

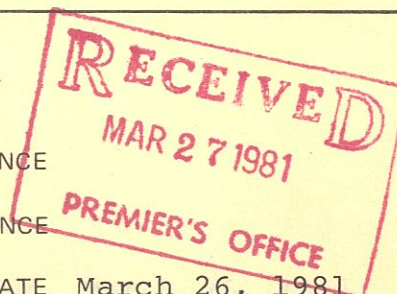
Court

Legal 1981 (Diary)

PROVINCIAL ARCHIVES OF ALBERTA	
ACC.	85.401
285	

ATTORNEY GENERAL

CONFIDENTIAL



FROM Neil Crawford,
Attorney General
227 Legislative Building

OUR FILE REFERENCE

YOUR FILE REFERENCE

TO Hon. Peter Lougheed,
Premier
307 Legislative Building

DATE March 26, 1981

TELEPHONE 427-2339

SUBJECT AN APPROPRIATE REFERENCE QUESTION RELATED TO PATRIATION

Attached please find observations as to whether a question should be put to our Appeal Court soliciting an opinion as to whether the Canada Act, if passed by the United Kingdom Parliament, in spite of a substantial provincial opposition, would still be effective law in Canada.

There is no doubt that a specific question should have been posed to one of the courts. You will recall, however, that in spite of the submissions in Winnipeg, before the Manitoba Reference was laid down, the Honourable Mr. Crawford, you and myself, we could not get any of the provinces to entertain such a question. The position was that the question was, by and large, contrary to the wishes of the Quebec, Manitoba and Saskatchewan representatives.

Neil Crawford,
Attorney General

You will also recall that our draft questions (which we advanced in Winnipeg and are attached) proposed by Mr. Pagano, after numerous discussions by the House of Commons, had a question that certainly was congruent in substance to the one now being considered. This question was:

Attachment

If the Canada Act is enacted by the Parliament of the United Kingdom in the first address of the House of Commons and the Senate of Canada to Her Majesty the Queen under the provisions of the Act, is the question that, in spite of a substantial opposition of that Act, it is still effective law in Canada?

However, I do not recommend that such a question be now referred to our court.

ATTORNEY GENERAL

CONFIDENTIAL

FROM Wm. Henkel, Q.C.
Assistant Deputy Minister
(Constitutional and Energy) Law

TO Mr. R. W. Paisley, Q.C.
Deputy Attorney General

OUR FILE REFERENCE

YOUR FILE REFERENCE

DATE March 26, 1981

TELEPHONE 427-9625

SUBJECT AN APPROPRIATE REFERENCE QUESTION RELATED TO PATRIATION

*// You asked me to consider whether the Lieutenant Governor of Alberta might consider a reference to the Appeal Court of Alberta. The question would be to the effect that, if the Canada Act and the resultant Constitution Act were passed by the U.K. Parliament, would that law, in spite of opposition by numerous provinces, be valid and binding in Canada.

// There is no doubt that such a specific question should have been posed to one of the courts. You will recall, however, that in spite of the submissions (in Winnipeg, before the Manitoba Reference was launched) by The Honourable Mr. Crawford, you and myself, we could not get the rest of the provinces to entertain such a question. My recollection was that the meeting was, by and large, influenced to the contrary by the Quebec, Manitoba and British Columbia representatives.

You will also recall that our draft questions (which we advanced in Winnipeg and are attached), prepared by Mr. Pagano, after numerous discussions by the three of us, had a question that certainly was congruent in substance to the one now being considered. This question reads:

If the Canada Act is enacted by the Parliament of the United Kingdom on the joint address of the House of Commons and the Senate of Canada to Her Majesty the Queen under the circumstances set out in question 2, is the Constitution Act, 1980 or any provision of that Act on its proclamation in force in Canada?

However, I do not recommend that such a question be now referred to our court.

. . . /2

March 26, 1981

Reasons for Not Posing the Question at This Time

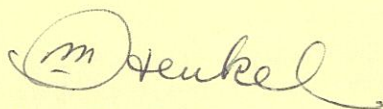
The Manitoba case has now been appealed. The Supreme Court of Canada may well await the decision of the Newfoundland court, which I understand is imminent, and possibly that of the Quebec Court of Appeal. I greatly doubt that they would await an Alberta decision.

