

Point of Order—Mr. Clark

courts now, because they know that if they do the question will never again come to our courts.

Some hon. Members: Shame, shame.

Mr. Clark: The briefing goes on to say:

It seems abundantly clear that the legal power remains for the U.K. parliament to enact such a law for Canada—

That is the view of the Government of Canada:

And it also seems clear that they will do so whenever so requested by the Parliament and Government of Canada.

I will not get into the argument on that particular paragraph. I want, though, to continue the quotation:

The more troublesome question is that of the requirements of the conventions that is the practices of the Canadian Constitution with respect to constitutional amendment. While the convention is that the U.K. parliament will act when requested to do so by the Canadian Parliament, there is a potential problem with the Canadian convention concerning the role of the provinces prior to such a request being made.

● (1530)

This is one of the matters which has been raised by the provinces in the courts; it was foreseen in August and September by the government. The government document goes on to indicate:

An argument is already being advanced by Ontario that patriation with an amending formula would involve a change of a fundamental nature affecting the provinces and that on the basis of past practices there is now a clear convention in Canada that such action requires consultation with, and the consent of, all provinces.

According to the government's document, this was the position of Ontario which was put forward during the summer. Presumably this is still the position of Ontario. Certainly it is the position of eight other provinces involved in court actions. The document goes on to indicate:

This is based on the premise that the "unilateral" adoption of an amending formula would affect existing rights of the provinces, at least their "right" of veto over amendments. (Unilateral patriation combined only with an amending formula requiring unanimity would, on this basis, not be assailable.)

But that is not what we are dealing with; we are dealing with something that by the extension of logic would be assailable. It continues:

Further, it is argued that this convention would be enforced as a rule of law by the courts.

They anticipated that at the time they decided whether they would exercise their exclusive right to make a direct reference to the Supreme Court of Canada. I suspect, on the basis of this document, that one of the reasons they decided not to act in this case, as they acted on the Senate case, was that they were afraid the Supreme Court would find that what they were proposing was illegal now, just as it found what they were proposing was illegal in the case of the Senate.

I think it would be highly unsatisfactory for a country like ours to allow a legal device, such as the refusal of the government to exercise its exclusive right of reference, to permit the passage of a matter which would be unconstitutional. The document goes on to indicate:

It may therefore be fairly safely assumed that if the question somehow came before a Canadian court, it would uphold the legal validity of the U.K. legislation affecting patriation.

In other words, if they can get a British law back here, we cannot touch it. It continues:

The court might very well, however, make a pronouncement, not necessarily for the decision, that the patriation process was in violation of established conventions and therefore in one sense was "unconstitutional" even though legally valid.

That was the advice the government received from its own advisers back in August and September of last year. The document continues:

Obviously, the foregoing suggests that while unilateral action can legally be accomplished, it involves the risk of prolonged dispute through the courts and the possibility of adverse judicial comment that could undermine the political legitimacy, though not the legal validity, of the patriation package.

In other words, they are arguing and clinging to the narrowest kinds of interpretation of law. They are admitting, in light of the advice of their own advisers, that even if what they are doing were legal—and we on this side have yet to be convinced of that—it is illegitimate.

The document goes on to offer advice which unhappily was not taken:

This points up the desirability of achieving agreement with the provinces on a patriation package.

Obviously the government did not follow that course. Instead of waiting today for premiers who are looking for agreement on an amending formula, the government is continuing to ignore the advice received from its own advisers back in August and September and is trying to bull this question through.

The point is that this advice offered by its own advisers back in August and September was not accepted by the government. Instead, they acted unilaterally; they refused to make the reference to the Supreme Court which only they could make to ensure that what we were doing was legal, to ensure that what we were doing respected and did not abuse the constitutional law and practice of this country. They have sought to avoid the courts. After the Prime Minister (Mr. Trudeau) has been waiting, as he is fond of saying, for 54 years, why else would he want to rush this through before April 28? If we have waited 54 years, surely we could wait for the Supreme Court of Canada to act within 29 days.

Some hon. Members: Hear, hear!

Mr. Clark: Now they are trying to export the question before the courts can decide on it.

There is a section of this document which is germane to Your Honour's ruling because it speaks to the state of mind of the government, particularly as it addressed the question as to whether it would make a reference. I remind Madam Speaker and the House that if the government had made a reference, there would be no question about our ability to discuss the question: we could not discuss it. It would not be discussible before the House of Commons if the government itself had made a reference. I respectfully suggest that Your Honour