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Thursday, March 10, 2011

Chair

Mr. Joe Preston

Standing Committee on Procedure and House Affairs

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● (1105)

[*English*]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): Thank you all for coming today.

We are here today pursuant to Standing Order 92(1)(a). The Subcommittee on Private Members' Business agrees that the following item of private members' business should be designated non-votable on the basis that it contravenes a criterion that bills and motions should not clearly violate the Constitution Act. This was the report from our subcommittee on private members' business.

Mr. Bigras is here today, as is his right to come and talk to us within five days about why he believes it to be the alternate of that.

Mr. Bigras, we're going to have you give us an opening statement. We'll then have a round of questions from the members.

Mr. Pierre Paquette (Joliette, BQ): How much?

The Chair: I was just going to finish that. We're going to have what it takes to get it done.

I'd like to spend an hour on this, at most. We'll excuse the witness at that point. The committee will then go into committee business, where one of the discussions will be about the ruling on this, and then I think you all know we have some other committee business we probably should look at today. So we'll try to keep it that way and see if we can keep the timeline.

I'll be as flexible as I can with Mr. Bigras. It is his right to defend his bill, so I'm saying an hour, but if we're on one side of that or the other, we'll be a bit flexible if we can.

Mr. Bigras, I understand you have an opening statement. Please take your time and give it to us. The committee will listen intently.

[*Translation*]

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Thank you very much, Mr. Chairman.

First of all, I want to emphasize that I'm here with Marc-André Roche, who will be able to help me answer certain questions during the meeting.

I want to thank the committee for this opportunity to show that my bill respecting the conclusion of treaties is constitutionally valid. You've already received my written arguments, and I'll be outlining them to you in a few moments.

Bill C-486 reaffirms what the Gérin-Lajoie doctrine has asserted for 46 years: international relations are not the exclusive prerogative of the federal government, but are a jurisdiction shared between Ottawa and the provinces in accordance with the distribution of powers provided for under the Constitution.

In more concrete terms, the bill would provide that when a treaty falls within an area of federal jurisdiction, Ottawa could negotiate, sign, implement and ratify it without reference to the provinces or Quebec. Where the treaty falls within areas of provincial jurisdiction or concerns the provinces, Ottawa would be able to act only if mandated by the provinces for that purpose. The bill therefore provides that, within six months following the coming into force of the treaty, the federal government must enter into an agreement with each of the provinces to state specifically how it will consult them before taking action.

As Quebec is the only province that has challenged the federal government's power to enter into treaties in areas of provincial jurisdiction, we would allow the agreement to provide for full delegation of the provincial prerogative to negotiate and enter into treaties in areas within its legislative authority.

However, as Quebec has never acknowledged Ottawa's right to negotiate on its behalf without its consent, in its own areas of jurisdiction, the agreement between Ottawa and Quebec City will have to provide specifically, first, for Quebec representatives to be among the Canadian delegation and, second, for the Government of Quebec to give its consent before a treaty is signed.

Where an international treaty falls within the areas of Quebec's exclusive jurisdiction and does not necessarily apply to Canada as a whole, Quebec may negotiate it and enter into it on its own. Thus, to enable the Government of Quebec to enter into relations with foreign countries, Ottawa must inform them that, under the Constitution of Canada, the provinces are authorized to enter into treaties on their own.

What is known today as the Gérin-Lajoie doctrine derives from a speech delivered to the Montreal Consular Corps by Paul Gérin-Lajoie, then deputy premier of Quebec, on April 12, 1965. The speech by Mr. Gérin-Lajoie, a constitutional lawyer, was based on a strict interpretation of the Constitution of Canada according to which, first, the federal government is not superior to the governments of the provinces; second, that the distribution of powers must be absolute, and, third, that the provinces are fully sovereign in their areas of jurisdiction, whether they exercise it or not .

In a way, international relations must be conducted as an extension of domestic jurisdictions. All Quebec governments since that time have subscribed to the Gérin-Lajoie doctrine. Consider what Jean Charest said about the matter in 2004: "Whatever is a Quebec jurisdiction here at home is a Quebec jurisdiction everywhere."

In fact, even the current Prime Minister of Canada subscribed to the doctrine before he decided to maintain a grip on all powers that he holds or believes he holds. Here's what he said during the election campaign that brought him to power in 2006: "I am ready to discuss mechanisms to enable the provinces to extend their jurisdictions on the international scene." And I emphasize "to extend their jurisdictions on the international scene."

