F 3-1113

June 17th, 1981.

COMMENTS ON QUEBEC DOCUMENT
ENTITLED "BACKGROUND BRIEF NO. 6
- THE CURRENT STATUS: THE SUPREME HEARINGS"

The document presents, at the very least, a gross distortion of the facts and in many places borders on dishonesty.

Assertion in the Document

The document contends that the federal government admitted for the first time before the Supreme Court that the constitutional proposal would limit provincial legislative powers.

Facts

The federal government has admitted from the beginning, both publicly and in arguments before the Canadian courts, that the constitutional proposal will diminish provincial legislative powers.

When the constitutional proposal was first tabled in the Canadian House of Commons and Senate in October, 1980, the government published an explanatory document entitled "The Canadian Constitution 1980, Explanation". At page 13 of that publication the following is found:

> "An entrenched Charter of Rights and Freedoms will limit the power of Parliament and provincial legislatures to pass laws ... ".

Paragraph 12 of the written argument, dated November 26, 1980, and filed by the Attorney General of Canada in the Manitoba Reference case reads as follows:

> "The proposed Charter of Rights and Freedoms would not involve any transfer of powers between federal and provincial authorities. It would place certain limitations on both federal and provincial legislatures ... .
>
> In summary, the proposed legislation would in no way upset the existing equilibrium as between federal and provincial governments or between federal and provincial legislatures. It would confer additional authority on both the federal Parliament and on provincial legislatures by enabling them to amend what can now be amended only by the United Kingdom Parliament."

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Identical or almost identical submissions are found in the argument of the Attorney General of Canada to the Newfoundland Court of Appeal, dated January 30, 1981 (paragraph 17), and to the Quebec Court of Appeal, dated February 27, 1981 (paragraph 41).

Assertion in the Document

The document correctly points out that it is the federal position that it is a resolution which is sent to London by the Senate and House of Commons. It implies, however, that there is something suspect in this contention. The document states:

> "This federal position was further discussed orally before the Supreme Court by federal government counsel, Maître Raynold Langlois. He affirmed that the Resolution was merely a mechanism by which the federal Parliament made known its wishes. The subject matter of the Resolution would not change its nature; it would not be an Act of Parliament, but would remain a resolution."

Facts

The federal position is and has been that the two Houses of the Canadian Parliament adopt a resolution which contains the text of the constitutional amendment requested by those two Houses. The request is made, through the Queen, to the United Kingdom Parliament which then enacts the appropriate legislation. It is hard to understand what the Quebec document is intending to imply when it says "the Resolution would not change its nature; it would not be an Act of Parliament". It would not be an act of the Canadian Parliament, obviously. It remains a resolution but when the request is acceded to, the constitutional amendment requested by the resolution becomes an Act of the U.K. Parliament.

An excerpt from the written argument of the Attorney General of Canada before the Supreme Court clearly establishes his position:

> " ... the practice invariably followed from 1867 to 1931 established a two-part convention:
>
> (a) only the Government or the two Houses of the Parliament of Canada can ask the Parliament of the United Kingdom to exercise its legal authority to amend the Constitution of Canada; and
>
> (b) the Parliament of the United Kingdom always acts upon the request of the two Houses of the Parliament of Canada."
>
> (Paragraph 149 of the written argument of the Attorney General of Canada, before the Supreme Court.)

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The further argument of the Attorney General (in paragraph 185) describes the situation after the Statute of Westminster was enacted in 1931. It noted that the pre-existing convention continued:

> " ... the Parliament of the United Kingdom conserved its full legal authority to amend the Constitution of Canada, such authority being exercised, as a matter of convention, on the request of the two Houses of the Canadian Parliament."

Assertion in the Document

> "Under cross-examination, the federal government counsel also conceded that when formed as a resolution, any 'request' was possible, even to the extent of a resolution requesting the abolition of the provinces."

Facts

There was, of course, no "cross-examination" in the hearing before the Supreme Court. The Supreme Court is an appeal court.

