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The form and use of royal recommendations :
report of the Standing Senate Committee
on National Finance.

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**Report of
the Standing Senate Committee on
National Finance**

Order of Reference

Extract from the Minutes of the Proceedings of the Senate of Tuesday, May 2, 1989

*With leave of the Senate,
The Honourable Senator Phillips moved:*

*That the Standing Senate Committee on National Finance be authorized to
prepare and report upon the expenditures set out in the Estimates for the fiscal year ending
the 31st of March, 1990 with the exception of Privy Council Vote 15 (Official Languages).*

**THE FORM
AND USE OF ROYAL
RECOMMENDATIONS**

Chairman

The Honourable Fernand-E. Leblanc

Deputy Chairman

The Honourable Roch Bolduc

Second Session

Thirty-Fourth Parliament

February 1990



Members Order of Reference

Extract from the *Minutes of the Proceedings of the Senate* of Tuesday, May 2, 1989:

"With leave of the Senate,
The Honourable Senator Phillips, moved:

That the Standing Senate Committee on National Finance be authorized to examine and report upon the expenditures set out in the Estimates for the fiscal year ending 31st March, 1990 with the exception of Privy Council Vote 15 (Official Languages).

After debate, and --
The question being put on the motion, it was --
Resolved in the affirmative."

The Form and Membership of the Committee

As of February 15, 1990

The Honourable Fernand-E. Leblanc, Chairman
The Honourable Roch Bolduc, Deputy Chairman

and

The Honourable Senators:

Balfour, James
Beaudoin, Gérald
Bosa, Peter
Hastings, Earl
Kirby, Michael
Kelly, William M.

* MacEachen, Allan, P.C. (or Frith, Royce)
Marsden, Lorna
* Murray, Lowell, P.C. (or Doody, William)
Simard, Jean-Maurice
Stewart, John (*Antigonish-Guysborough*)
Stollery, Peter

* *Ex officio* Members

The Form and Use of Royal Recommendations

Preamble

For many years, in its examinations of the annual spending Estimates, the Standing Senate Committee on National Finance has noted the ever-increasing proportion that the statutory component has come to play in government expenditures. For example, in its Interim Report on the 1989-90 Estimates, the Committee noted that, from 1983-84 to 1988-89, statutory expenditures had risen from 59 per cent to 67 per cent of total annual expenditures.¹ This led the Committee to comment that the increasing importance of these statutory items was making it difficult for the government to reduce its annual deficit within the current revenue and expenditure framework.²

Statutory expenditure items are included in the Estimates for information only. They come about as the result of Acts authorizing the government to draw on public revenues without any further parliamentary approval. Examples of such already approved legislation include the Acts that authorize the payment of fiscal transfers to the provinces, the payment of family allowances and the payment of judges' salaries.

When a bill that authorizes statutory expenditure is introduced in the House of Commons it is accompanied by an all-purpose, standard recommendation from the Governor General stating that His/Her Excellency recommends the appropriation(s) sought by the bill. After first reading -- well before such bills come to the Senate -- this message is removed from the bill. Consequently, Senators are not informed about the potential impact that bills they are asked to approve will have on the government's financial position.

In the 33rd Parliament a number of bills with which this Committee was asked to deal had a royal recommendation at first reading in the House of Commons. However, government officials who appeared as witnesses before the Committee were unable to point out the clauses in the bills that would authorize draws on public revenues and that consequently would have an impact on future statutory expenditure. The members of the Committee felt strongly that if appropriations were in fact being sought by the bills, not only

the Senators but all Members of Parliament were being poorly informed about the potential impact of legislation on the ability of the government to manage its expenditures. That concern led the Committee to examine the issue of royal recommendations and to prepare this report.

Requirement for the Royal Recommendation

A royal message of recommendation is required before the House of Commons passes any bill which in whole or in part appropriates money.³ A message does not recommend a bill; it recommends the appropriation that would be effected by the bill.

Section 54 of the *Constitution Act, 1867*, reads:

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.

No bill containing one or more clauses appropriating money may be introduced in Parliament in the Senate.

