The Royal Recommendation: An Update

by John Mark Keyes

In a previous issue of the Review (Vol. 20, No. 4) an article by the same author appeared on the requirement of a royal recommendation for bills that involve the spending of public money. Shortly after its publication, the Speaker of the House of Commons ruled on two points of order relating to this requirement. These rulings are significant because they suggest a more critical approach to the application of the requirement as well as a shift away from applying it to indirect appropriations of public money. There have also been developments on the question of what constitutes a tax. This question affects the royal recommendation when a bill not only requires amounts to be paid, but also authorizes the proceeds to be spent. The Speakers of both Houses have recently reached opposite conclusions on this issue in relation to the same bill (S-13). In addition, the Supreme Court of Canada has also ruled on this question in relation to section 53 of the Constitution Act, 1867, which requires money bills to originate in the House of Commons. A majority of the Court held that the courts have jurisdiction to enforce this section and, by implication, section 54, which deals with the royal recommendation.

Bill S-3: ***An Act to amend the Pension Benefits Standards Act, 1985 and the Office of the Superintendent of Financial Institutions Act***

Bill S-3 was introduced in and passed by the Senate before its introduction in the House of Commons. It would have enhanced the regulatory powers of the Superintendent of Financial Institutions in relation to pension plans. For example, clause 5 would have added a provision authorizing the Superintendent to require and participate in meetings with pension administrators and beneficiaries.

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In his ruling of February 10, 1998, the Speaker of the House of Commons accepted that "it may well be that additional expenditures would be incurred because of those enhanced powers of the Superintendent." However, he ruled that this did not attract the requirement of the royal recommendation, saying:

> Should an increase be necessary as a result of these new powers, the necessary allocation of money would have to be sought by means of an appropriation bill because I was unable to find any provision for money in Bill S-3.

This ruling departs from previous rulings that have recognized that a provision may constitute an appropriation even though it does not expressly allocate money to undertake the activities that the provision would authorize. For example, previous Speakers of the House of Commons have ruled that provisions establishing gov-

ernmental bodies,[1] increasing their membership[2] or providing for the appointment of officers and employees[3] have required the royal recommendation, even though they were not accompanied by provisions expressly appropriating public money. There is also a ruling of the Speaker of the Senate on February 27, 1991 dealing with a provision which, like that in Bill S-3, would have added new powers and responsibilities to those already conferred on a public office-holder. The provision was in Bill S-18, entitled *An Act to further the aspirations of the aboriginal peoples of Canada*. Relying on the 21st edition of *Erskine May*, the Speaker ruled:

> The Chair is of the opinion that clauses 8(2) and (3) clearly impose new statutory duties on the Minister of Indian and Northern Affairs, and hence on the department. They therefore infringe upon the financial initiative of the Crown and are not in order.[4]

Bill S-4: *An Act to Amend the Canada Shipping Act (Maritime Liability)*

A second ruling of the Speaker of the House of Commons casts even more doubt on the application of the requirement to indirect appropriations. On February 12, 1998, he ruled on Bill S-4, which had also been introduced in and passed by the Senate before its introduction in the House. Its purpose was to increase the limits on shipowners' liability and the compensation payable for maritime claims, particularly those relating to oil pollution. It was argued that the increase would fall on the Crown and amounted to an appropriation requiring the royal recommendation. The Speaker rejected this argument on the basis that this charge was not new because the existing law (*the Crown Liability and Proceedings Act*) already provided for the payment of money to satisfy civil judgments against the Crown. Although it is easy to agree that the royal recommendation was not required, the reasoning of the Speaker's decision bears analysis in terms of both its characterization of the existing law and its premise that the bill would have increased the Crown's liability.

The *Crown Liability and Proceedings Act* provides a mechanism for recovering judgments against the Crown. Subsection 30(1) requires the Minister of Finance to authorize the payment of judgments out of the Consolidated Revenue Fund. It is a continuing statutory appropriation that does not have to be renewed or supplemented by any further legislation in order to be effective. However, it is not a self-contained appropriation because it does not state a particular dollar amount. Instead, the amounts appropriated depend on the Crown's liability to pay court judgments, which in turn depends on the law governing its civil liability. A law that increases this liability effectively increases the amount that would be otherwise appropriated. It would seem to fit one of the principal situations in which many previous Speaker's decisions have recognized that the recommendation is required. These decisions relate largely to amendments to bills and are summarized as follows in the 6th edition of Beauchesne's *Parliamentary Rules and Forms*:

> ... an amendment infringes the financial initiative of the Crown not only if it increases the amount but also if it extends the objects and purposes ... expressed in the communication by which the Crown has demanded or recommended a charge.

If the result of Bill S-4 were to increase the Crown's civil liability, then it would clearly extend the existing statutory appropriation under the *Crown Liability and Proceedings Act*. However, this premise is questionable. The provisions in Bill S-4 applied generally to ship owners and were not targeted exclusively at the Crown. Since the Crown is not in the business of merchant shipping, one wonders how the bill could have had any significant impact on its liability. It is also worth noting that subsection 677(9) of the *Canada Shipping Act* specifically exempts ships owned by the Crown from civil liability for oil pollution. Thus, there seems little reason to think that Bill S-4 would have imposed any significant charges on public money.

