the last man in the world to go in for superfluous verbiage. Like Sir Robert Borden, he left nothing to chance. He came from a long -- I repeat, a long -- parliamentary tradition in Nova Scotia, going back before there was any Parliament of Canada, before there was a Legislature in any other part of Canada: long, long before.

MR. FOX: I think there was the impression left -- and I'm just trying to correct it, I guess -- in the asking of a previous question that all of these experts were in the past somehow not up to snuff, when it seems to me that all you're really saying is that they didn't have all the facts before them and if they had had the facts that you have, they would be able to make reasoned interpretations.

DR. FORSEY: Yes. I tried to make that point in reply to a question by Mr. Wright, that it was a matter of ignorance of fact, not of law.

MR. CHAIRMAN: Mr. Wright, followed by Mr. Schumacher.

MR. WRIGHT: Yes. You were questioned by Parliamentary Counsel, Dr. Forsey, on the question of privilege, and a difference between your testimony and that of Dr. Dawson in the terms used, at any rate, was adverted to. But you see, if you read Dr. Dawson's evidence, he did say that privilege is composed of law and custom and standing orders and so on and the bundle of it amounts to privilege, so he agreed that law itself might be a part of considering what privilege is. My question is: would you not agree that largely these differences are one of definition?

DR. FORSEY: Yes, I suppose so. I should have thought that privilege in any Legislature would always be subject to actual statute law. I can't imagine that a Speaker in the House of Commons would rule that something that was contrary to the statutory right of a member was not a breach of privilege.

MR. WRIGHT: Okay. My second question in this lot then, Dr. Forsey, concerns the assertion that has been made that the privileges of other members of the Assembly who don't understand French would be breached because the French speaker would be speaking something they couldn't understand at the time. So my question is: supposing that to be a right, then whether the other people in the Legislative Assembly can't understand it is entirely immaterial, and therefore no question of privilege can arise?

DR. FORSEY: Well, I'm afraid I would have to answer that by what you might call a circumlocution. It seems to me that that question could arise, and it could have arisen at all events in the House of Commons before the days of simultaneous translation, and probably did arise. And it could have arisen in the Assembly of the Northwest Territories before 1892, and quite possibly did arise. I don't know, but it's perfectly possible. Whether there's any record of anybody having said that his privileges were being invaded or breached in such circumstances, I don't know. I should have thought that the probability is that any Speaker would have either given it a translation himself, if he was capable of it, or asked the member to give a translation, or called in somebody from outside and said, "Can you give us a translation of this?" I shouldn't have thought it would have evoked a large issue at all. I think it should simply have been a matter of courtesy and common sense and some way would have been found of making the meaning available.

MR. WRIGHT: Well, I do respectfully agree with you on the practicalities of it and the ease of getting over the difficulty, but I'm just dealing with the logic of it. If a member has a right to speak French, that cannot be whittled down simply because other members don't understand what he's saying.

DR. FORSEY: I entirely agree.

MR. CHAIRMAN: Mr. Schumacher, followed by Mr. Musgreave.

MR. SCHUMACHER: Thank you, Mr. Chairman. I guess my questions are somewhat related to Mr. Wright's last line of questioning.

I would first of all like to ask Dr. Forsey whether he sees any difference at all in the use of another language other than English in the proceedings of the Chamber with regards to the different things that are going in the Chamber; that is, the question period, second reading debate, Committee of Supply, Committee of the Whole. Do you see any difference at all as to whether the language might be more permissible at one stage, going back to what they meant by "debates" when they talked about the use of language in debate in the Legislature?