And this is very specifically what Bill C-486 does. The constitution does not state which government, the federal government or those of the provinces, has the power to enter into treaties, and rightly so. In 1867, that power belonged to the British Crown. In 1931, with the Statute of Westminster, Ottawa believed it had inherited all the treaty powers of the British Crown. If that had been the case, it would have exclusively held treaty powers, including powers over implementation, as provided by section 132 of the British North America Act. However, that was not the case. That was determined by the Judicial Committee of the Privy Council in 1936. On the contrary, the committee held that the legislative powers of the provinces remained intact and that the provincial legislatures were not bound by Ottawa's signature.

As to whether the federal government or the provincial governments has the power to negotiate and sign treaties, the tribunal did not rule. In fact, no court has ruled on the matter to date. However, one point has been well settled in constitutional law: executive powers are distributed between Ottawa and the provinces in the same manner as legislative powers.

The sovereign power that London held in 1867 was, in the words of the Supreme Court in 1998, transferred from Westminster to the federal and provincial capitals of Canada. I emphasize: nothing in the Constitution or the case law states that the federal government has full and exclusive power with respect to treaties—nothing.

Some say that, since Ottawa does have that power, it is because it has that right. That is the position asserted by constitutional expert Peter Hogg in the 1992 edition of his treatise on constitutional law.

The Supreme Court responded to that argument in 1998, in Reference re Secession of Quebec. It held:

> A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. ... A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation.

In short, the fact that Ottawa has seized exclusive power over treaties does not mean that it had the right to do so and that the provinces did not. There are no doubt some of you around this table who think it would be a bad idea for the provinces to play a role in the process of entering into treaties in their areas of jurisdiction. I agree with those people, and I intend to take advantage of the debate on Bill C-486 to convince them. However, that is a matter of political debate, not of constitutional right.

I would remind committee members that private members' bills may be automatically put to a vote unless they do not meet the criterion that the committee must apply: they "should not clearly violate the Constitution Acts, 1867 to 1982." In the absence of any constitutional enactment or case law contradicting my bill, I find it hard to see how this committee could find that my bill clearly violates the constitution. It does not concern the distribution of powers between the executive and legislative branches. Nor does it concern the distribution of legislative powers either. It merely enables the provinces to exercise the powers that are already theirs under the constitution.

With that, I am prepared to answer your questions.

Thank you, Mr. Chairman.

● (1110)

[*English*]

The Chair: Thank you, Monsieur Bigras.

Mr. Proulx will go first.

For the first round, let's do seven minutes and see how we do.

Mr. Marcel Proulx (Hull—Aylmer, Lib.): This will be very short.

The Chair: It will be good if you can do that.

[*Translation*]

Mr. Marcel Proulx: Good morning, Mr. Bigras, and welcome.

We understand that we are not here to discuss the content of your bill, but rather to determine whether your bill is votable.

You have been summoned here following a decision by a subcommittee of this committee. I won't claim to be a constitutional expert or specialist, something that I am not, but I would like to ask you a question. Have you consulted experts on the constitution, constitutional specialists, who are of the view, based on their interpretation, that your bill can be debated and subsequently voted upon?

Mr. Bernard Bigras: Thanks to the member for his question. A clear question deserves a clear answer. I'm also used to asking questions when I'm on the other side of the table.

The answer is yes. I consulted three constitutional specialists, the best known of whom has addressed the issue as a whole. That is Hugo Cyr, professor of constitutional law at UQAM. He has considered the matter in a book entitled *Canadian Federalism and Treaty Powers*. Those three constitutional experts have come to the conclusion that my bill is irreproachable in that respect.

Of course, a political debate must be held, but those three constitutional specialists stated that this bill was irreproachable from a constitutional standpoint.

● (1115)

Mr. Marcel Proulx: If I may take the liberty of asking you the question, Mr. Bigras, who are the other two?

Mr. Marc-André Roche (Counsellor, Bloc Québécois): They preferred to speak to us confidentially. However, I imagine we can have them come as witnesses during the study.

Mr. Bernard Bigras: One of the other two persons is a very well-known constitutional expert in Quebec whose name you probably know, but I have to keep quiet on that for the moment.

Mr. Marcel Proulx: I understand. You're telling us you consulted three, but if you can only name one, in fact it's as though you had only consulted one. I understand that this is clear in your mind because you consulted two others. However, that's not at all a problem for me.

Mr. Bernard Bigras: No, I confirm that we consulted three constitutional experts, but we can only disclose the name of one of the three for the moment.

However, if the bill receives the consent of the House in the study on second reading, those constitutional experts will definitely be pleased to come and appear in committee.

Mr. Marcel Proulx: All right. However, you understand my question, in that it concerns the restriction, if I can call it that, that might prevent you from submitting your bill for debate and then to a vote—and that's the entire question—having regard to the Constitution.

