• (1420)

QUESTION PERIOD

[*English*]

THE CONSTITUTION

EFFECT OF JUDGMENT OF SUPREME COURT OF NEWFOUNDLAND

Hon. Raymond J. Perrault (Leader of the Opposition): Honourable senators, yesterday a number of questions were asked on the subject of the Constitution, and I undertook to inquire of the appropriate sources in the government and to obtain certain information requested by the Leader of the Opposition. I suggest that it may be useful for this statement to be made at the outset of the Question Period.

Hon. Senators: Agreed.

Senator Perrault: Indeed, it may remove the need to ask some of the questions that might have been anticipated.

Senator Asselin: Is it a statement?

Senator Perrault: Yes.

Senator Asselin: Do you have a copy of it?

Senator Perrault: It is a reply to a question; it is not an official government statement.

Yesterday the Leader of the Opposition raised several points during the Question Period relating to our consideration of the constitutional resolution before us, and reference of that resolution to the Supreme Court of Canada.

Senator Flynn, the Leader of the Opposition, asked whether the government has taken a decision in consequence of the judgment of the Supreme Court of Newfoundland, whether a decision has been made to appeal this judgment to the Supreme Court of Canada, and, if so, in what form. He also asked about the intentions of the government with respect to the continuation of the debate on the resolution in Parliament.

Honourable senators, the position the government has taken—after hearing the decision rendered by the court in Newfoundland and after learning at the end of last week that the Supreme Court of Canada had decided to hear the constitutional case before the end of this month—has been to express the hope that these two cases will be brought before the Supreme Court of Canada, as well as the judgment of the Quebec Court of Appeal, if it is rendered in time. In other words, the government would like to have the Supreme Court of Canada adjudicate all the cases which were brought before the courts by the provinces.

Hon. Jacques Flynn (Leader of the Opposition): May I ask at this point if Senator Guay is listening?

Senator Guay: A good point.

Senator Frith: Explain.

Senator Perrault: I have found that Senator Guay always listens intently.

Senator Flynn: He doesn't understand it the same way as I do.

Senator Perrault: How that will be done has not been decided at this stage.

With respect to the continuation of the debate on the resolution in Parliament, the government views it as desirable that the resolution should be in its final form for the court to be able to give a proper opinion. This is indeed what Chief Justice Freedman of the Manitoba Court of Appeal said in his judgment, and I quote:

> We therefore face a real likelihood that the amendments sought on the proposed resolution may be altered, deleted, or supplanted by other amendments before the resolution is deemed ready for transmission to Her Majesty. In this situation there is a danger that if we answer question . . . 1 we may later find that we have answered matters no longer before us and have not answered matters that emerged in their stead. The court should not be exposed to the risk of such an adventure in futility.

The Supreme Court of Canada, in the past has also frequently objected to receiving matters referred to it because of their hypothetical nature.

As I stated yesterday, Mr. Justice Bora Laskin stated in 1971 that:

> The utility of the reference as a vehicule for determining whether actual or proposed legislation is competent under the allocations of power made by the British North America Act is seriously affected in the present case because there is no factual underpinning for the issues that are raised by the order of reference.

As the Prime Minister said in the other place yesterday, the government's

> —proposal has the advantage of going to the courts with something certain and final. If it is legal, that settles the matter; if not, it also settles the matter.

• (1425)

The Honourable Senator Flynn brought up the point that Parliament may be in contempt of court if it continues to discuss the matter. May I quote from the March 31 ruling of the Honourable the Speaker of the other place on that matter, in which Madam Speaker said:

> With regard to the sub judice aspect, at the outset it should be made quite clear that any practice or convention of the House to discontinue or not initiate discussion on a matter for the reason that it was then before the courts would have to be a voluntary or self-imposed practice or convention because the Bill of Rights of 1688, which is part of the law of the Parliament of Canada, provides that:
>
> —freedom of speech and debate and proceedings in Parliament may not be questioned . . . in any court or place out of Parliament.

Sub judice is such a practice or convention. It is one that the House has imposed on itself to avoid discussing matters which are then under judicial consideration or before the courts.

Sir Robert Peel probably best summed up the essence of the convention when he said in 1844:

> —that the right of Parliament as the highest court in this land to discuss what it will cannot be limited, but that good taste and sense of fair play should in some circumstances limit the exercise of that right.