DR. FORSEY: Well, I find it difficult to believe that the word "debates" -- for example, section 133 of the Constitution Act, 1867, would not have been considered to apply to any oral proceedings at all, any oral statements, questions, or whatnot. Obviously, we've never had a judicial decision on this. It's possi-

ble that the Supreme Court might say, "Oh, yes; in the House of Commons or the Senate you can speak French all you like in debates, and whether people understand you or whether they don't doesn't matter." Now, of course, simultaneous translation has changed this, but there was a long time when there wasn't any simultaneous translation. "You can say all you like in French, but you mustn't ask a question": the British North America Act doesn't cover it. I find that very difficult to accept. I feel confident that when the Act of 1867 said "debates," it was intended to cover the use of French in any proceedings in the House of Commons.

Anyhow, the people didn't understand it: too bad. And the other way around: if a lot of the French members didn't understand English, too bad. People have come to the House of Commons from French Canada, as I said a while ago, not knowing any English. When Jean Chretien came to the House of Commons, he didn't know any English whatever. I know that because he told me so himself the day he was appointed Minister of Finance, and he had to muck it up. Ernest Lapointe was in the same position; he didn't know any English when he came to the House of Commons. He became a master of English, but he didn't know any English when he came there. That is very relevant, because when Lapointe came there and when he was a minister, there was no simultaneous translation. He must have been at a very serious disadvantage. But there was section 133 of the British North America Act, and if he had got up and said in French, "I can't understand what the hon. member is saying and therefore my privilege is being breached," I think we would have gotten uncommonly short shrift from the Speaker.

MR. SCHUMACHER: Dr. Forsey, you made reference earlier about what your view of what a commonsense solution to this problem is. In your long years of observing parliamentary procedures -- and I assume observing them in Quebec, New Brunswick, Ottawa -- have you ever seen the application of what you characterize as a commonsense solution?

DR. FORSEY: No, I haven't, but it's something that would occur only very rarely in the House of Commons for the very reason that I've given, that there you had section 133. I have only once observed the proceedings of the Legislature of New Brunswick, and once very briefly the Legislature of Newfoundland, and once very briefly the Legislature of Ontario. I've nothing to go on there, and while I've watched innumerable parliamentary debates and question periods over, I suppose, 75 years now, I have never seen anything come up like this, but that doesn't say that it may not have come up. An awful lot went on before 75 years ago, and an awful lot has gone on between the first time I watched debates and the introduction of simultaneous translation. So I'm not going to make any categorical statements about that.

MR. SCHUMACHER: I gather the short answer to my question was that no, you haven't seen the practical application of your commonsense solution.

MR. CHAIRMAN: Mr. Musgreave, followed by Mr. Wright.

MR. MUSGREAVE: I'll pass.

MR. CHAIRMAN: Mr. Wright.

MR. WRIGHT: Yes. You were asked by the Attorney General

about the other parts of section 110, and you said that you hadn't studied them recently because it didn't seem germane to the question before the committee. Of course, the other parts of the Haultain resolution -- that's to say, the recording of the languages. If the Haultain resolution was ineffective does raise the question of whether the statutes should have been continued up till recently, or the present day even, possibly, in English and French. And perhaps when you mentioned the interpretation Acts, you were thinking of the provisions of the various interpretation Acts between 1906 and 1958, I think it was, in the province of Alberta that required that unless there was provision to the contrary, public records are to be kept, or any written process is to be heard or taken, in the English language. I'm paraphrasing it. Was that the . . .

DR. FORSEY: That was exactly what I was thinking of, and I thought the Acts establishing the courts of the province had been pretty clear on the subject. I must confess that I looked at these things recently, but I didn't scrutinize them with the intense care that I perhaps should have, for two reasons: one, I didn't think they were really germane, and the other, when I read the various cases that had come up, I found them very difficult to follow, thanks to my lack of legal training, and I found also that some of what the learned judges said, as I think Dr. Christian indicated at one point, seemed to me a direct reference to proceedings in the Assembly, seemed to be rather obiter and not part of the judgment or the body of the judgment itself. I concurred in that view that he took. So I didn't -- I'm not going to go into this question of the courts. It's not strictly relevant, to my mind, and it would involve me in a great deal of strenuous work for which I am ill-equipped, and I don't think the results of it would be of any particular benefit to the committee.