You're telling me that you have in fact verified the matter and that there was no problem, according to your experts, although you can only name one of them.

Mr. Bernard Bigras: That's it.

Mr. Marcel Proulx: That's enough for me.

Thank you.

[*English*]

The Chair: Mr. Reid.

[*Translation*]

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Thank you, Mr. Chairman.

I believe it's appropriate for Mr. Bigras not to give us the names of the other two constitutional experts without their consent. I have no doubt he has consulted three constitutional experts on this matter.

[*English*]

I was the one in the subcommittee who raised constitutional concerns about the validity of this private member's bill. To explain why that's the case—

[*Translation*]

Mr. Yvon Godin (Acadie—Bathurst, NDP): I have a point of order, Mr. Chairman.

[*English*]

The Chair: I caught it too. Mr. Reid, that was an in camera meeting.

Mr. Scott Reid: My apologies.

Mr. Yvon Godin: We don't want to hear who's the hero.

Mr. Scott Reid: All right. My apologies for revealing that.

What I want to do is to explain the logic of why I have concerns about its constitutional validity.

What I would like to do is start with a citation. Unfortunately, it's quite a lengthy citation from Peter Hogg's book on the constitutional law of Canada, section 11.6, which is under the heading, "Provincial treaty-making". And I apologize, as it's quite a long citation.

He says:

> There have been claims that the provinces have treaty-making power under the Constitution, and at international law. So far as international law is concerned, it seems that the provinces would be accepted by foreign countries as having treaty-making capacity if the Constitution of Canada clearly accorded that capacity.

I'll pick up the quote in a second, but I just want to emphasize here that there is one country I know of, Switzerland, where there is a clear treaty-making power for its subordinate units, its cantons, clearly stated in the constitution. That is not the case here in Canada.

So now I return to my quotation:

> And so the question comes back to the Constitution. The Constitution is completely silent as to the power to make treaties. As explained earlier, this is because the framers did not envisage that Canada would acquire the power of an independent nation to make treaties. Section 132 confers the power to implement British empire treaties on "the Parliament and Government of Canada"—a provision which is hardly encouraging to the proponents of provincial treaty-making power. However, in the 1960s Quebec asserted that the provinces did have treaty-making power. The primary argument for this position is that the exclusive right conceded to the provinces by the *Labour Conventions* case

—that's a 1937 case of the Judicial Committee of the Privy Council, then our Supreme Court—

> to implement treaties upon subjects within provincial legislative competence must carry with it the power to make treaties upon subjects within provincial legislative competence. As the treaty-making power devolved from the imperial government to Canada, the federal government acquired treaty-making power with respect to s. 91 subjects, and the provinces acquired treaty-making power with respect to s. 92 subjects. This conclusion was not affected by the broad delegation to the federal government in the Letters Patent constituting the office of Governor General [in 1947] because the doctrine that within Canada executive powers are distributed on substantially the same basis legislative powers, which normally means that the provincial governments have executive powers which match the provincial legislative powers. So the argument runs.

And that's the end of the quote.

I look at that and I say the appropriate way to determine what the courts have actually said—Professor Hogg, of course, is merely a scholar on the subject—is to turn to the relevant case and to that question, the specific question, do the executive powers and legislative powers always line up? If they always do, then Quebec has the right to make treaties, and all the provinces do. If they don't, then Quebec does not.

In the Labour Conventions case—and I have a copy of the ruling in front of me—the Chief Justice of Canada and two other justices, exactly half of the six-member panel ruling on this for the Supreme Court, held that not only did the federal government have the exclusive treaty-making power, but so did the Parliament have the exclusive ratification power. Three other justices took a different point of view on the ratification part, or, more to the point, the legislative enactment of enabling legislation part of that decision. And the judicial committee of the Privy Council then issued a decision, unanimous as they always were, which reiterated that particular point on which the entire membership of the Supreme Court had agreed.

Lord Atkin, speaking for the judicial committee, says:

> It is true, as pointed out in the judgment of the Chief Justice [of Canada], that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties....

And he then goes on to describes that. He then says, however, that there is a distinction; the two are not firmly linked together. It is not the case that executive powers are limited in all cases by the legislative powers of the Parliament to which the ministers are responsible.

● (1120)

He says specifically, and I'll just follow from where I left off the quote. If the Parliament were to disapprove of the ministers, "they would either"—meaning the treaties—

> not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive.

In other words, the two are not linked, and therefore the constitutional basis of the case for provincial treaty-making does not actually exist.

Thank you, Mr. Chair. I apologize for the fact that it took so long. I know it eats into the time to respond, but I had no way of getting the point across without fully citing.

