Some Thoughts on Section 54 and the Financial Initiative of the Crown

by R.R. Walsh

According to the preamble in the Constitution Act, 1867, the founding provinces expressed a desire to be federally united "with a Constitution similar in Principle to that of the United Kingdom", i.e., a constitution based on the British parliamentary system of government: a parliament comprised of the Crown and two legislative chambers. A fundamental rule of British parliamentary procedure, passed on to Canada by the 1867 Act, is that the legislative initiative in respect of fiscal matters rests with the Crown. This rule expresses a principle of the highest constitutional importance, namely, that no public charge can be incurred except on the initiative of the Crown. The result is a sharing of legislative power in respect of financial matters: legislative initiatives affecting the public revenue may be initiated only by the Crown but must be presented to and approved by the House of Commons. This article examines some implications of this central principal.

In Canada, this shared legislative power is entrenched in section 54 of the *Constitution Act, 1867*.

> 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or bill is proposed.

Section 54 gives the executive branch a legislative primacy over the legislative branch in respect of financial matters (so-called "money votes") by requiring that the matter first be recommended to the House of Commons by the Governor General.

On occasion (too often, in the minds of some), a government bill is presented in the House of Commons with a royal recommendation attached when it is not at all clear that the bill requires one. Private members are thereby restricted in the amendments they can make to the bill. On the other side, a private member's bill is frequently challenged (informally in most cases, whether before or after introduction in the House) as beyond the power of a private member to introduce because it is a "money bill" and requires a royal recommendation (which a private member has not the power to obtain).

> ***There is often considerable uncertainty about when a royal recommendation is required on a bill, which leads counsel to expound on the ambit of section 54. A companion question, advanced by the proceduralists, is whether the House can require a royal recommendation whether or not section 54 applies.***

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The British Parliament

Erskine May sets out four rules which govern the financial procedure of the British House, the second of which is entitled The financial initiative of the Crown: "A charge cannot be taken into consideration [by the House] unless it is demanded by the Crown or recommended from the Crown."[1]

According to May, the financial initiative of the Crown in respect of Supply and Ways and Means has developed as a matter of constitutional practice and is implied in procedure rather than expressly asserted.[2] In respect of Supply, the Queen announces in the Throne Speech that estimates will be laid before the House and these estimates are subsequently presented to the House by command of Her Majesty. The presentation of estimates constitutes the Crown's demand for supply. While the royal initiative in respect of Supply rests upon ancient constitutional usage, when applied to charges demanded by a particular bill the royal initiative in Britain is based on House procedural rules, in particular, U.K. Standing Order 46.

Standing Order 46 was first introduced in 1713 with respect to petitions and in 1852 was expanded to include motions "for a grant or charge upon the public revenue". The 1852 amendment was required to enable expenditure bills to be introduced where the financial initiative of the Crown by way of a demand for supply had not been earlier exercised in respect of the expenditures. Such bills would be allowed on the strength of a recommendation from the Crown. The expenditures proposed in such bills were deemed, by virtue of the accompanying royal recommendation, to be within the estimates earlier presented (i.e., the earlier demand for supply).

In 1866, Standing Order 46 was again amended to include bills calling for a grant or charge upon the public revenue payable "out of money to be provided by Parliament". May calls these bills "novel expenditure" bills (expenditures that were not contained in the estimates earlier presented and voted upon in the course of Supply). The 1866 amendment went further than the 1852 amendment and included bills which called for expenditures that, by their own terms, could not be considered within the estimates earlier presented. These bills were prospective in nature insofar as they looked to a future demand and grant of supply ("out of money to be provided by Parliament") and could not be allowed on the basis of an earlier demand for supply but only by virtue of an accompanying royal recommendation.