In addition to the foregoing, one has to admit that the issue has been argued in the other courts, even though it was not specifically framed as a question. It is an integral part of the "conventions" argument and the Alberta "rule of law" argument. Numerous, if not all the factums cited Justice Rand's observations in a Canadian Bar article that the U.K. was only a bare trustee. Therefore, it follows that if the bare trustee legislates in contravention to the wishes of some of the beneficiaries of the trusteeship, such action, although theoretically a valid British statute, would not be applicable, binding law in Canada. In fact, in Newfoundland, one of the arguments advanced, by way of example, was that the U.K. Parliament could no doubt pass a statute giving people of British descent in New York State the right to vote, but such a statute would not be the law of New York State.

Moreover, since it can be demonstrated that this question has in fact been indirectly dealt with, we probably would not have any provinces join our effort. This would mean that Alberta, after a rash of references in the other provinces, would be looked upon as a bit of a loner, and it might be interpreted by the public as a break in the "six province" approach.

Also, it seems imperative that Sections 2, 4 and 7 of the Statute of Westminster would be part of the "bare trustee" argument. And again, although not with any consensus or uniformity, these sections have been canvassed in the arguments in the other courts. These sections are attached as Appendix II.

I conclude as I started, by recognizing the question as one that should have been put, and especially if the Prime Minister moves to put the Resolution in the hands of the British.



Wm. Henkel, Q.C.
Assistant Deputy Minister
Constitutional and Energy Law

WH/fe

Attachments

Constitutional Questions Act

Appendix

1 In this Appendix, "Canada Act" includes

- (a) Schedule A to the Canada Act, and
- (b) the Constitution Act, 1980 as set out in Schedule B to the Canada Act, and
- (c) Schedule 1 to the Constitution Act, 1980.

2 Do the House of Commons and the Senate of Canada have the authority to request the Parliament of the United Kingdom to enact the Canada Act or any provision of the Canada Act as referred to in the Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, attached as Schedule I, in each of the following circumstances:

- (a) without the consent of any of the provinces;
- (b) with the consent of one or more of the provinces?

3 If the Canada Act is enacted by the Parliament of the United Kingdom on the joint address of the House of Commons and the Senate of Canada to Her Majesty the Queen under the circumstances set out in question 2, is the Constitution Act, 1980 or any provision of that Act on its proclamation in force in Canada?

4 To what extent are the House of Commons and the Senate of Canada and the Parliament of the United Kingdom bound by established convention in dealing with the enactment of laws affecting the assets, property, natural resources, rights, privileges or legislative powers of a province?

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Meaning of
"Dominion"
in this Act

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Validity of laws
made by
Parliament of a
Dominion. 28 &
29 Vict. c. 63

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Power of
Parliament of
Dominion to
legislate extra-
territorially

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

la législation de ce Dominion, sauf à la demande et avec l'agrément de celui-ci;

Considérant que la ratification, la confirmation et la mise à effet de certains desdits énoncés et vœux desdites Conférences nécessitent la confection et l'adoption, par autorité du Parlement du Royaume-Uni, d'une loi en bonne et due forme;

Considérant que le Dominion du Canada, le Commonwealth d'Australie, le Dominion de la Nouvelle-Zélande, l'Union Sud-Africaine, l'État libre d'Irlande, et Terre-Neuve ont solidairement demandé et agréé de saisir le Parlement du Royaume-Uni d'une mesure tendant à statuer, quant aux questions susdites, dans le sens prescrit ci-après dans la présente loi:

A ces causes, qu'il soit édicté ce qui suit par Sa Très Excellente Majesté le Roi, de l'avis et du consentement et par autorité des lords spirituels et temporels et des communes en le présent Parlement assemblés:

1. Dans la présente loi l'expression «Dominion» signifie l'un quelconque des Dominions suivants: le Dominion du Canada, le Commonwealth d'Australie, le Dominion de la Nouvelle-Zélande, l'Union Sud-Africaine, l'État libre d'Irlande, et Terre-Neuve.