Thank you.

The Chair: There are about 30 seconds left of Mr. Reid's time, if you'd like to respond at all.

[*Translation*]

Mr. Bernard Bigras: I want to make three points.

First of all, the member will recognize that the Constitution does not grant the federal government a plenary power with respect to treaties.

Second, when Canada obtained what could be called an international personality on the international scene, the Statute of Westminster of 1931 resulted in no change to the distribution of powers.

Third, it seems quite clear to me that executive powers are distributed in the same manner as legislative powers. That has been confirmed on at least two occasions. The Privy Council confirmed it first in 1892, and at least 50 Supreme Court judgments have confirmed it as well. I will only cite one, the 1978 judgment in *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission*, in which it held that the executive powers, or prerogatives of the Crown, are distributed in accordance with the distribution of legislative powers.

Having regard to the constitution, the international personality attributed to Canada under the Treaty of Westminster, the Privy Council decision and the some 50 Supreme Court decisions on the matter, it seems to me that there is material to inform us, to enable us to come to the conclusion that the bill is entirely constitutional. I understand that it may give rise to various opinions, but it at the very least merits debate in the House of Commons.

● (1125)

[*English*]

The Chair: Thank you.

I'm being fairly flexible with time, just because it's important that we get the points done today.

Monsieur Paquette, would you like to go for seven minutes?

[*Translation*]

Mr. Pierre Paquette: Thank you, Mr. Chairman. I'm going to share my speaking time with my colleague Mario Laframboise.

First of all, I'd like to go back to the summary of the distribution of executive and legislative powers that you made in response to Mr. Reid. It's now so true that, in the context of the negotiations for the Canada-Europe free trade agreement, the Europeans themselves have asked that the provinces be seated at the bargaining table because they know very well that jurisdictions respecting government contracts, for example, belong in large part to the provinces. All matters pertaining to education are currently the subject of considerable discussion. Even this example shows the extent to which the provincial jurisdictions are now re-emerging onto the international scene.

Further to Mr. Reid's remarks, I'm going to ask the question differently. From the moment Canada's Constitution is silent on certain matters—you very clearly demonstrated that point—and very clearly establishes the distribution of powers, why doesn't Quebec simply take the initiative of developing its own international relations? It's already doing so, but they could lead to the signing of treaties with sovereign countries.

Mr. Bernard Bigras: That, among other things, is the purpose of the bill. Before Quebec or any other province can negotiate and sign agreements, it requires the authorization of the Government of Canada, and we have to indicate to the international community, at negotiation meetings, that those states can undertake the negotiations. Something is therefore lacking to enable the provinces to act on the international scene. That's what's required; that's what the bill requests. It naturally requires the authorization of the Government of Canada. That's not contained in the present act.

In addition, I would like to go back to an argument raised by Mr. Reid. Earlier, he told us that, to his knowledge, only one country was making this type of delegation. He mentioned Switzerland, but there are many others, in particular Belgium, Germany, Argentina and Austria. I'll cite only the example of Belgium. Among other things, I'll cite article 167 of the Belgian constitution, which states: "The community and regional governments contemplated in article 121 enter into treaties, each in areas that pertain to it, concerning matters that fall under the jurisdiction of their Parliament."

So you're entirely right, Mr. Reid, to say that Switzerland is an example, but there are many others in the world, at least among the federated states. There is the example of Switzerland, but we could also cite the examples of Belgium and Germany.

Mr. Pierre Paquette: In a way, it's not up to other countries to come and tell the Canadian government with whom they are going to negotiate. Currently on the international scene, other countries assume that it's the Canadian government that negotiates the treaties. In that sense, your bill is useful, but it's not so much as a result of the Constitution of Canada as it is the result of the customary practices of the international community. It might possibly be seen by the Canadian government as interference, if a government directly negotiated a free trade agreement with, for example, the province of Quebec.

Mr. Bernard Bigras: That's correct. From a reading of the bill, you'll see that one clause provides that the Government of Canada will inform the governments of foreign countries that a province is able to negotiate and enter into a treaty on its own. You asked me why Quebec wasn't doing it. That's precisely because Canada has to inform foreign countries of the fact that the province is able to negotiate and enter into a treaty.

Mr. Pierre Paquette: I'd like to ask one final question before handing over to my colleague Mario Laframboise.

How much time is left, Mr. Chairman?

[*English*]

The Chair: You have two and a half minutes.

[*Translation*]

Mr. Pierre Paquette: So I'll ask it very quickly.

Among the criteria that must be used to determine whether a bill can be considered as non-votable, the following has been stated: Bills and motions should not clearly violate the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms.