May has explained that with the passage of time and repeated usage of the royal recommendation for bills providing for expenditures payable "out of money to be provided by Parliament", the use of the royal recommendation came to be taken as reflecting an exercise of the financial initiative of the Crown when this was never the case:

> At first the requirement of the Queen's recommendation was confined to proposals which directly and effectively authorized expenditure by ordering payments to be made out of the Consolidated Fund. It was a considerable step when the requirement was extended to proposals which were not in themselves effective, and did no more than direct that payment should be made "out of moneys to be provided by Parliament", i.e. by estimates to be subsequently presented which the House might vote or reject as it pleased. By 1866, when this step was taken, experience had shown that such proposals were not as ineffective as their form suggested, since they often made the presentation of estimates necessary, and thus subjected the initiative of the Crown to dictation by the House.[3]

Canadian Parliamentary History

Section 54 was first introduced into Canadian (British North American) parliamentary law by the *Union Act, 1840*. A reading of Lord Durham and other material of the time indicates that section 54 was first legislated in 1840 to control the introduction of bills calling for a "money vote", i.e., an appropriation:

> It is necessary that I should also recommend what appears to me an essential limitation on the present powers of the Representative bodies in these Colonies. I consider good Government not to be attainable, while the present unrestricted powers of voting public money, and of managing the local expenditure of the community, are lodged in the hands of an Assembly. As long as a revenue is raised which leaves a large surplus after the payment of the necessary expenses of the Civil Government, and *as long as any member of the Assembly may, without restriction, propose a vote of public money,* so long will the Assembly retain in its hands the powers which it everywhere abuses, of misapplying that money. The prerogative of the Crown, which is constantly exercised in Great Britain for the real protection of the people, ought never to have been waived in the Colonies; and if the rule of the Imperial Parliament, that no money vote should be proposed without the previous consent of the Crown, were introduced into these Colonies, it might be wisely employed in protecting the public interests, now frequently sacrificed in that scramble for local appropriation, which chiefly serves to give an undue influence to particular individuals or parties. *(emphasis added)*

It seems clear that Lord Durham's objective in 1840 was to require royal recommendations in respect of bills that seek an appropriation. The 1840 clause was carried over to the 1867 Act as section 54.

The 1867 Act was passed by the British House only a year after the same House changed its Standing Order 46

to require a royal recommendation in respect of so-called "novel expenditure" bills. The British House, including Colonial Office officials and parliamentary counsel responsible for drafting the 1867 Act, might be taken as cognizant of the 1866 amendment to U.K. Standing Order 46 and of the legislative problem it was designed to solve, yet it did not use language in section 54 that would include the so-called "novel expenditure" bills. In this respect, the wording of section 54 is important to note: "...any Vote, Resolution, Address, or bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost...". It seems clear that section 54 applies only to a bill that effects an appropriation and not to one that would require an appropriation to be effective but does not itself effect an appropriation.

Practice and Procedure

The first branch of May's rule on the financial initiative of the Crown, namely, the Crown's demand for supply, is seen in the presentation of estimates of public expenditure by the government. In testimony before the Senate National Finance Committee in 1989, Allan Darling, Deputy Secretary of the Treasury Board's Program Branch, explained Treasury Board's approach in the preparation of the annual estimates:

> Let me begin by saying that obviously the process we use begins with the legislation itself. Basically, our rule of thumb is that, unless otherwise provided for in specific legislation, *all items requiring funding should be obtained through an annual appropriation of Parliament.* We find that most often the standard wording in legislation which provides explicitly for an appropriation is as follows:
>
> > All expenditures for the purposes of this Act shall be paid out of moneys appropriated by Parliament.
>
> In many other cases, the legislation is altogether silent on the funding authority and in those cases we simply interpret the legislation to mean that the funding needs arising from the Act shall be provided by an annual appropriation.
>
> With respect to statutory items, ongoing spending authorities usually apply to very specific items and in this event the legislation must be clear. If it is intended that ongoing authority be provided, the legislation will generally state so with words to the effect that the item shall be charged to the Consolidated Revenue Fund.[4] (emphasis added)

The Senate National Finance Committee heard from Peter Johnson, Q.C., Chief Legislative Counsel and head of the Legislation Branch of the federal Department of Justice:

> Sometimes bills are passed during a session for which no appropriation is made. *In those cases we will usually put an appropriation clause in the bill because there has been no appropriation.* In other cases, we do not have to put appropriations in the bill; we presume that Parliament will appropriate the moneys. *If they do not appropriate the moneys, effectively the law will not operate.* We usually make these decisions on the advice of the instructing officials of the departments in consultation with the people in the Department of Finance.[5] (emphasis added)

Mr. Johnson provided what he described as guidelines that the lawyers in his office used to advise the Privy Council Office in respect of royal recommendations. The relevant portion for our purposes is the following:

> The requirement [under section 54] applies in respect of any bill that proposes to authorize an expenditure of public money (i.e., "any Part of the Public Revenue, or of any Tax or Impost"). This authorization may be
>
> (a) direct, as in the case of an appropriation bill; or
>
> (b) indirect, as in the case of a bill that authorizes or requires something that entails the expenditure of public money.[6]

While the Justice guidelines correctly state that the requirement for a royal recommendation flows from section 54, they seem to go beyond section 54 when they include "indirect" appropriations or authorizations. When the guidelines speak of a bill "that requires something that entails the expenditure of money", they seem to be saying that bills that would require an expenditure of public funds to be implemented but which do not appropriate public funds nor authorize any expenditure of public funds (and which Mr. Johnson said would not operate for lack of an appropriation) nonetheless require a royal recommendation.

Mr. Johnson explained that Justice lawyers, out of an abundance of caution, often advised the Privy Council Office that a recommendation was required when there was some doubt on the matter:

> From a legal standpoint, I would think it would be safer, in a dubious case, to get the royal recommendation on the bill. If it were not on the bill, then when that bill becomes an Act, there is the possibility that the Act would be struck down *ab initio*.... Therefore, from our point of view, when we are advising the Privy Council Office we take the prudent view and err on the side of safety.[7]

If Mr. Johnson's testimony in 1989 is still representative of Justice practice, it would seem fair to surmise that while every government bill that requires a royal recommendation will probably have one, not every government bill introduced with a royal recommendation will always have required one.

In testimony before the Senate National Finance Committee, former House of Commons Law Clerk and Parliamentary Counsel, Joseph Maingot, referring to a citation in *Beauchesne*, 4th edition (1959), said the tendency in the House of Commons over the previous 25

years had been to rule out all motions purporting to give the government a direct order to do a thing which cannot be done without the expenditure of money.[8] The corresponding citation in *Beauchesne*, 6th edition, is #616 but it would appear limited to motions. Citation #615 might also be read in this connection. However, both citations are presented under the heading "Abstract motions".

Citations #613 and #614 in *Beauchesne*, 6th edition, under the heading "Legislation not requiring Royal Recommendation", would seem more relevant:

> #613. A bill, which does not involve a direct expenditure but merely confers upon the government a power for the exercise of which public money will have to be voted by Parliament, is not a money bill, and no royal recommendation is necessary as a condition precedent to its introduction.
>
> #614. A bill, designed to furnish machinery for the expenditure of a certain sum of public money, to be voted subsequently by Parliament, may be introduced in the House without the recommendation of the Crown. *Journals*, January 16, 1912, pp. 118-19.

The 1912 debate mentioned in citation #614 provides a good illustration of the central question relevant to the royal recommendation. At second reading of a government bill to amend the *Inquiries Act*, an objection was made that the bill required a resolution first being made in Committee of the Whole with a royal recommendation because the bill imposed a charge upon the revenues of the country insofar as it would authorize commissioners under the *Inquiries Act* to employ architects, engineers, counsel and other expert assistants. The Minister of Justice, the sponsor of the bill, responded as follows:

> I submit that when it comes to be a matter of determining what payment is to be made to the people who are to be employed, we shall be called upon to get, in the regular manner from this House, a vote authorizing these payments.[9]