The purpose of the practice is to avoid any discussion in the House which might have a prejudicial effect on an accused or on the parties to a civil action, since it might influence a jury or witness when they read of it in the newspapers or see it on television. It is rightly doubtful that judges are liable to be influenced by anything spoken in the House.

In respect of criminal matters it is clear both here and in the United Kingdom that once a person has been charged in the courts in a criminal matter, it is the correct practice not to permit the matter to be raised in the House.

In respect of civil litigation matters the United Kingdom House in 1963 laid down a rule that once the case is set down for trial, the issues should not be raised in the House.

The position of the Canadian House in this respect appears to provide more latitude. In 1976 the Speaker said, and I quote:

> —in any event no restriction ought to exist on the right of any member to put questions respecting any matter before the courts, particularly those relating to a civil matter, unless and until that matter is at least at trial.

In 1971 the United Kingdom House resolved to allow references to be made to matters awaiting or under jurisdiction in all civil courts, subject to the discretion of the Chair and provided that there is no real and substantial danger of prejudice to the proceedings. This seems to provide even more and wider latitude.

In this context, in the same year, 1971, the Speaker of the Canadian House felt that the traditional position that a member while speaking must not refer to any matters upon which a judicial decision is pending, as set out in Beauchesne:

> —should be interpreted as narrowly as possible. I doubt very much if the Chair should be called upon to intervene whenever a Member refers to a matter which is before the Courts.

Furthermore, whatever self-imposed practice exists both in the United Kingdom and Canadian chambers in respect of matters that are before the courts, it is settled both here and in the United Kingdom that the practice would not be applied in the case of a bill, that is, while the House is involved in the legislative process—and I insist on that word. In other words, the House will not for any reason stop discussing outside events while embarked on the legislative process. Otherwise, it would mean that the courts could bring parliamentary proceedings to a halt, whereas one of the corporate rights of the House is to manage its internal affairs without their interference.

The proceedings in Parliament relating to the proposed Address to the Queen contained in the proposal presently before the House is not only a parliamentary procedure in Canada but is also part of the legislative process in respect of constitutional amendment. The address contains the proposed bill and the process being undergone comes within the exception referred to by Erskine May, in that the practice of sub judice is not applied to the legislative process.

With respect to issues beyond those relating to Criminal Code offences or traditional Civil litigation, the present rule in the U.K. House is that subject to the discretion of the Chair, reference may be made in the House to matters awaiting or under adjudication in all civil courts in so far as such matters concern issues of national importance, such as the national economy, public order or the essentials of life. Of course, if the matter is before the courts by virtue of a resolution of the House of Commons, the sub judice convention would no doubt be invoked, but only then. It is trite to say that the subject matter of the minister's resolution is an issue of national importance.

• (1430)

It is hoped that this statement has responded to some of the concerns of the Leader of the Opposition and other honourable senators.

Senator Flynn: Honourable senators, I think the Leader of the Government has provided us with some ammunition which can be used one way or the other on the motion that I indicated yesterday I will move—perhaps I will not, but that is all right. I ask the question, really, in an effort to find out from the Leader of the Government the exact intention of the government in referring this resolution to the Supreme Court.

From what the Leader of the Government has said, I gather that the government is prepared to refer to the Supreme Court, under section 55 of the Supreme Court Act, the so-called constitutional package as it would be passed by the House of Commons and the Senate, but that the government is not prepared at this time to submit the package as it is presently before the house, possibly with some suggested amendments by the opposition parties. I was wondering what difference the Leader of the Government sees between the two positions.

Senator Perrault: Honourable senators, I would like to clarify the situation. No decision has been made with respect to a reference of the package as a whole under the Supreme Court Act. The words I employed related to the Quebec Court of Appeal, the Supreme Court of Manitoba and the Supreme Court of Newfoundland. However, let me say, honourable

senators, that I understand that discussions and negotiations involving the house leaders and the parties in Parliament are under way this afternoon. Perhaps a course of action will be adopted ultimately which may meet the needs of all of the parties. I think that some honourable senators are also aware of that fact.