The mere fact that we are holding this debate here today shows that this is not clear. In that sense, the bill does not clearly violate the Constitution of Canada. In my opinion, we should allow the political debate to be held in the House, as was done with regard to the French Language Charter that would apply to the federal institutions.

Mr. Marcel Proulx: Very good idea.

Mr. Pierre Paquette: We agreed that it could be debated, even if it was rejected, but that's another question.

I now give the floor to my colleague Mario Laframboise.

● (1130)

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Ultimately, Mr. Paquette is talking about the criteria that the Standing Committee on Procedure and House Affairs adopted in 2007. They are the criteria of our committee. We aren't outside our borders; we're in Canada.

My question is simple. Has there ever been an international treaty bill in Parliament that was ruled non-votable?

Mr. Bernard Bigras: The answer is yes. In 2000, Bill C-214 by my former colleague Daniel Turp was introduced and had a similar purpose. Many members supported the bill. So it will be understood that this is not new. The debate was held in Parliament in 2000. The people around the table clearly were not all in agreement, but at least this type of bill, which introduced nothing new, was debated in the House of Commons. This is essentially what we're asking. My Liberal colleague was entirely right earlier to say that we do not have to take a position on the merits of the bill. We simply have to determine whether it is possible to debate it, to the extent that it is not all clear.

Mr. Pierre Paquette: It seems to me, Mr. Chairman—

[*English*]

The Chair: You have 30 seconds.

[*Translation*]

Mr. Pierre Paquette: Yes, but I'd just like to clarify that matter. At the time, the Conservatives, the NDP members and us, the Bloc Québécois, had voted in favour of the bill.

Mr. Yvon Godin: It was in camera.

Mr. Pierre Paquette: No, I'm talking about the meeting of the Sub-committee on Private Members' Business.

Mr. Bernard Bigras: He's talking about Bill C-214.

Mr. Pierre Paquette: I'm saying that, in 2000, the Conservatives and you, with your colleagues from the New Democratic Party, voted in favour of the bill introduced by Daniel Turp.

[*English*]

The Chair: Thank you, colleagues. We are not discussing the substance of the bill today; we're discussing the votability of the bill. We may in fact get to the substance, but we are discussing the votability of the bill.

Mr. Godin, for seven minutes.

[*Translation*]

Mr. Yvon Godin: Thank you, Mr. Chairman.

Thank you, Mr. Bigras, for being here to present your definition of all that.

It was said that we did not have to discuss the substance of the bill, but we have no choice because it is the substance that will indicate whether or not it is constitutional, at least in part. Here's that the bill states, in clause 4:

> Not later than six months after the coming into force of this Act, the Government of Canada shall inform foreign governments that a province is able to negotiate and enter into a treaty that:
>
> (*a*) is in an area within the exclusive legislative authority of the legislatures of the provinces;...

That could be education, for example. New Brunswick negotiates agreements with Africa. All kinds of agreements are entered into, and that didn't start just recently. Your bill states that the federal government is responsible for informing countries that there will be negotiations in areas of provincial jurisdiction.

Mr. Bernard Bigras: Absolutely.

Mr. Yvon Godin: It's true that similar bills have previously been debated in the House, and the House has had to decide. I see no problem in submitting that kind of bill to the House again today.

Frankly, I believe it will be up to members to decide on the fate of the bill before us. Parliament will decide this matter.

Mr. Bernard Bigras: I wanted to say thank you to you.

Mr. Yvon Godin: We've also checked these matters with constitutional experts. For us to refuse to debate a bill, there must clearly be some violation of constitutional enactments; however, that is not the case here. In the case of many other things, this was not clear either, and it was decided that it was parliamentarians' job to legislate and that debate would be permitted in the House of Commons.

[*English*]

The Chair: Thank you.

Ms. Ratansi, are you taking the next round?

Ms. Yasmin Ratansi (Don Valley East, Lib.): No.

The Chair: I'm happy to stop at this point if I have....

Mr. Paquette.

[*Translation*]

Mr. Pierre Paquette: It seems to me that the Standing Committee on Procedure and House Affairs should simply say that Bill C-486 is votable. That's my motion.

[*English*]

The Chair: We can excuse the witness or do it right now. You've made a motion.

Is there any discussion on Mr. Paquette's motion that the full committee find this motion votable?

(Motion agreed to)

● (1135)

The Chair: We will deem it votable and send it to the House.

Monsieur Bigras, thank you for coming today. It's good to see that the system works this way.

If we're finished with that piece of business, we will move in camera. We have committee business to discuss. We'll try to do that in as quick and orderly a fashion as we can.

[*Proceedings continue in camera*]

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