The Prime Minister, Mr. Borden, joined the debate in support of the bill offering the following comment which seems particularly apposite to private members' bills that contain a non-appropriation clause:

> [S]o far as this bill is concerned, it seems to me very much as if it were in this position: suppose you added a clause that any of these persons so to be employed might be paid out of moneys to be voted by Parliament for that purpose; in that case you must come to Parliament and get the money voted. Therefore, **no charge is imposed upon the people until that money is voted by Parliament.** (emphasis added)

The House of Commons Speaker ruled that the bill did not constitute "a motion for any public aid or charge upon the people" (the language of the standing order, S.O. 77):

> The most that can be said is that under [the bill's] provisions something may be done which may rise to a claim against the Government. If this be sufficient to bring it within the rule, then it would have to be held that every bill conferring a power upon the Government in the exercise of which expense might be incurred, comes under the rule. This, in my opinion, would be giving altogether too extensive an interpretation to the words "a motion for any public aid or charge upon the people".[10]

Bourinot's Parliamentary Procedure cites S.O. 77 as "another check [that] is imposed on the expenditure of public money" and goes on to say:

> This [S.O. 77] is substantially the standing order of the English Commons— the only difference being that the latter is somewhat more definite since it adds the words, "or charge upon the public revenue, whether payable out of the consolidated fund or out of moneys to be provided by Parliament".[11]

The British equivalent to S.O. 77 expressly included bills that imposed a charge "out of moneys to be provided by Parliament", so-called "novel expenditure" bills. The Canadian House Speaker in 1912 (pre-4th edition *Bourinot*) refused to apply S.O. 77 as if it had the same meaning as its British equivalent. Similarly, the House Speaker today should not give section 54 (S.O. 79) an extended meaning based on U.K. S.O. 46 as amended in 1866. The language of section 54 (S.O. 79) does not support such an interpretation any more than the language of S.O. 77 supported the extended meaning sought in 1912.

In its report to the Senate, the Senate Committee on National Finance referred to Mr. Maingot's testimony about House practice in respect of so-called "money bills" and the tendency of the House to apply citation #616 to a bill "even when the motion or bill contained no appropriating clauses":

> Such rulings probably reflected the so-called Gladstone Amendment of 1866 to a Standing Order of the British House of Commons, which reads:
>
> This House will receive no Petition for any sum relating to Public Service or proceed upon any Motion for a grant or charge upon Public Revenue, *whether payable out of the Consolidated Fund or out of moneys to be provided by Parliament*, unless recommended from the Crown.
>
> The purpose of this order was to prevent private members from introducing bills or amendments which, while not appropriating money to meet the costs of their schemes, referred to future appropriation by Parliament. Such motions would, of course, lack a royal recommendation. Although the Canadian House of Commons apparently has chosen to bind itself by this British rule, it has never incorporated the rule into its own

Standing Orders. Furthermore, the drafters of the Canadian Constitution did not include the substance of the Gladstone Amendment in Section 54. Therefore, advice given to ministers that a royal recommendation must be attached to all bills having implications for current or future expenditure would seem to go beyond the provisions of Section 54.[12]

It seems reasonable to suggest that section 54 entrenched in the Canadian Constitution the British rule on the financial initiative of the Crown in respect of Supply (appropriations) but only as it stood prior to the Standing Order 46 amendment in 1866: the demand for supply by the Crown done either in the traditional form of estimates or as allowed under the 1852 amendment to Standing Order 46 (see above).

> ***Section 54, it is submitted, does not apply to bills that will require public funds for their implementation but do not authorize an expenditure of public funds for that or any other purpose.***

Private Members' Bills and Non-appropriation Clauses

Non-appropriation clauses are sometimes found in private member's bills to protect them from challenge under section 54. For example:

> 16. No payment shall be made out of the Consolidated Revenue Fund to defray any expense necessary for the implementation of this Act without the authority of an appropriation made by Parliament for such purpose.