Section 53 of the *Constitution Act, 1867*, reads:

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

The Parliament of Canada appropriates money by two quite different kinds of bills: (a) bills based on supply votes carried in the House of Commons, which cover the annual expenditures; and (b) bills which contain clauses authorizing "statutory expenditure" for purposes other than those provided for annually.⁴

There are few, if any, serious problems relating to the royal recommendation in the case of the first of these two kinds of bills. Each such bill is based on the several Votes set forth in Estimates recommended to the House of Commons in a message from the Governor General.⁵ That message is presented and read to the House by the Speaker. If an appropriation bill contains nothing extraneous, it is a pure appropriation bill. In Canada all

such bills -- whether based on interim supply requests, on the Main Estimates, or on a set of supplementary estimates -- are called Appropriation Bills. Generally at least four Appropriation Bills are dealt with by Parliament in relation to each fiscal year: one late in March to cover the first months of the forthcoming (April 1) fiscal year; one based on the Main Estimates at the end of June; one based on fall supplementary estimates; and one, in March, based on final supplementary estimates.

The situation is far more complex in the case of bills that authorize "statutory expenditure". These bills authorize expenditures for what at Westminster are called "novel purposes". There are many such bills; they vary in importance. Some of them are in effect only temporarily, while others remain on the statute books for years. For example, in the 1989-90 fiscal year, statutory expenditures of \$88.7 billion account for two-thirds of the \$133.1 billion in total expenditures in the Estimates that have been tabled to date.⁶

In the case of Appropriation Acts, the royal recommendation, as mentioned above, takes the form of a message read by the Speaker asking the Commons to vote the supplies specified in the Votes in the Estimates. In the case of requests for new "statutory expenditures" the royal recommendation since 1968 is presented in a written message which does not specify the particular appropriation sought because the message is in a standard form.

The Form of the Royal Recommendation

Before the House of Commons changed its Standing Orders on December 20, 1968, the constitutional purpose and effect of royal recommendations were obvious. The old Standing Orders required that before any bill or clause that appropriated money could be introduced, the House had to have carried a financial resolution approving that appropriation. The words of every financial resolution were recommended to the House by the Governor General. The resolution, on which the bill subsequently was based, defined precisely the amount and purpose of any appropriation to be made. The bill had to conform to the resolution in every appropriating clause, and no member of the House could move to amend any such clause so as to increase the amount or change the purpose. If the government wished to change any part of a bill based on a resolution -- that is, any appropriating clause -- it had to obtain a new recommendation embodying the change. Any part of a bill not based directly on the resolution could be amended by the House in the ordinary way on the motion of a minister or a private member.

During the 1960s the House of Commons found that the debate at the resolution stage frequently was repeated at the second-reading stage. Consequently, in December, 1968 it abolished its requirement that any bill which provided for statutory expenditure be introduced only after a resolution specifying the appropriation recommended by the Governor General had been adopted by the House. It changed its standing orders so that the recommendation would be given to the House, not in the form of a proposed resolution, but as a printed notice. The new standing order, the words of which have remained unchanged since 1968, reads as follows:

79(2) The message and recommendation of the Governor General in relation to any bill for the appropriation of any part of the public revenue or of any tax or impost shall be printed on the Notice Paper and in the *Votes and Proceedings* when any such measure is to be introduced and the text of such recommendation shall be printed with or annexed to every such bill.⁷

This standing order does not alter, indeed it could not alter, the requirement set forth in Section 54 of the *Constitution Act*; in fact, that section is set forth as S.O. 79(1). The words "such measure" in S.O. 79(2) refer to "any vote, resolution, address or bill for the appropriation of any part of the public revenue, or of any tax or impost,..." as found in S.O. 79(1). Consequently this new standing order, S.O. 79(2), simply changed the way the House of Commons receives and deals with a recommendation. Under it, a recommendation is put before the House, not as a proposed resolution to be debated and carried (or defeated), but as a notice. The new standing order does not state, nor does it imply, that the content of a recommendation is to be different from what was required before December, 1968.