The Attorney General of Canada's argument on this point is found in paragraph 220 of his written presentation to the Supreme Court.

> "Some provinces argue that, because it /the authority of the two Houses of the Canadian Parliament to adopt resolutions for constitutional amendments/ could be used to transform completely the federal nature of Canada, the power to request amendments cannot possibly reside in the Canadian Senate and House of Commons, and the power to enact legislation in response to such request cannot possibly reside in the Parliament of the United Kingdom. While the Resolution seeks to maintain federalism and does nothing to change the equilibrium of Canadian federalism, it remains the case, in any event, that the way in which a power might conceivably be exercised is not a reason to deny the existence of that power. See Bank of Toronto v. Lambe (1887). 12 A.C. 575 at page 587. The totally unrealistic hypothetical situation to which the provinces refer is not in issue in this case."

Further, in oral argument the Attorney General of Canada clearly pointed out that once the constitutional proposals are law, the provinces will be accorded a guaranteed role in amendments to the Constitution. Thus, thereafter, the federal authority to unilaterally obtain amendments would no longer exist.

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Assertion in the Document

> "The federal government also conceded that if what presently appears in the proposed Resolution were to appear as a statute, it would be justiciable and could be declared ultra vires. Mr. J.J. Robinett, Q.C., admitted that the only reason a resolution enjoys an immunity that a statute does not have, is purely because it is a resolution."

Facts

The description in the document leaves out one obvious fact: by definition any such amendment which Canada finds necessary to request from the United Kingdom would be invalid if enacted by the Parliament of Canada. If there was authority in Canada to enact the required amendments, it would be unnecessary to make any request to Britain to legislate. That has been equally true of all past amendments requested of Westminster by the Parliament of Canada.

Assertion in the Document

> "At the Supreme Court hearings, it was further admitted by the federal authorities that the present proposal is unprecedented ... "

Facts

The federal government did admit the proposal was unprecedented - never before has Canada asked to have its Constitution fully repatriated. If it had, the problem would no longer exist.

Another federal argument on the unprecedented nature of the action is set out in paragraphs 14-15 of its written argument:

> "There is no precedent in Canadian legal or political history for the circumstances surrounding this reference. The search for over half a century by an otherwise sovereign nation for a formula to permit it to amend its Constitution has been pursued to the point of paralysis and without reward ...
>
> For the past fifty-four years, the federal government and the provincial governments have attempted unsuccessfully to reach agreement on constitutional reform and on a legal process that would end this unsatisfactory state of affairs ... "

The federal argument describes the circumstances surrounding as unprecedented, not the procedure followed.

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Assertion in the Document

> "In 1907 no such convention existed, as evidenced by the statements of Lord Elgin and Mr. Churchill in discussions of a proposed amendment which was opposed by British Columbia. On this occasion, Westminster changed the wording of the amendment."

Facts

The Kershaw committee concluded, and those provinces opposed to the constitutional proposal have repeatedly stated, that in 1907 the United Kingdom Parliament changed a request made by the two Houses of the Canadian Parliament in response to representations of British Columbia. As set out in the federal publication "The Role of the United Kingdom in the Amendment of the Canadian Constitution" (paragraph 59), and in the written arguments of the federal government before the courts in Canada, the change was a small drafting change, suggested by the U.K. draftsman and agreed to by the Canadian government, before representations from B.C. were received by the U.K. Parliament.

Assertion in the Document

> "It is the central contradiction of the federal government's position that on the one hand Westminster has full and sole legislative authority to amend the Canadian constitution but that on the other hand it may not look behind the substance of any request from Canada for amendment and that there is a binding requirement on Westminster of automatic action. It is difficult to see how full legislative authority can be reconciled with no discretion in the exercise of this authority."

Facts

The Government of Canada's position is set out in its publication "The Role of the United Kingdom in the Amendment of the Canadian Constitution". That publication explains that while the U.K. Parliament has full legal authority to amend the Canadian Constitution, that legal authority is conditioned by a constitutional device well known in British constitutional tradition: a convention that the legal power is exercised on the advice of those having political responsibility to the relevant electorate. Thus, in this case the United Kingdom Parliament has acted on the request of the two Houses of the Canadian Parliament, the authorities who have the democratic responsibility for such Canadian affairs.