Senator Flynn: That is fine. Though I do not want to press the Leader of the Government, I would like to be told exactly what the government's intentions are. I am sorry that Senator Guay has left the chamber, but I think that the Leader of the Government has just confirmed what I understood the Prime Minister to say yesterday, which is that he would rather have the Supreme Court deal with all of the cases which were before the provincial courts of appeal. Is that correct?

Senator Perrault: That is the present position of the government.

Senator Flynn: Thank you.

Hon. Arthur Tremblay: May I ask a supplementary question in that regard? If it is only the resolution which has been submitted to the appeal court, if I am correct, it is the resolution in its first draft. I am referring to the draft resolution which was referred to the joint committee last fall for consideration, and not the draft which resulted from the committee's consideration, including the 67 amendments introduced by the members of the committee.

• (1435)

Taking into account that the Manitoba Court of Appeal rendered its decision before the committee had concluded its consideration of this resolution, it seems clear that a decision was based on the October draft of the resolution, in which case, the amendments introduced by the committee, and those suggested by the House of Commons and the Senate, which form a significant part of the resolution as it is now, will not be under consideration by the Supreme Court.

My interpretation is that the Newfoundland Supreme Court and the Quebec Court of Appeal will both be making a decision on the same subject matter, that is, the first draft of the resolution, not on the draft which is now before us.

Will there be a way, other than by a reference from the Governor in Council, to have the amendments of the committee put to the Supreme Court because, surely, the idea is that all of the package, including the amendments of the committee and other possible amendments, should be put to the court.

Senator Perrault: I repeat what I said earlier: negotiations are under way involving the parties represented in Parliament. The position that I have outlined is the position presently held by the government.

The government is aware of some of the concerns which have been expressed by the opposition. The government is concerned with obtaining the view of the Supreme Court, and methods are being considered to achieve the goal which has been delineated by the honourable senator and the Leader of the Opposition.

Hon. Allister Grosart: Supplementary to the question which has been raised, did I correctly understand the deputy leader, in his earlier comment, to say that certain arrangements would be pending "reference to the Supreme Court"? I believe that was the phrase the deputy leader used. Was he indicating to us that the government had decided to refer the "package", as it is called, to the Supreme Court, or was he using the phrase in a very loose sense to suggest that the reference might also include an appeal? He did use, I believe, the phrase, "reference to the Supreme Court." Was he indicating that the government has decided that there will be a reference to the Supreme Court?

Senator Frith: I was not using the word "reference" in the narrow sense.

Hon. Lowell Murray: May I ask the Leader or the Deputy Leader of the Government if the government has considered what its position would be if, once Parliament had passed the resolution, it were found, in some aspects, to be *ultra vires* or faulty by the Supreme Court of Canada and the government wished to correct those aspects? Would it not have to start all over again?

Senator Perrault: Honourable senators, at least the first sentence of the question posed by the honourable senator is clearly hypothetical. However, the Prime Minister stated yesterday, or the day before, that, of course, the government would certainly examine its position should such an eventuality occur, and other courses of action would then be considered. This is clearly a hypothetical question.

[*Translation*]

Hon. Martial Asselin: Honourable senators, on a supplementary. Before referring to the Supreme Court for a declaratory judgment the whole matter now before both Houses, would it not be more proper, and perhaps more courageous on the part of the government, to consult the provinces beforehand and find out whether agreement could not be reached at least on an amending formula? I feel that if the federal government were to do that, it would prove to the Supreme Court at least the legitimacy of its action.

[*English*]

Senator Perrault: Honourable senators, many efforts have been made over a number of years to develop an amending formula that has the support of all the Canadian provinces. I am sure you are all aware of the recent meetings, involving, I believe, six provinces, which were held to agree on a wording for an amending formula. Obviously, agreement was not achieved because, certainly, a press conference would have been held and the information provided to an awaiting Canada. But Canada has been waiting for many years for an amending formula. Just three weeks ago I spoke to one of the provincial premiers who advised me that two provinces were still unable to agree on the type of amending formula that would be satisfactory to the other provinces.

The record clearly shows that the federal government has made strenuous efforts to develop an amending formula in co-operation with the provinces. Honourable senators will

recall the conference held in Victoria in 1971. At one point during the course of the conference all the provinces agreed to an amending formula.