Indeed, for several years after Standing Order 79(2) had been adopted, the message and recommendation of the Governor General in relation to a bill spelled out in detail the appropriation(s) in the bill. For example, Bill C-44, *An Act to amend the Senate and House of Commons Act, the Salaries Act and the Parliamentary Secretaries Act*, was introduced in the House of Commons and given first reading on December 16, 1974. The message and recommendation of the Governor General in relation to this bill stated, in part:

His Excellency the Governor General recommends to the House of Commons a measure

(2) to amend the *Salaries Act* to increase the salary paid to the Prime Minister from \$25,000 to \$45,000 per annum; to increase the salaries paid to the Ministers listed in section 4 of the Act from \$15,000 to

\$25,000 per annum; and to increase the salary paid to each Minister of State being a member of the Queen's Privy Council for Canada who presides over a Ministry of State from \$15,000 to \$25,000 per annum.⁸

However, in the fall of 1976 the Government began to obtain recommendations which did not state what appropriation(s) was (were) recommended. Since then, recommendations have been in the following standard form:

His/Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled ...

Neither a specific purpose, nor a specific amount, nor a formula for calculating such an amount is stated in the recommendation.

The Recent Use of Royal Recommendations

Three bills introduced in the 33rd Parliament (1984-88) illustrate the desirability of a form of royal recommendation which specifies the recommended appropriation.

Bill C-103, *An Act to establish the Atlantic Canada Opportunities Agency and Enterprise Cape Breton Corporation*, was introduced in the House of Commons with a royal recommendation. While certain clauses of this bill referred to salaries and other expenditures, no clause which appropriated money was identified. It appeared that the Government intended to ask Parliament to appropriate all the money required for salaries and other costs in the annual requests for supply. When the Senate divided the bill into two parts, the House of Commons refused to concur. The House contended in effect that Bill C-103 was an appropriation bill -- a bill granting aids and supplies -- which under its Standing Order 80(1) could not be amended by the Senate.

A royal recommendation was attached to Bill C-147, *An Act to establish the International Centre for Human Rights and Democratic Development*. This bill appropriated specific amounts from the Consolidated Revenue Fund over several years. This bill was amended by the Senate, although not in the clauses that appropriated money. The House accepted the Senate amendments.

Bill C-148, *An Act to establish the Canadian Centre for Management Development* was introduced with a royal recommendation. After close scrutiny, the Senate Committee on National Finance was unable to identify any clause of the bill that appropriated money, and it appeared that any funds needed to underwrite the costs of the proposed Centre would have to be appropriated later by means of the annual Appropriation Acts.⁹ However, government witnesses testified that the royal recommendation had been included as a prudent measure on the advice of officials of the Department of Justice and the Machinery of Government Secretariat of the Privy Council Office.¹⁰

In the 34th Parliament, Bill C-10, *An Act for the Forgiveness of Debts owed (sub-Saharan Africa)*, was referred to the Standing Senate Committee on Foreign Affairs in October 1989. As was the case with Bill C-148 of the previous Parliament, this bill had been introduced in the House of Commons with a royal recommendation; yet no clause of the bill appeared to appropriate money. (These debts resulted from loans authorized by Parliament; consequently, the appropriation of the amount of the debts had been recommended years earlier when the Government had come to Parliament seeking authority to make the loans.) However, a government witness told the Committee that a very small amount of the debt owed by one of the countries, Nigeria, was interest-bearing and that, because the debt was to be forgiven, the interest payable would be forgone. This would entail a loss of revenue otherwise payable to the Consolidated Revenue Fund and the witness stated that this perhaps was the reason why a royal recommendation had been attached to the bill.¹¹ The cardinal point is that nothing in the bill itself revealed that an appropriation was being sought; in the bill all the countries were dealt with in the same way although in the case of one country a new appropriation was in fact being sought.

An examination of these bills strongly suggests that the form of the royal recommendation now used does not serve to make clear what, if any, appropriation(s) the ministers are seeking by bills to which royal recommendations are appended.