MR. WRIGHT: Now, it is a curious fact, Dr. Forsey, that if you look at the *Gazettes* of the Northwest Territories for the years 1892 and 1893 and for 1895, from January to August, they were in fact published in both French and English. What's curious about that is that if in fact the Haultain resolution had been proclaimed and indeed was believed to be effective at the time, is it likely that they would have continued to publish the *Gazettes* in both languages?

DR. FORSEY: I think highly unlikely, to say the least of it. I wasn't aware of this, and this is another case of ignorance, pure ignorance. But it seems to me to be a very interesting point and a very significant point.

MR. WRIGHT: That is a point we can all satisfy ourselves of just by looking in the *Gazettes*. We don't need to have evidence on it.

MR. SCHUMACHER: If French is a statutory right in this Assembly as a result of the continuation of section 110 of the North-West Territories Act, is it your opinion that that happened purely by accident, or was it by some sort of design?

DR. FORSEY: Well, my feeling is that the Legislature has probably taken it for granted all along that the Haultain resolution had come into full force and effect. As far as I know, it was only in the 1960s that somebody began to tumble to the idea that perhaps this wasn't so. The first place I ran across it was in an issue of the *McGill Law Journal* in, I think it was, 1966. I'd have to verify that. It was somewhere: '64, '65, '66. In an arti-

cle by Armand de Mestral and an English-speaking lawyer whose name slips my mind, they pointed out that there had been no proclamation, at least they couldn't find one -- they'd made diligent search and couldn't find one -- and that therefore it was highly doubtful whether the thing had ever come into effect at all. I don't think they put it more strongly than to say that it was highly doubtful. But I think it just was taken for granted by a great many people that it had come into effect, and it was only when some curious academics started probing that doubts arose. The doubts seem to me to be more than justified, as I've indicated, but a lot of people just took it for granted.

I think the simple explanation is that the French-speaking minority in this province became so small that it never came up as a matter of practical politics, and probably it's only with the special emphasis on language questions all over the country in the last relatively few years that it has come up. People began then to ask questions which they hadn't asked before.

MR. SCHUMACHER: But as far as you're concerned, it was certainly not the intent of the Laurier government of 1905 to carry over section 110 into the law of the province of Alberta.

DR. FORSEY: Well, it was certainly the intention of Sir Charles Fitzpatrick, the Minister of Justice, because he said so plainly. Presumably he spoke for the -- no, perhaps I shouldn't say he spoke for the government, because he said, "This is certainly my personal view, my personal intention," something of that sort. But on the other hand, ordinarily if the Minister of Justice on a matter of this sort says, "This is the intention," you take it that that is government policy. I don't think the quotations from Sir Wilfrid Laurier invalidate that. I'd have to look at them again carefully. They were read out rather rapidly, and I would want to look at them carefully before I was prepared to be absolutely precise.

MR. SCHUMACHER: But, Dr. Forsey, if you say it was the intent of the government to bring forth the use of French in the province of Alberta by means of the Alberta Act and the way they were handling it, why would they specifically defeat a motion or an amendment by Monk that would have restored the bilingual status of this area as it stood in 1877?

DR. FORSEY: In the first place, I think it was merely the intention that it should be transitional, and in the second place, so that the province would have absolute authority to do what it wanted to afterward. And in the third place, I think it was partly that nobody really realized that the Haultain resolution had probably been aborted -- null, void, and of no effect. The thing was . . .

MR. SCHUMACHER: Aren't you really saying that if section 110 applies at the present time, it is purely by accident and not by design?

DR. FORSEY: Well, yes, I think you could put it that way. Accident may not be the right word; I don't know. But inadvertence perhaps.