Behind this breastplate, private members have introduced bills in the House of Commons that others would argue are beyond the power of a private member to introduce because they constitute an implied authorization to expend public funds insofar as implementation of the bill will require an expenditure of funds. Defenders of non-appropriation clauses argue that insertion of a non-appropriation clause makes it clear that the bill neither effects nor implies an appropriation.

On November 9, 1978, the Deputy House Speaker commented that bills with non-appropriation clauses seemed out of order because they infringed upon the financial initiative of the Crown. The clause in the bill before the Deputy Speaker read as follows:

> 4. Nothing in this Act shall be construed as requiring an appropriation of any part of the public revenue.

The Deputy Speaker thought that use of such clauses was not an acceptable way of eluding the requirement for a royal recommendation. It was the duty of the Chair to decide whether a bill requires a royal recommendation and to do so without giving any consideration to the presence of a non-appropriation clause in the bill.[13] It is difficult to see why this should be so when passage of the bill, with a non-appropriation clause, would clearly indicate that an expenditure of public funds under the bill is not authorized.

On October 23, 1991, Senate Bill S-5, which contained a non-appropriation clause, was ruled out of order by the Senate Speaker under Senate Rule 82 which reads as follows:

> 82. The Senate shall not proceed upon a bill appropriating public money that has not within the knowledge of the Senate been recommended by the Queen's representative.

Bill S-5 extended war veterans' benefits to merchant seamen. The Senate Speaker said the bill would give rise to claims by merchant seamen and their spouses against the government and would cause the government to incur liabilities of the kind that Erskine May indicates would constitute a charge upon the public revenue.[14]

The Senate Speaker said Canadian parliamentary tradition indicates that private members' bills "which bind the House to future legislation appropriating monies" are not in order in either the House of Commons or the Senate. The Speaker cited *Bourinot's Parliamentary Procedure*, in support of the proposition that section 54 of the 1867 Act is to be interpreted in terms of the U.K. Standing Order 46. The Speaker rejected the view taken by the Senate National Finance Committee (above) in respect of section 54.

The Senate Speaker's ruling on Bill S-5 goes against the ruling of the Commons Speaker in 1912 (discussed above) and relies on a perceived Canadian parliamentary tradition that the British practice under U.K. Standing Order 46 as amended in 1866 applied in the Canadian House of Commons and Senate. No rulings to this effect by the House Speaker were provided in the Senate Speaker's ruling. The passage in *Bourinot* cited by the Speaker in the Senate does not, it is respectfully submitted, support the view that section 54 is to be read as having the ambit of U.K. Standing Order 46. In relying on a perceived Canadian parliamentary tradition, the Senate Speaker seems to concede that the language of section 54 does not include bills to which the 1866 amendment to U.K. Standing Order 46 would apply.

In respect of a private member's bill containing a non-appropriation clause, the Speaker need only ask two questions: (a) would the bill, in the absence of the non-appropriation clause, require a royal recommendation? and (b) if so, is the non-appropriation clause sufficient to dispense with requiring a royal

recommendation? In respect of the latter, the test should be whether the non-appropriation clause clearly disclaims authorization by Parliament to expend public funds for purposes of the bill. In the absence of an authorization by Parliament, no public funds may be expended: section 26, *Financial Administration Act*.

In respect of Bill S-5, the Senate Speaker answered only the first question and did so in the affirmative. The Speaker characterized bills containing non-appropriation clauses as ones that bound the House to effect an appropriation at some future time. This seems to overlook the fact that the House, as one of the two Houses of Parliament, cannot bind itself in respect of future legislative action: a Parliament cannot bind a future Parliament. At best, the House might bind itself morally, i.e., as a political and not a legal matter.

Some have argued that a non-appropriation clause enables a private member to do indirectly what he cannot do directly, namely, appropriate public funds.[15] In introducing a bill with a non-appropriation clause, a member is not doing indirectly what cannot be done directly because the bill clearly indicates through its non-appropriation clause that it does not do what it might have done without the clause, i.e., appropriate public funds or authorize an expenditure of public funds. For this reason, the "direct action/indirect action" rule does not apply insofar as the alleged indirect action does not achieve what could not be achieved by direct action.