This view was substantially confirmed by the testimony of witnesses who appeared before the Committee. For example, a former Law Clerk and Parliamentary Counsel of the House of Commons stated:

What I relied on as Law Clerk was what I thought would be acceptable as a money bill or not by the Speaker of the House of Commons ... whether the bill was a private member's bill or a government bill ... I would then advise the minister of the

government or the Privy Councillor that the bill would need to be accompanied by a recommendation.¹²

To determine what was "acceptable," he relied on the Speakers' rulings cited in successive editions of Beauchesne's *Rules and Forms of the House of Commons of Canada*. After advising the appropriate minister that a royal recommendation would be required, he himself then would request the recommendation of the Governor General on the Minister's behalf.¹³

This witness further stated:

There have been occasions when the government has tried to do things for the purpose of introducing bills in the Senate. For example, in one case, the government wanted to introduce a bill that said the money would be appropriated by Parliament pursuant to the *Appropriation Act* ... however, exception was taken to that because the Law Clerk did not think it would succeed.¹⁴

In fact, he indicated, for at least the past twenty-five years Speakers of the House had tended to rule out of order all motions -- including on occasion bills passed by the Senate -- that purported to instruct the government to undertake an activity that would involve the expenditure of money, 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.¹⁵ 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.

The Chief Legislative Counsel of the Department of Justice appeared as a witness before the Committee. He stated that it is his practice to send a regular report on the status of legislation to the Privy Council Office for the use of the Government House Leader, advising that Office which bills, in his view, would require a royal recommendation. A list of guidelines is used in the Department to assist drafters in determining whether a bill requires a royal recommendation, based on rulings of Speakers of the House over the years.¹⁶ This witness stated further that, in offering his advice on the need for a royal recommendation:

We are there to assist the government house leader's office in determining whether or not the bill will be challenged if it [is] introduced in the Senate ... we tend to err on the side of safety ... it would be safer, in a dubious case, to get the royal recommendation on the bill ... we take the prudent view and ... simply tell them [the Privy Council Office] not to introduce that bill in the Senate because it might be ruled out of order.¹⁷

Regarding the final decision to ask for the Governor General's recommendation, the witness first indicated that this was made by the Government House Leader's office, but later he stated:

It is ultimately up to the Parliamentary Counsel's office to decide whether or not the royal recommendation is required because he is the one that received (*sic*) it, and we do not have any contact with him on this issue.¹⁸

Conclusions

Before the fall of 1976, governments had an important interest in assuring that the content of a recommendation was precise, because such recommendations defined the proposed appropriation and thus limited what the House of Commons could do to the subsequent bill by way of amendment. Since 1976 a recommendation merely states, in effect, that whatever appropriation is sought in the bill is recommended. The new form makes it necessary for members of both Houses to go through any bill accompanied by a recommendation in an effort to discover what appropriation has been recommended. However, as shown by the example of Bill C-10 (*supra*) even the most careful scrutiny in some instances would not find the invisible.

Moreover, the adoption of a standard form of recommendation resulted in a shift of the locus of the initial decision as to whether or not any particular bill could be introduced without a recommendation. Before the fall of 1976 a government had to decide exactly what appropriation should be recommended. Accordingly, the government had to answer the prior question, namely, whether or not a recommendation was required. Now, however, apparently it is the Law Clerk of the House of Commons who makes that decision; indeed, apparently it is the Law Clerk, not the government, who advises the Governor General to send a recommending message.

Before December, 1968 a resolution bound the ministers as well as the private members. Thus there was a practical reason why recommendations were not sought unless necessary. Now, however, it may be thought that there is little to be gained by introducing a bill without a royal recommendation. Indeed, it may be thought prudent to have a recommendation even if the bill appears to contain no appropriating clauses.

We have identified the difficulty: namely, that the standard form of the recommendation now used does not define and specify the appropriation or appropriations recommended by the Governor General. This leads us to ask whether such a message is sufficient to meet the requirements of Section 54 of the *Constitution Act*, 1867. Regardless of how one answers that constitutional question, the fact remains that a general message of the kind now used leaves the members of both Houses, including the Speakers, without a clear

statement from the Crown as to what appropriation(s) is (are) being sought by a recommendation.

As stated in the preamble, the Committee's principal purpose in investigating the question of royal recommendations, under its mandate to examine the Estimates, was to determine whether the form of the recommendation is at least partially responsible for the increasing relative importance in the Estimates in recent years of statutory expenditures -- expenditures that cannot be questioned by either House when dealing with Estimates because they were approved when the original bill was passed, often years before. At the same time, the Committee recognizes that the use of royal recommendations raises important legal and constitutional issues, on which further light may be cast by additional study.