Bill S-13: *Tobacco Industry Responsibility Act*

Bill S-13 proposed the incorporation of a non-profit foundation (the Canadian Tobacco Industry Community Responsibility Foundation). It also proposed to authorize the Foundation to collect a levy on the sale or other disposition of tobacco products and to use the proceeds for a variety of purposes, principally related to reducing the use of tobacco products by young persons in Canada. Like the bills discussed, it too was first introduced in the Senate where the Speaker decided that the provisions authorizing the use of this money did not amount to an appropriation requiring the royal recommendation.

The Speaker began his ruling by stating that:

> The fundamental purpose of the requirement for a Royal Recommendation is to limit the authority for appropriating money from the Consolidated Revenue Fund to the Government.

He also noted the definitions of "appropriation", "Consolidated Revenue Fund" and "public money" in section 2 of the *Financial Administration Act*, observing that the definition of "public money" is cast in terms of "all money belonging to Canada". The decision turns on this point since clause 33(1) of the bill stated that "the Foundation is not an agent of Her Majesty and its funds are not public funds of Canada." The Speaker then addressed the question of whether the levy was a tax. This is important because section 54 of the *Constitution Act, 1867* (which imposes the requirement of a royal recommendation) expressly applies to the appropriation of "any tax or impost". He found that the levy did not constitute a tax because it was "imposed on the tobacco industry alone ... to meet an industry purpose beneficial to it." This conclusion was based on the language of the bill, which said that its purpose was:

> to enable and assist the Canadian tobacco industry to carry out its publicly-stated objective of reducing the use of tobacco products by young persons throughout Canada.

This ruling is significant in at least two ways. First, it recognizes that not all money payable under statutory authority is public money or, as section 54 of the *Constitution Act, 1867* puts it, "public revenue or ... any tax or impost". Second, it recognizes that the definitions of the *Financial Administration Act* can be important indicators of the scope of the requirement for a royal recommendation. This provides guidance on determining these questions and it suggests that careful drafting may provide persuasive arguments for avoiding the requirement. However, the strength of this guidance is thrown into question by a subsequent ruling on the bill by the Speaker of the House of Commons.

When the bill reached the House of Commons, the Government House Leader objected that it imposed a tax and, accordingly, should have originated in that House (as required by section 53 of the *Constitution Act, 1867* and Standing Order 80) and should have been preceded by the adoption of a ways and means motion. The debate focused on whether the levy was imposed for the benefit of the tobacco industry. The Speaker decided it was not. Although he noted both the stated purpose of the bill as well as the provision that the levy was not payable into the Consolidated Revenue Fund, he concluded:

> Surely the lack of credibility referred to [in the bill] is a function of our common sense understanding of the self-interest of the tobacco industry, namely that, as a commercial enterprise, its primary goal is to expand its markets and thereby to increase profits. Young people would constitute the future growth potential for the industry's market. How could it be of benefit to the industry to reduce smoking among the very people who constitute its growth market? It is this implausible proposition that underlies the credibility problem to which the bill refers.

The differing results in the two Speakers rulings turn on how each of them determined the purpose of the bill. The Senate Speaker was prepared to rely on what the bill said, whereas the Commons Speaker took a substantive approach, relying on "our common sense understanding" and posing the question "Why is legislation like this required?". The differing approaches raise important questions that go to the heart of the Speaker's role.

The textual approach of the Senate Speaker operates at a distance from the bill, avoiding comment on its merits. This allows the Speaker to maintain the impartiality that is so crucial to his office by leaving the merits to be judged by the members. However, it also leaves open the possibility of form triumphing over substance, a possibility that clearly worried the Commons Speaker. This concern for substance is laudable and it is also demonstrated by the courts when they must determine the purposes of legislation or the character of amounts required to be paid under it. But it requires a thorough understanding of the context of the legislation and how it is likely to operate. Deciding these issues at a preliminary stage in parliamentary proceedings on the basis of "common sense" may not necessarily do them justice. For example, Bill S-13 was intended to operate in the context of the prohibitions of the *Tobacco Act* on furnishing tobacco products to young persons. Steps to dissuade them from tobacco use would arguably not be contrary to the interests of the tobacco industry because sales to young persons are already illegal.

Re Eurig Estate

It may come as a surprise to many to find that the Speakers are not the only ones who may rule on procedural matters relating to financial legislation. On October 23, 1998, the Supreme Court of Canada ruled on *Re Eurig Estate*[5], a case involving the imposition of probate fees by regulations under the Ontario *Administration of Justice Act*. A majority of the Court held that the fees were taxes and that their imposition by regulation contravened section 53 of the *Constitution Act, 1867* because they originated in a regulation of the Lieutenant-Governor in Council, rather than in a bill passed by the Legislative Assembly. Justice Major wrote:

> [para 30] In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle

> of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

He also stated that section 53 "is a constitutional imperative that is enforceable by the courts." This statement may apply equally to the requirement of a royal recommendation under section 54 *Constitution Act, 1867*, although the financial initiative of the Crown is perhaps less well entrenched than the principle of no taxation without representation.

