

real and substantial danger of prejudice to the court that is referred to in all the authorities.

The second matter to be dealt with is whether Parliament can proceed with a measure when the Supreme Court of Canada is considering precisely the question of the legality of Parliament's enacting that measure. That has nothing to do with how the question got there; it has to do with the fact the question is there and it speaks directly to the legality of what the House of Commons and Senate of Canada are being asked to do. Let me draw everyone's attention to the questions that were put before the Manitoba court. I apologize for taking the time to do this, but I think it is important we know precisely what is at issue here before the issue is forced out of the country. The first question to the Manitoba Court of Appeal was:

If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected, and, if so, in what respect or respects?

The second question is:

Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

The third question is:

Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

You will see, Madam Speaker, that each one of those questions has to do directly with whether or not we have the legal power as a Parliament to do alone what this government is asking this Parliament to do alone.

There are other questions raised by Mr. Justice O'Sullivan. For example, he made the point that when the Parliament of Canada is controlled by a party majority in both Houses, what is happening, in effect, is that it is not a parliamentary decision but a party decision that is being taken in this case. That was *obiter dicta* in the Manitoba court but it is a matter that Your Honour may well want to consider. What is precisely at issue before the Supreme Court is the right of Parliament to act alone on this question. That is precisely the legal question.

Now, I think there are real questions as to whether what we are being asked to do is legal. The court will begin to consider the legality of the government's proposed action on April 28. The government wants to act before the court decides whether our action is legal. That certainly offends my sense of justice as an individual Member of Parliament and as a Canadian, but it also fundamentally offends our rights and practices as a Parliament and people, and does so on one of the most fundamental questions that Parliament can ever be seized of.

Some hon. Members: Hear, hear!

Point of Order—Mr. Clark

Mr. Clark: The difficulty for you and this House, Madam Speaker, and the reason I raise the matter, is that we are on new ground here. To my knowledge, this matter has not been raised in Parliament before. If the question has arisen in practice, it has not been raised in this House before. We have never been involved in a direct conflict between a timetable of the Canadian government and that of the Supreme Court, yet that is what we are involved in here. The Supreme Court has set a timetable that begins on April 28, and the government is following a timetable that will end before that date. They are trying to get the question out of the country before the courts can begin consideration of it. To my knowledge, that has not happened before so you will have to consider the newness of this question in coming to your decision.

When Parliament has ruled on questions that are sub judice, the practice has always been to avoid prejudice to the courts; to protect the right of Parliament to bring in bills and legislate, but always to avoid prejudice to the courts. And as Madam Speaker argued in Friday's citation, the criterion has always been justice and fair play.

What must be decided now, in circumstances in which there is no specific parliamentary precedent, is whether it is just, fair, and without prejudice to the courts to allow a party majority to enforce enactment of a matter before the courts have a chance to decide whether that action is legal. That is the question before us and it is one of very real importance to us all.

In coming to your decision, Madam Speaker, you will want to consider a number of matters, including the stated intention of the government in the so-called Kirby document. I want to quote from that document because, among other things, it made reference to possible legal challenges to the unilateral implementation process. Under the heading "The Legal Position" it says:

As soon as the contents of a unilateral patriation package become known, upon introduction in Parliament, it can be assumed that opposition both inside and outside Parliament will focus more on the validity of the procedure than on the contents of the package and most likely will demand that a reference be taken to the Supreme Court before the resolution proceeds further in Parliament.

In other words, the government expected that would happen back in August and September of last year. It goes on:

It will be necessary to have a position on this matter at that time.

As to the question of validity, it is the view of the Department of Justice—

This is not just somebody in the Privy Council writing a memorandum; this is reporting the view of the Department of Justice.

—that a law passed by the U.K. parliament to patriate the Constitution, with an amendment formula and other changes, could not be successfully attacked in the courts.

What that is saying, Madam Speaker, is that if we get this question out of Canada to Britain, then it could well be beyond the courts of Canada forever. That is the view of the Department of Justice upon which presumably this government is acting. That is why the government want to get away from our