Recommendations

The Committee therefore recommends:

1. That the Senate consider sending a message to the House of Commons asking it to consider adopting a standing order requiring that all messages of recommendation be specific as to any and all appropriation(s) -- both the purpose and the amount, or the formula for calculating the amount -- recommended by the message.
2. That the Senate consider adopting a standing order requiring that, when any bill authorizing expenditure for a novel purpose comes to the Senate, the bill not go beyond second-reading stage without an authoritative statement from the government specifying any and all appropriation(s) -- both the purpose and the amount, or the formula for calculating the amount -- sought by the bill.
3. That the Senate refer the issue of royal recommendations to its Standing Committee on Legal and Constitutional Affairs for additional study.

Notes

1. See "The Estimates, 1989-90: Interim Report of the Standing Senate Committee on National Finance", Appendix "B", *Debates of the Senate*, Tuesday, October 17, 1989, pp. 574-578.
2. *Ibid.*, p. 576.
3. At one time, the British House of Commons granted the proceeds of particular taxes, imposts and levies to the king to supplement his own revenues and to spend them as he saw fit. Appropriation, by contrast, gives the Crown the authority to pay out money from public revenues -- now normally the Consolidated Revenue Fund -- in specified amounts for specified purposes, in either one fiscal year or for as long as the statute remains in effect. For a more complete historical review, see the testimony of Mr. Graham Eglinton in *Proceedings of the Standing Senate Committee on National Finance*, Thursday, October 5, 1989, pp. 14:6-23.
4. The term "statutory expenditures" is used in parliamentary practice to refer to expenditures authorized by Parliament outside the annual supply process. Acts authorizing statutory expenditures give the government the authority to withdraw funds from the Consolidated Revenue Fund for one or more years without the annual approval of Parliament. The amounts to be spent are included in the Estimates for information only, and are not dealt with in the Appropriation Bills since the amounts have already been appropriated.
5. Votes are items of proposed expenditure within the Estimates of a particular department or agency. In most cases there is only one Vote -- known as a Program Expenditure Vote -- for each program of a department or agency. However, programs with annual capital expenditures or grants and contributions in excess of \$5 million generally have separate Votes to cover operating expenditures, capital expenditures, and grants and contributions.

For a full discussion, see, for example, *1989-90 Estimates: Part II: The Main Estimates*, pp. 1-3 to 1-7.

6. See "Report of the Standing Senate Committee on National Finance on Supplementary Estimates (B), 1989-90," Appendix, *Debates of the Senate*, Wednesday, November 29, 1989, pp. 775-778.
7. See Chapter X, "Financial Procedures," *Annotated Standing Orders of the House of Commons, 1989*.
8. See *House of Commons Journals*, December 16, 1974, pp. 213-214.
9. See *Proceedings of the Standing Senate Committee on National Finance*, Thursday, September 22, 1988, pp. 45:22-23.
10. This bill was still at committee stage in the Senate when the 33rd Parliament was dissolved and therefore did not become law.
11. See *Proceedings of the Standing Senate Committee on Foreign Affairs*, Tuesday, October 31, 1989, pp. 11:6-7.
12. See testimony of Mr. Joseph Maingot, *Proceedings of the Standing Senate Committee on National Finance*, Thursday, October 19, 1989, p. 15:15.
13. *Ibid.*, p. 15:16.
14. *Ibid.*, p. 15:15.
15. See testimony of Mr. Eglington in *Proceedings of the Standing Senate Committee on National Finance*, Thursday, October 5, 1989, pp. 14:6-7.

16. See testimony of Mr. Peter Johnson, Q.C., in *Proceedings of the Standing Senate Committee on National Finance*, Thursday, November 2, 1989, pp. 17:5-15. The Department of Justice guidelines appear in Appendix "NF-17", pp. 17A:1-2 of these *Proceedings*.
17. *Ibid.*, pp. 17:7, 17:10-11.
18. *Ibid.*, pp. 17:7-8.