MR. SCHUMACHER: Okay

DR. FORSEY: I feel very little doubt in my own mind that had it been noticed at the time that the Haultain resolution possibly had not really come into effect, you might very well have had at

some stage an initiative taken by a private member or by the government to make certain that English alone should be the language. That seems to me a perfectly possible thing. But as nearly everybody assumed apparently, I think somewhat rashly, that the Haultain resolution had come into effect and that therefore French was out. Nobody bothered to bring in a motion or propose a Bill or anything to get rid of it. They would have said: "What are you doing? Everybody knows that's gone long ago. It disappeared in 1892." But everybody didn't know.

MR. CHAIRMAN: Mr. Wright.

MR. WRIGHT: Yes. I don't know whether to apologize for this question or not, Dr. Forsey, but having regard to the very recent initiatives of the Premiers and the Prime Minister to reach a tentative agreement between all of them as to unanimous acceptance of the Constitution of Canada by amending it somewhat and recognizing that the final form of that amendment is not yet known, do you have any opinion as a parliamentarian as to its effect in any way in sending a message to provincial Legislatures as to the use of French in those Legislatures where the Francophone group is a minority and likewise to the province of Quebec, where the Anglophone group is a minority? Are there any lessons in that for us now, for the future?

DR. FORSEY: Well, I'm very glad you asked that question. It's a very interesting one and I think of some significance, though possibly not within the committee's terms of reference. But I think it's interesting and significant, because in my judgment, when you have the section of the accord which says the Constitution "shall be interpreted in a manner consistent with" -- and then come two provisions: one usually summed up as the principle of duality and the other the role of the Quebec Legislature to preserve and promote the distinct identity of Quebec. When you have that, it seems to me that the power given to the courts, the obligation placed upon the courts to interpret the Constitution in a manner consistent with the principle of duality might quite well be taken up by the French language minorities in the other provinces to say: "Look, you gave a commitment" -- that's down in the language -- "to preserve the dual character. You are not giving such and such rights to the French language minority in your province. You are not living up to your commitment. We ask the courts to tell you that you must live up to the commitment. You must do such and such to satisfy the claims of the French-speaking minority in your province." This, I think, is a distinct possibility. It is one of the things that I think needs to be looked at very carefully, because it might mean a distinct infringement of the autonomy of the provincial Legislatures.

When I put this in an article that I wrote on the Meech Lake accord and showed it to Senator Royce Frith, he said to me: "Oh, I think you're exaggerating. The courts would never order a Legislature to do anything." He said, "They came rather near it in the Manitoba language case, but they didn't actually do it." I took this up with a very good constitutional lawyer I know; I don't think I'm entitled to use his name in public. I made this point to him. He said: "You are not exaggerating at all. You are perfectly correct. This is exactly what the Supreme Court of the United States did in the matter of redistribution of seats in the state Legislatures and in the case of," I think it was Brown vs the board of education or some such case. I've forgotten the name of it. They did order the Legislatures of the States to do certain things, and they had to do them. He said, "I think this is

a perfectly possible result here." And he said, "In the Manitoba language case the court did order the Manitoba Legislature to do something. It attached certain provisos, but it did order the Legislature."

Now, this is my illegal legal opinion. I've given a lot of them in my time, twice at the request of the Department of Justice, I might add, and been paid for them, of all things under the sun. But I have the view of a very eminent constitutional lawyer that I am not pipe-dreaming in the matter; it is a perfectly possible development.

MR. WRIGHT: But of course since the Meech Lake accord, subsection 2 has been added to, whatever section it is -- 4 is it? -- that makes it clear that the rights of the provinces and the powers of the provinces have been neither abridged nor enlarged by that previous declaration.

DR. FORSEY: With respect, I'm not quite so sure of that, Mr. Wright. Because if you look at section 36 of the Act of 1982, the equalization section, the language that is used there is not the same as the language that is used in the Meech Lake accord in the proviso that you mentioned. That says: without variegating from. Section 36 says something like: shall not impair or interfere with -- I've forgotten the exact language; I should have it and I haven't -- the legislative authority of the Parliament of Canada or the Legislature of any of the provinces or the exercise of their Legislative authority. Now, it seems to me that the clause of the Meech Lake accord says that you can't take away, but I'm not sure that it means you can't impose something extra. I'm uneasy about that.