Senator Asselin: That was a long time ago.

Senator Perrault: That formula, which came to be called the Victoria formula, is under strenuous attack by the western provinces today, whereas in 1971 it was held up as the protector of western rights and was enthusiastically supported by the Honourable W. A. C. Bennett, the then premier of British Columbia, the Premier of Alberta, the Premier of Saskatchewan and the Premier of Manitoba.

Senator Asselin: Times have changed.

Senator Perrault: The search for an amending formula seems to be more elusive than the search for the Holy Grail.

Senator Frith: Under this proposal, there are still two more years.

Senator Asselin: Don't talk about two years; we want a decision now.

Senator Perrault: The deputy leader has reminded me that this proposal provides for a veto for all the provinces for a full two years after the Constitution is brought home. The provinces and the federal government will have two years to negotiate and agree to an amending formula. There is also the provision for a referendum to allow the people to decide, should that become necessary. Surely, there could not be a more forthcoming attitude by any national government than that demonstrated by this government.

Senator Asselin: I am talking about now.

Senator Frith: Then vote for the proposal, and you can have it right now.

ENERGY

QUEBEC AND MARITIMES PIPELINE—MAINLAND TO VANCOUVER ISLAND PIPELINE—GOVERNMENT ASSISTANCE

Hon. Richard A. Donahoe: Honourable senators, I direct my question to the Minister of State for Economic Development. In the submission of the Nova Scotia government to the National Energy Board, during the hearing of the application of the Trans Quebec & Maritimes Pipe Lines, there was included a statement to the effect that the federal government had indicated that it would provide $101 million to help build a natural gas distribution system in Nova Scotia. While I am prone to accept statements made on the authority of the Government of Nova Scotia, would the minister say whether it is his understanding that this is a correct statement and, if so, would the minister be prepared to confirm that commitment?

Hon. H. A. Olson (Minister of State for Economic Development): I will look into the matter, honourable senators.

Senator Donahoe: I have a supplementary question. The government, through the National Energy Program, committed $500 million in support of both the eastern Canada system extension and the new line to Vancouver Island. While the minister is looking into the question of whether the government is, indeed, prepared to put up $101 million, which the Province of Nova Scotia says it has committed, will he also ascertain whether that amount of $101 million is part of the eastern Canada system extension and, if so, whether it is part of the commitment of $500 million or is an additional commitment?

Senator Olson: Honourable senators, I will look into that question as well.

Senator Donahoe: Honourable senators, I have a further supplementary question. Has the government received an indication, similar to the one given last week by Trans Quebec & Maritimes Pipe Lines, from either B.C. Hydro or Westcoast Transmission Company Limited as to how much money they will require from the federal government in order to proceed with the construction of the line to Vancouver Island once it is approved by the National Energy Board?

Senator Olson: I believe that at least two proposals based on studies have been made with regard to the construction of a gas pipe line from the mainland to Vancouver Island. If those proposals or studies are available, I will provide them to the honourable senator.

OIL AND GAS EXPLORATION LICENCES—PROVINCIAL REVENUES

Hon. G. I. Smith: Honourable senators, I should like to direct a question to the Minister of State for Economic Development. It relates to a delayed answer provided by the minister to a question of mine. The delayed answer can be found on page 1641 of the proceedings of this house for February 11, 1981, and it reads, in part as follows:

> Honourable senators, I have another delayed answer I should like to give in response to a number of questions raised on December 16 by Senator Smith. His questions concerned oil and gas exploration licences.

Then the minister made a reference to British Columbia land sales which were held on January 21. The ending of the delayed answer reads:

> In Alberta no official estimate has been made by that province regarding revenue expectations from land sales for the year 1981.

Would the minister tell me whether it is correct to say that figures are now available for Alberta government revenues from sales of land for oil and gas drilling exploration for the first quarter of 1981? If so, is it correct to say that these revenues amounted to approximately $62 million, as compared to $280 million for the same period in 1980, which amounts to a decrease of about 78 per cent?

Hon. H. A. Olson (Minister of State for Economic Development): Honourable senators, I understand that certain figures are now available. I shall take the honourable senator's question as notice, and in the meantime I shall try to determine whether those figures can be reconciled with what has been the position of Alberta. Of course, my honourable friend will