Signification du
mot
«Dominion»
dans la présente
loi

2. (1) La Loi de 1865 relative à la validité des lois des colonies ne doit s'appliquer à aucune loi adoptée par le Parlement d'un Dominion postérieurement à la proclamation de la présente loi.

Validité des lois
émancées du
Parlement d'un
Dominion. 28 et
29 Vict. ch. 63

(2) Nulle loi et nulle disposition de toute loi édictée postérieurement à la proclamation de la présente loi par le Parlement d'un Dominion ne sera invalide ou inopérante à cause de son incompatibilité avec la législation d'Angleterre, ou avec les dispositions de toute loi existante ou à venir émanée du Parlement du Royaume-Uni, ou avec tout arrêté, statut ou règlement rendu en exécution de toute loi comme susdit, et les attributions du Parlement d'un Dominion comprendront la faculté d'abroger ou de modifier toute loi ou tout arrêté, statut ou règlement comme susdit faisant partie de la législation de ce Dominion.

3. Il est déclaré et statué par les présentes que le Parlement d'un Dominion a le plein pouvoir d'adopter des lois d'une portée extra-territoriale.

Pouvoir du
Parlement d'un
Dominion de
légiférer extra-
territorialement

Parliament of
United
Kingdom not to
legislate for
Dominion
except by
consent

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.

4. Nulle loi du Parlement du Royaume-Uni adoptée postérieurement à l'entrée en vigueur de la présente Loi ne doit s'étendre ou être censée s'étendre à un Dominion, comme partie de la législation en vigueur dans ce Dominion, à moins qu'il n'y soit expressément déclaré que ce Dominion a demandé cette loi et a consenti à ce qu'elle soit édictée.

Le Parlement
du Royaume-
Uni ne doit
légiférer pour un
Dominion que
du consentement
de celui-ci

Powers of
Dominion
Parliaments in
relation to
merchant
shipping. 57 &
58 Vict. c. 60

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

5. Sans préjudice de l'ensemble des dispositions précédentes de la présente Loi, les articles sept cent trente-cinq et sept cent trente-six de la Loi de la Marine marchande, de 1894, doivent être interprétés comme si la mention de la Législature d'une possession britannique ne s'appliquait pas au Parlement d'un Dominion.

Pouvoirs des
Parlements des
Dominions
relativement à
la Marine
marchande. 57
et 58 Vict. c. 60

A.D. 1931.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

6. Sans préjudice de l'ensemble des dispositions précédentes de la présente Loi, et dès la mise en vigueur de celle-ci, doivent cesser d'avoir effet dans les Dominions: l'article quatre de la Loi relative aux cours coloniales d'amirauté, de 1890, (qui exige que certaines lois soient réservées en attendant la signification du bon plaisir de Sa Majesté, ou contiennent une clause suspensive), et la partie de l'article sept de ladite loi qui exige l'approbation par Sa Majesté en son conseil de toute règle de cour concernant la pratique et la procédure d'une cour coloniale d'amirauté.

Pouvoirs des
Parlements des
Dominions
relativement
aux Cours
d'amirauté. 53 et
54 Vict., c. 27

Saving for
British North
America Acts
and application
of the Act to
Canada

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

7. (1) Rien dans la présente Loi ne doit être considéré comme se rapportant à l'abrogation ou à la modification des Actes de l'Amérique du Nord britannique, 1867 à 1930, ou d'un arrêté, statut ou règlement quelconque édicté en vertu desdites Actes.

Exception dans
le cas des Actes
de l'Amérique
du Nord
britannique et
application de
la Loi au
Canada

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(2) Les dispositions de l'article deux de la présente Loi doivent s'étendre aux lois édictées par les provinces du Canada et aux pouvoirs des législatures de ces provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

(3) Les pouvoirs que la présente Loi confère au Parlement du Canada ou aux législatures des provinces ne les autorisent qu'à légiférer sur des questions qui sont de leur compétence respective.

Saving for
Constitution
Acts of Australia
and New
Zealand

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the

8. Rien dans la présente Loi n'est censé conférer le pouvoir d'abroger ou de modifier la Constitution ou la Loi constitutionnelle du

Exception dans
le cas des Lois
constitution-
nelles de
l'Australie et de
la Nouvelle-
Zélande