MR. WRIGHT: Very well. My last question, Mr. Chairman, to Dr. Forsey is: you mention the message that may be going to the courts arising from this development, but it doesn't specifically mention the courts; it could equally well apply to the Legislatures, could it not?

DR. FORSEY: Oh, yes. But it seems to me it could apply to the courts too. Surely the courts, faced with a constitutional provision saying that the constitution shall be interpreted in a certain way, would have to pay some attention to that and say: "Well, this applies to us too. One of our jobs is to interpret the Constitution, and we have in the Constitution a clause that says it shall be interpreted in a manner consistent with . . ."

MR. WRIGHT: Naturally, but is there some message for the Legislatures also?

DR. FORSEY: Oh, yes. But if the Legislatures don't live up to their commitment, in the opinion of the Supreme Court of Canada, my point is you might have the Supreme Court of Canada saying: "Come on; you haven't given enough. You've done such and such, but you haven't done enough." Of course they might say: "No, no, don't be silly. We're not going to apply this." Who knows? Sir John A. Macdonald once said: elections are like horse races; you know more about them after they've run. And I have irreverently said sometimes that judicial decisions are like horse races; you know more about them after they're delivered.

There have been in my judgment some very curious decisions even by the Supreme Court of Canada, and I might add that an ex-judge of that Supreme Court said to me one day that certain questions I'd had about it were not questions at all; he

said they were quite wrong.

MR. WRIGHT: Well, there are several of us here who would second that idea.

MR. CHAIRMAN: Members of the committee, at the present time . . .

DR. FORSEY: Now, I don't know what the Supreme Court would say, of course; I've no idea. But I do say that there is a possible danger there which I hope will be explored in subsequent discussions of the accord. I'm not even saying that I would object to the courts ordering certain things, though I am a bit leery of giving the courts power at the expense of Parliaments and Legislatures.

MR. CHAIRMAN: At the present time I have no other names on my list, unless I missed some member. Are there any further questions of Dr. Forsey?

AN HON. MEMBER: I move we adjourn.

MR. CHAIRMAN: Well, we'll complete our agenda.
Mr. Hyland?

MR. HYLAND: That's what I was going to do too.

MR. CHAIRMAN: I first of all want to thank . . . Mr. Wright.

MR. WRIGHT: Under Other Business, where do we go from here, Mr. Chairman?

MR. CHAIRMAN: We'll come to that on the agenda.

I just want to first, though, express on behalf of all members our thanks to Dr. Forsey for being with us. I'm sure we have appreciated this opportunity to direct questions your way.
[applause]

DR. FORSEY: If I may be allowed to offer my thanks to the members of the committee for their perspicacity, their excellent questions, and to counsel of course likewise, and their searching questions and for the kindness and patience they have shown, especially with my [inaudible] of what I call my Newfoundland-West Country English temper.

MR. CHAIRMAN: Thank you again, Dr. Forsey.

Item 6 on our agenda is other business. Is there any other business to come forward at this time?

MR. WRIGHT: Except the next meeting and next evidence and so on.

Oh, I have some other business. I wonder if I can, through you, Mr. Chairman, ask the committee counsel to check out and confirm the statements I made about the use of both French and English, but of course specifically French, in the *Gazettes* of the Northwest Territories for the years in question. I can hand him the fruits of our research here that he can confirm or otherwise, and it can be just filed as a statement or evidence.

MR. RITTER: Mr. Wright, can you give me the years again that you were referring to?