It is also argued that such bills constitute an indirect demand for supply and would, if passed, leave the Crown bound to make a demand for supply for purposes of the bill and the Crown ought not to be put in a position where its financial initiative is compromised. In this connection, it is pertinent to note that the Crown has been known to not proclaim an Act of Parliament into force for years after the bill has become an Act of Parliament upon royal assent. The courts have upheld the Crown's right not to proclaim into force an Act that has been passed by Parliament. If the Crown is not obliged —and evidently does not feel itself obliged— to bring into force an Act that Parliament has seen fit to enact, how can it say that enactment of a private member's bill with a non-appropriation clause leaves it obliged to exercise its financial initiative and to make a demand for supply? In short, this argument lacks credibility.

House Powers over Procedure

The recent decision of the Supreme Court of Canada in *Donahoe v. C.B.C. et al* seems to support the view requiring a royal recommendation under section 54 is a matter within the purview of the House to regulate as a matter of procedure.[16] At issue was the right of the Nova Scotia Legislative Assembly to exclude television cameras ("strangers") from the chamber. It was argued that freedom of the press under paragraph 2(b) of the *Charter of Rights and Liberties*, being part of the written constitution of Canada, should prevail over unwritten rules about parliamentary privilege such as the power of the Legislative Assembly to exclude strangers.

McLachlin, J. held that the *Charter* cannot be applied to remove a power (or right) that has constitutional status, although it may be applied in respect of a particular exercise of the power (the tree must be distinguished from the fruit of the tree).[17] In the case of the House (and provincial legislative assemblies), its power to determine its procedure has constitutional status because it is necessary if the House is to carry out its function:

> In summary, it seems clear that, from an historical perspective, Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning. These privileges are part of the fundamental law of our land, and hence are constitutional. The courts may determine if the privilege claimed is necessary to the capacity of the legislature [sic] to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.

Justice McLachlin cited Erskine May with approval in support of the proposition that the House is "the sole judge of the lawfulness of its proceedings", that in settling or departing from its own codes of procedure "the House can practically change or practically supersede the law".

The decision in *Donahoe* provides authority for two propositions. First, enactment of a constitutional right such as freedom of the press under paragraph 2(b) of the *Charter* does not set aside the constitutional right of the House to determine its procedure or regulate its proceedings. Secondly, it is not for the court to judge the lawfulness of any exercise by the House of its power over procedure.

It is not clear from *Donahoe* whether the court's "hands off" position in respect of House procedure means the court would never enforce section 54 against the House. Will the court always allow the House to be the sole judge of whether section 54 applies to a particular bill?

The question of whether a bill requires a royal recommendation under section 54 is a question of law. Section 54 provides constitutional protection to the right of the Crown to have the legislative initiative on financial matters. If the House, as a matter of procedure, were to allow private members to introduce section 54 bills without a royal recommendation, should not the Crown be entitled to go to the court for enforcement of its constitutional right? Would the court intervene? In

Donahoe, Chief Justice Lamer offered the following comment:

> [The] courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the Assembly than at those which involve matters entirely internal to the Assembly. The lines are not altogether clear here either though.

The Chief Justice agreed with Justice McLachlin that the courts have long maintained a "hands off" approach to the exercise of parliamentary privilege,

> particularly when it is directed toward maintaining control of the internal proceedings of the House. This approach fosters the independence of the legislative and judicial branches of our government from one another.

If the House were to require a royal recommendation in respect of a bill to which section 54 did not apply, this would be an extension of section 54 and *Donahoe* would suggest that the court would not interfere. On the other hand, if the House were to pass a bill that is introduced without a royal recommendation although section 54 applied, this would be in breach of section 54. In the latter case, would the court apply *Donahoe* and rule against the House if the issue were presented on an application by the Crown?