The Supreme Court's decision confirms an overlap of jurisdiction between the Speakers and the courts on the procedural issues addressed by these sections of the Constitution. Speakers have often noted this overlap, as indeed the Commons Speaker did in ruling on Bill S-13:

> though this tax question might be characterized as a question of law and in another context outside this Chamber might be raised and considered as a question of law, in this context it is considered only as an integral part of a question on procedure and parliamentary privilege.

It is less clear whether the Speakers are in any sense bound by the rulings of the courts on sections 53 and 54. Although the courts clearly cannot dictate how Parliament conducts its proceedings, they hold over it the possibility of invalidating legislation that is enacted in contravention of what the courts consider sections 53 and 54 to require. This is a remarkable development, especially given that in Australia the High Court has avoided this overlap by ruling that the courts have no power to enforce comparable provisions in its Constitution, their jurisdiction being confined to law, not "proposed laws".[6]

Conclusion

The Commons Speaker's rulings on Bill S-3 and Bill S-4 suggest a significant shift away from the approach taken to the royal recommendation by previous Speakers in both the House of Commons and the Senate. The ruling on Bill S-3 seems to reject the application of the requirement to indirect appropriations, moving toward the approach found in parliaments such as that of the Commonwealth of Australia and advocated by several commentators on the situation in the Canadian Parliament.[7] This approach would make it simpler to decide whether a royal recommendation is required and it would also expand the scope for private-members initiatives. However, it would also weaken the Crown's control over government finances and public spending.

As for the ruling on Bill S-4, it reaches a sensible result, but its reasoning betrays some of the confusion that lurks about the royal recommendation. I would suggest that the *Crown Liability and Proceedings Act* does not amount to a pre-existing appropriation for matters provided for in Bill S-4. It would instead make a direct appropriation out of any provision increasing the Crown's civil liability. The better argument for rejecting the application of the royal recommendation in this case is that the provisions of Bill S-4 simply would not have imposed any substantial charge on public money because they applied to private sector activities that the Crown does not generally engage in.

The rulings on Bill S-13 demonstrate very different approaches to distinguishing taxes from industry levies. The approach of the Senate Speaker is grounded in a careful analysis of the language of the bill and suggests a critical regard for the procedural requirements of origination and the royal recommendation, which limit the ability of senators to introduce bills. In contrast, the approach of the Speaker of the House of Commons is substantive in nature and is obviously motivated by concern for the right of that House to originate financial measures.

The merits of each approach are debatable, but it is ironic that the Supreme Court may have tipped them in favour of the substantive approach. Its decision in *Re Eurig Estate* poses a host of questions about the relationship between the courts and parliamentary bodies because it holds that the courts may determine those questions of parliamentary procedure that have been constitutionalized in sections 53 and (probably) 54 of the *Constitution Act, 1867*. This means that the Speaker now plays a potentially important role in ensuring that bills conform to these provisions, not only as a matter of parliamentary procedure, but also incidentally as a matter of constitutional law. Given that the courts tend to adopt a substantive approach to questions of legislative purpose and the character of taxes, the Speakers may be able to play a more effective role by taking the same approach.

Although this is one conclusion to be drawn from *Re Eurig Estate*, it is nevertheless profoundly disturbing. In countless decisions, Speakers have indicated that they have no jurisdiction to decide legal questions. Until the Supreme Court decision, this has posed little problem because the procedural context of Speakers' decisions has been quite separate from the context in which these questions arise in the courts, for example in relation to the division of powers between Parliament and the provincial legislatures. However, with *Re Eurig Estate*, we now

have exactly the same questions being decided both by the Speakers and the courts. This raises many concerns.

It is possible that conflict may occur between the Speakers and the courts if, for example, they reach different results on the characterization of taxes. Indeed, given the disagreement between the Speakers on Bill S-13, it is surely not difficult to imagine that the courts may reach different conclusions as well. This is particularly likely because the judicial concept of a tax is rooted in constitutional law cases on the division of powers between Parliament and the provincial legislatures.[8] The courts have taken little account of how taxes have been characterized for the purposes of parliamentary procedure. In addition, they have had even less to do with the royal recommendation and the definition of an appropriation. In light of the uncertainty surrounding what is, in effect, a new basis for invaliditing legislation, both past and future, one can only hope that they will have due regard for Speakers' rulings on these matters.

Notes

1. House of Commons, *Debates*, July 11, 1988 p. 17367 and March 28, 1969, p. 7265.
2. House of Commons, *Debates*, December 10, 1963 p. 5665.
3. House of Commons *Journals*, November 9, 1978 pp. 130-1 and February 20, 1979 pp. 393-5.
4. Senate *Journals*, February 27, 1991 p. 2262-2264.
5. [1998] 2 SCJ, No. 72.
6. *Victoria v. Commonwealth* (1975) ALR 277 (HC) p. 347.
7. See J. Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995), 27 *Ottawa Law Review* p. 33 and R.R. Walsh, "Some Thoughts on Section 54 and the Financial Initiative of the Crown" (1994), 17 *Canadian Parliamentary Review* p. 22.
8. *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357.