MR. WRIGHT: Well, yes. To read into the record: our re-

search shows, subject to confirmation of course, that both French and English was used in the *North-West Territories Gazettes* for the years 1884 to 1889 inclusive. In our library the *Gazettes* for the years 1890 and 1891 are missing. For the years 1892 and 1893, both French and English were used. For 1894, English only was used; from January to August 1895, both French and English; from 1895 onwards, to the cessation of the Northwest Territories in this part of the world, English only.

MR. CHAIRMAN: Is that agreeable?

MR. RITTER: Yes, Mr. Chairman.

MR. CHAIRMAN: Very well, on Other Business, Mr. Wright has brought up the subject of the next meeting. As you recall, we had sort of scheduled and had definite commitments in respect to each meeting up to and including this evening. We have nothing absolutely scheduled, and I'm in the hands of the committee with respect to the next meeting, as to date and time. If you wish to leave that to the Chair to discuss with individual members -- Mr. Wright perhaps and one of the other members from the government party -- I would be pleased to do that and to work out a date and time and agenda for the next meeting.
Mr. Fox.

MR. FOX: At a previous meeting, Mr. Chairman, there were two other witnesses that were authorized or approved by the committee, Ms Barrett and Mr. Piquette. I'm wondering: is it the intention of the Chair or indeed the other members of the committee to pursue that and call either or both of those people? If so, perhaps we should schedule that.

MR. CHAIRMAN: Well, I'm in the hands of the committee in that regard. Any takers on that as to a suggestion? Mr. Russell.

MR. RUSSELL: Well, Mr. Chairman, I'm trying to put together the two things that have been put on the table. The date of our next meeting presumably could be next Wednesday evening. The House may or may not be in session the way it's going, or we could be here till July, I suppose. I would like some time to consider the calling of those witnesses. It was myself that suggested Ms Barrett.

MR. CHAIRMAN: Well, there being no suggestion or motion with respect to the agenda for the next meeting, I think what we will have to do then is leave it in the hands of the Chair to work out with the members, and we will certainly come back in good time and give all parties notice.

MR. RUSSELL: The reason I spoke, Mr. Chairman -- I didn't finish -- is that it looks like it would be easy to call those witnesses on short notice for next Wednesday if the House is still in session, and it looks like it will be. I've put a lot of ifs in there but . . .

MR. CHAIRMAN: Mr. Wright.

MR. WRIGHT: If it is the opinion of anyone on the committee that either or both of those particular people we have asked to be witnesses to date should in fact be present to give evidence, then it might be convenient to say next Wednesday for whichever one, whoever it is, subject to the fact that if it turns out that you don't really need either of them or of course that the House has

risen and so it will be inconvenient to come back, it can be canceled, rather than doing it the other way around. Then we can make a tentative . . . I suppose either way it doesn't matter too much. We should keep Wednesday clear in case.

MR. CHAIRMAN: I think that's a good idea. We should keep Wednesday definitely clear.

MR. WRIGHT: Apart from that, there is a piece of evidence that we have to file too. I suppose we can file it now. It's simply, Mr. Chairman, an excerpt from *Hansard* for, I think, 1974, showing an occasion where French was used in question period. I suppose the convenient thing to do would be to make a motion to receive that particular . . .

MR. CHAIRMAN: I'll accept that as a motion. All in favour of the motion? Carried. That'll be exhibit 10. We will distribute copies of that to all members, Mr. Wright.

Mr. Gibeault.

MR. GIBEAULT: Mr. Chairman, regarding the time of the next meeting, I was just going to offer that next Tuesday morning is available for our caucus. We've rearranged our weekly caucus meeting along our previous discussions, so that's a possibility. I'll just give that as advice.

MR. CHAIRMAN: Very good. Okay, then we'll leave it at that, and we will keep in touch to set our schedule and our agenda and our date and notify all the members accordingly. Mr. Hyland.

MR. HYLAND: I move we adjourn.

MR. CHAIRMAN: Motion for adjournment. All in favour, say aye. Contrary? The motion is carried.

[The committee adjourned at 9:53 p.m.]