The court in *Donahoe* affirmed that control over procedure is necessary if the House is to carry out its democratic function independent of any other branch of government. This reflects recognition of a separation of powers within a parliamentary system of government, although not as strictly defined as the American model. The issue in *Donahoe* was whether the judicial branch might effect some measure of control over the legislative branch by exercising its powers of judicial review. The court decided it could not do so. The plaintiff in *Donahoe* was the C.B.C., not the Crown. It seems fair to ask whether the court, *Donahoe* notwithstanding, would exercise its power of judicial review against the House if a Minister of the federal Crown brought an action alleging violation of the financial initiative of the Crown, i.e., violation of section 54. Surely the House cannot act in disregard of the constitutional interdiction provided in section 54: "It shall not be lawful...". Would the court consider application of section 54 a matter of "internal parliamentary procedure" and beyond its powers to enforce?[18]

In *Donahoe* the court constrained its powers in favour of the legislative branch in order to assure the latter's independence. In relation to violations of section 54, should the powers of the legislative branch be constrained by the court in favour of the executive branch? If so, would the independence of the legislative branch be well served? If *Donahoe* protects the independence of the legislative branch vis-à-vis the judicial branch, a recent ruling in the Quebec National Assembly in respect of the financial initiative of the Crown seems to go the other way in protecting the independence of the executive branch vis-à-vis the legislative branch. It seems ironic, in historical terms, that the legislative branch should be protecting the powers of the executive branch.

The Case of Bill 197 (Quebec National Assembly)

On December 16, 1991, the President of the Quebec National Assembly ruled Bill 197, "An Act respecting the limitation of budgetary expenditures", out of order as "Contrary to the principle of financial initiative of the Crown".[19] According to parliamentary counsel, the bill set graduated budget deficit limits over a period of years toward an eventual elimination of any deficit. The bill would eventually render government spending in excess of revenues illegal.

The President invoked words taken from a 1972 ruling of House of Commons Speaker Lamoureux where the Speaker held that he must reject any bill that infringes upon the financial initiative of the Crown. The President then posed the central question: In Quebec and elsewhere in Canada, what is the outline of that principle and what are its consequences?"

The President acknowledged that the situation arising under Bill 197 was unusual, if not peculiar. It was not a classic case of a private member's bill that authorized the spending of public funds. Rather, Bill 197 sought to limit government spending generally and to impose balanced budgets: "That rule would be binding on the government even before the process of estimates begin."

The President said he must consider whether the constraint on the government proposed by Bill 197 constituted an encroachment upon "les prérogatives de la Couronne", i.e., "la prérogative de la Couronne en matière financière".

After reviewing various parliamentary authorities, the President affirmed what is generally accepted, namely, that it is the Crown who demands supply of the legislative chamber and it is only the latter who can authorize the expenditure of public funds through a grant of supply. However, the President drew a further conclusion:

> According to the experts who have written on that question, the Crown and the Assembly each have their own prerogatives which could not be encroached upon without putting the balance of our institutions at risk. Each of the executive branch and the legislative branch exercises its own prerogatives absolutely within the boundaries assigned to each of those branches.

The President considered the place of the budgetary process in parliamentary systems and concluded that the legislative chamber had no right to participate in the preparation of the annual budget of the state, that this was a matter wholly within the executive powers of the government and the role of the legislative chamber consisted of approving the government's budget through authorizing new taxes, if requested by the Crown, and authorizing the various expenditures of public funds that the government in its budgetary estimates has proposed:

> The Assembly does not exercise its control in advance or at the beginning of the preparation of the Estimates. The power of intervention of the Assembly starts to be exercised when the Estimates are tabled before the National Assembly. That power is great. It is the moment when the Assembly can reduce or withdraw the subsidies asked for by the government. It is a the time of the consideration of Estimates that the Assembly can require that the deficits be eliminated in the accounts of the current operations of the government.

In short, the power of a legislative chamber to say "yes" **after** a demand for supply does not include the power to say "no" **before** such a demand.