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Assertion in the Document

Two statements are quoted from the debates on the Statute of Westminster in 1931, one by the Rt. Hon. L.S. Amery and the other by Viscount Hailsham, to suggest that the United Kingdom Parliament retains political responsibility for amendments to the Canadian Constitution.

Facts

The quotations in question were not referring to any political responsibility of the United Kingdom Parliament. The main issue in the debate was whether authority to amend the Constitution of the Irish Free State should be withheld from that Dominion in a manner similar to the provisions respecting Canada. This is well set out in the speech of Mr. Rhys (at page 1240 of the Debates):

> "The argument has run that Ireland should be accorded the same status as Canada, and that because in the Bill provision is made to safeguard the Constitution of Canada, the same provision ought to be inserted on behalf of Ireland. But what is always overlooked, it seems to me, is the fact that that provision safeguarding the Constitution of Canada has been inserted at the request of Canada, and has not been inserted at the desire of the United Kingdom."

In addition, it is clear from numerous precedents since, at least 1931, that the United Kingdom Parliament has not felt it had political responsibility for amendments requested by Canada. Six such examples are found in Appendix A.

Assertion in the Document

> "In 1920 a request made by the federal government to amend the Canadian constitution was delayed eleven years."

Facts

In 1920 the two Houses of the Canadian Parliament requested authority to legislate extra-territorially. The text of the amendment forwarded to the U.K. would have authorized the Canadian Parliament to legislate extra-territorially "in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom". Law officers of the United Kingdom government objected to this text because it was their view it would allow Canada to legislate for the other Dominions. Negotiations on a revised text proceeded leisurely, the matter not being considered urgent, and in 1924 an acceptable text was agreed upon. This text was adopted by the two Houses of the Canadian Parliament in June

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and July, 1924, but it was never forwarded to London. What had happened was that the issue of the extra-territorial operation of Dominion legislation had become an Empire-wide issue. Preparations were in progress for the Imperial Conference of 1926. The issue was placed on the agenda of that Conference. This led to the Balfour Report and ultimately the Statute of Westminster.

Position of the Dissident Provinces Before the Courts in Canada

Those provincial governments which disagree with the Canadian constitutional proposal are arguing that the United Kingdom Parliament has and should exercise political responsibility for the proposal. Yet, in Canada, before the courts, they pressed the contrary argument, asserting that both legal and political responsibility rested in Canada.

Quebec's written argument before the Supreme Court of Canada, at pages 10-11:

> "Canada is a sovereign country. The accession to sovereignty by Canada fundamentally changed the nature and effect of the joint resolution and of the true role of the United Kingdom Parliament ...
>
> Because Canada is a sovereign country, the United Kingdom Parliament no longer decides on modifications to be made to the Canadian Constitution; that decision must be made in Canada ... ".

Manitoba's written argument, at page 15:

> " ... legislative sovereignty passed to Canada no later than 1931. So also did the right to determine what amendments should be made to the Canadian Constitution ... ".

(It was, of course, part of the Manitoba argument that this authority is split between the federal and provincial governments.)

Prince Edward Island adopted Manitoba's reasoning.

Alberta's written argument, at page 23 of its factum:

> "... it is submitted that the general intent of the Statute of Westminster was to give to Canada in the totality of its legislative powers, federal and provincial combined, sovereign independence (save for the enactment of certain amendments). That being so, section 7(1) either derogates from this

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> general intent, making the whole of the Statute of Westminster meaningless in its application or, in our submission, it must be interpreted as authorizing the Parliament of the U.K. to act only as a bare legislative trustee ... of the whole dominion (inclusive of the provinces), and it is precluded from acting on its own initiative or acting at the request of some of the constituent parts and not all."