It is respectfully submitted that this decision confused the executive process of preparing a budget with the legislative process of presenting a budget in the legislative chamber and seeking approval by the chamber. Enactment of Bill 197 prohibiting budgetary deficits would not have prevented the government from presenting a deficit budget. If the government enjoyed the confidence of the chamber, which it must if it is the government, its proposed budget deficit would be approved, notwithstanding prior enactment of Bill 197 (although in doing so the National Assembly would have impliedly repealed or amended its enactment and ought to do so formally to avoid confusion). If the National Assembly applied Bill 197 and voted against the budget, the vote would be taken as a vote of non-confidence and the government would be obliged to resign.

Prior enactment of Bill 197 would not have impaired the power of the National Assembly to approve or reject the proposed budget nor would it have obliged the government to present a balanced or surplus budget. To say otherwise is to disregard the fundamental assumption in the parliamentary system that the government of the day has the confidence of the legislative chamber, which can be denied to the government at any time that the legislative chamber votes against a budgetary measure presented by the government. Bill 197 would have been little more than prior notice to the government of the voting intention of the National Assembly when the government next presented its budget.[20]

After the decision in *Donahoe* it may be that a legislative chamber can, as a matter of procedure, apply the rule in respect of the financial initiative of the Crown as broadly as was done in the Quebec National Assembly and the court will not intervene. It may be that a legislative chamber, as a matter of procedure, can go beyond section 54 in protecting the financial initiative of the Crown, but should it do so?❖

Notes

1. Erskine May, *Parliamentary Practice*, 21st edition (1989), p. 688.
2. *Ibid.*, p. 691.
3. Erskine May, *Parliamentary Practice*, 20th edition (1983), p. 763. This explanation does not appear in the 21st edition.
4. Minutes of Proceedings, Standing Senate Committee on National Finance, October 26, 1989, pp. 16:5 - 16:6.
5. *Ibid.*, November 2, 1989, p. 17:8.
6. *Ibid.*, Appendix "NF-17", p. 17A:1.
7. *Ibid.*, p. 17:11.
8. *Ibid.*, October 19, 1989, p. 15:15.
9. *Commons Debates*, January 11, 1912, pp. 1022-1026.
10. *Ibid.*, January 16, 1912, pp. 118-119.
11. *Bourinot's Parliamentary Procedure*, 4th ed. (1916), p 408.
12. Ninth Report of the Standing Senate Committee on National Finance, Senate of Canada, February 13, 1990, p 20:12.
13. *Commons Debates*, November 9, 1978, pp. 975-977.
14. *Senate Debates*, September 24, 1991, pp. 363-368 and October 23, 1991, pp. 493-495.
15. See the comment by the Commons Deputy Speaker in respect of Bill C-251, *Commons Debates*, October 22, 1991, p. 3842. See also *Commons Debates*, November 1, 1991, pp. 4410-4420.
16. [1993] 1 S.C.R. 319.
17. McLachlin, J., wrote with the concurrence of 3 of the 8 justices participating in the judgment. Two other justices wrote concurring reasons. On the matters discussed in this paper, Justice McLachlin spoke on behalf of a majority of 5, if not 6, of the justices participating in the judgment.
18. See Hogg, Peter W. *Constitutional Law in Canada*, 3rd ed., 1992, pp. 344-45: The presence of sections 53 and 54 in the *Constitution Act, 1867* suggests that they enjoy a higher status than internal parliamentary procedure.
19. *Débats de l'Assemblée nationale*, 16 décembre 1991, pp. 11643-11647. Regrettably, we could not obtain a copy of Bill 197 as it was never introduced in the National Assembly and printed. For purposes of this paper, based on the comments of Quebec parliamentary counsel, it is assumed that Bill 197 prohibited incurring a deficit and not preparing or planning for a deficit.
20. As an expression of intention, it would have been more appropriate to present Bill 197 as a resolution and not a bill, but this is another question.