Newfoundland's written argument at page 21:

> "The Parliament of the U.K. has a technical ability to modify the British North America Acts but unless such were done following proper request from the Canadian nation as a federal whole, such modifications would not form part of the law of Canada as the U.K. has no substantive power to legislate for Canada."

and at page 22:

> " ... the United Kingdom Parliament has the formal power to legislate in respect to the British North America Act, but does not have the substantive power ... ".

Nova Scotia (at page 13):

> "In the absence of substantive legal authority /to amend the Constitution/, in either the federal Parliament or in the Parliament of the United Kingdom, the proposed legislation requires the consent of the provinces to have legal effect ... ".

British Columbia (paragraphs 14-)

> "Prior to Canada's independence, the U.K. Parliament possessed the power to resolve constitutional differences between Canada and the Provinces.
>
> .....
>
> It is submitted that both the U.K. Parliament and the Judicial Committee relinquished their respective roles and powers by virtue of the Statute of Westminister, 1931; the latter not formally until 1947 ...
>
> The jurisdiction to resolve all constitutional disputes between the Federal juristic unit and the Provinces was fully "patriated" by 1947. Thereafter no element of such jurisdiction remained with the U.K. Parliament whose surviving nominal legislative competence may now be exercised, it is submitted, only with the consent of the federal Parliament and the Provinces, or in the event of disagreement, as determined by the Supreme Court of Canada."

APPENDIX A

(1) In 1940 when jurisdiction over unemployment insurance was transferred to Parliament, the Solicitor General who had carriage of the Bill in the United Kingdom House of Commons was asked whether the provinces had consented and he replied that he did not know. He stated that it was sufficient justification for the Parliament of the United Kingdom to act on the ground that a request had been received from the Parliament of Canada.

U.K. House Commons Debates, 1940, pp. 1179-81

(2) In 1943 when an amendment, to which Québec, Saskatchewan and Manitoba objected, was sought postponing redistribution of the seats of the House of Commons until after the cessation of hostilities in the Second World War, the Secretary of State for Dominion Affairs, Mr. Attlee was questioned as to whether the provinces had consented. He replied that he had no information on the matter and in any event it was not for the United Kingdom "to look behind" an address voted by both Houses of the Canadian Parliament.

U.K. House of Commons Debates, 1943, pp. 1102

(3) In passing the 1946 amendment which changed the principles of representation in the House of Commons and to which Quebec objected, the following comments were made by Viscount Bennett (a former Prime Minister of Canada) in the House of Lords:

> "Canada is the only one of the Dominions in which a Party majority can amend the Constitution. They cannot amend it directly, but they do it indirectly, because we have agreed that we will consent to pass any legislation that they may petition to have passed by this Parliament .... Canada alone passes legislation amending the Constitution by a majority vote."
>
> U.K. House of Lords Debates, 1946, p. 698.

There was no reference in either the House of Commons or the House of Lords to the fact that Québec objected to the amendment.

(4) In passing the 1949 amendment adding section 91(1) to the British North America Act, 1867, reference was made to the fact that some provinces objected strongly to the proposal. But the objections were ignored.

U.K. House of Commons Debates, 1949, p. 1459

(5) In 1960 when passing the amendment which provided a compulsory retirement age of 75 for Superior Court judges, the Minister of State for Commonwealth Relations stated that in accordance with long-established precedent they should refrain from discussing the merits of a Bill sent to them by both Houses of the Canadian Parliament. No inquiry was made as to whether the provinces had given their consent.

U.K. House of Commons Debates, 1960, pp. 1369-70

(6) In passing the 1964 amendment giving Parliament authority to legislate with respect to supplementary benefits, no inquiry was made as to whether there had been provincial consent. One member of the House of Commons commented as follows:

> "I took some steps to research into the history of this and I was most astonished to learn that technically Canadian legislation is still subject to the Colonial Laws Validity Act, 1865. It is one of the most astonishing and absurd historial anomalies that we have now, as we are doing, to accede to the request of the Canadian Parliament that it should be allowed to legislate in regard to old age pensions."

U.K. House of Commons Debates, 1964, p. 1286.