CHAPTER 5

THE ROYAL RECOMMENDATION

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In a parliamentary system of government based on the British model, as we have it in Canada, the Crown (that is, the Government) has the financial initiative, that is, only the Crown can propose a new tax or a tax increase or propose the spending of public funds. In respect of the latter, the House may not vote on a spending proposal that was not recommended to the House by the Crown. This rule is entrenched in our Constitution by section 54 of the *Constitution Act, 1867*, and is reproduced in subsection 79(1) of the *Standing Orders of the House of Commons*.[1]

This constitutional requirement is based on Lord Durham's Report to the British Government in 1838. In his Report, Lord Durham wrote:

> 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 the Assembly.[2]

The problem for Lord Durham arose from the availability of surplus public funds:

> As long as revenue is raised, which leaves a large surplus after the payment of the necessary expenses of 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.[3]

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1. (UK), 30 & 31 Vict, c 3, s 54, reprinted in RSC 1985, App II, No 5, [*Constitution Act*]; *Standing Orders of the House of Commons*, SOR, 2014-79, s 1 [*Standing Orders*].
2. Ontario, House of Assembly, *Appendix to Journal of the House of Assembly of the Upper Canada*, 13th Parl, 4th Sess, Vol 1 (1839) at 92 (Earl Durham).
3. *Ibid*.

The solution to the spending problem in colonial Canada seemed obvious to Lord Durham:

> [I]f 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 appropriations, which chiefly serves to give an undue influence to particular individuals or parties.[4]

It seems to me not unreasonable to ask whether Lord Durham's problem in 1838 in respect of public spending for self-serving political purposes is not still with us, albeit by the Crown (the Government) and not the legislative assembly as it was in Lord Durham's day. The financial initiative rule enshrined in section 54 may not have resolved Lord Durham's concerns about the management of public funds.

When I first came to the House in the early 1990s, my office was expected to get the Governor General's signature on a "*royal rec*" (as it was commonly called) for a Government bill that was about to be introduced in the House. At that time, the House rules required the recommendation to be appended to or printed upon the bill when it was first introduced in the House. I was responsible for deciding whether the bill required a *royal rec* though this was usually done after consultations with the Department of Justice Legislation Section that had drafted the bill. Government bills, as you know, are typically lengthy and quite complex. It was not an easy task for someone who had not drafted the bill to examine the bill to determine if there were provisions that fell under section 54. Then, for someone from my office to head off across town to Rideau Hall, the Governor General's residence, to get the Governor General's signature on a recommendation was absurd. It was not for a mid-level functionary at the House to make recommendations to the Governor General! This was to be done by officials of the Government, whether the Department of Justice or the Privy Council, acting on behalf of the Government. Why was my office doing this, I asked?

I arranged to meet with officials from the Department of Justice, Department of Finance and the Privy Council Office, and eventually they found a way to take over this function. I was pleased to be rid of it. It was a holdover from former times, up to the late 1940s, when

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4. *Ibid*.

the Law Clerk had an oversight function in the preparation of Government bills for introduction in the House.

For a bill to require a *royal rec*, it must be appropriating funds from the Consolidated Revenue Fund (CRF) only. Appropriations of public funds before they form part of the CRF do not come under section 54.[5]

Notwithstanding its entrenchment in the *Constitution Act, 1867*, application of the financial initiative rule is a matter between the Government and the House, that is, were the Government to feel that the House was not fully respecting its financial initiative, it is unlikely that a court would be receptive to an action by the Government to enforce section 54 against the House. The courts have recognized that the House has absolute control of its proceedings. The House decides what is proper procedure for its purposes. This means that section 54 applies to House procedures as the House may determine. I do not think the courts would be comfortable telling the House how its proceedings are to be conducted in view of section 54 (or sections 20, 53 or 55 of the *Constitution Act, 1867*), notwithstanding its constitutional status. In fact, during the minority government years, 2004-2011, the Government on many occasions objected that a bill ought not to receive a vote as it required a *royal rec* and did not have one. Of course, the Government, being in the minority, was concerned that the bill might be passed in the House if the opposition parties voted for the bill. The Speaker would make a ruling, sometimes in support of the Government's view and sometimes not. I doubt that the Government ever thought it could go to court to enforce section 54 against a ruling by the Speaker.

Until 1994, Standing Order 79 required that a royal recommendation must accompany bills on their introduction, which for Private Member's Bills meant that they did not reach the floor of the House if they required a *royal rec*.[6] In 1994, the Standing Orders were amended to require only that a *royal rec* must be produced before the bill receives a final vote at third reading. This meant that the sponsoring Private Member would at least get a debate even though the bill called for or authorized the spending of public funds.

5. See Bill C-363, *An Act to amend the Canada Mortgage and Housing Corporation Act (profits distributed to provinces), 38th Parl, 1st Sess, 2005, (defeated at second reading 5 November 2005); House of Commons Debates, 38th Parl*, 1st Sess, No 130 (3 October 2005) at 8293-8294.
6. *Supra*, note 1.

It must be remembered that a *royal rec* is only given by the Governor General on the recommendation of the Government, which means that an opposition Member will likely never get a *royal rec* for his or her bill if it needed one. For this reason, before the change to Standing Order 79 in 1994, the *royal rec* issue was important to Private Members as they would not even get a debate in the House if their bills required a *royal rec*. In my time at the House (1991-2012), it happened once that a Private Member obtained a *royal rec* for his bill. The Member was a member of the Government caucus (the bill gave unemployment benefits to persons selected for jury duty).[7] It seems to me unreasonable to suppose that over my 21 years at the House, no Private Member (with one exception) ever had a good idea for the use of public funds, given the number of Private Member's bills introduced over this period (in the thousands).

Parliamentary procedure in Britain (where the Crown's financial initiative is not entrenched in a written constitution) had for many years applied the financial initiative rule to any proposal that would constitute a "new and distinct charge" upon the public purse, whether or not the language of appropriation is used. This has been the guiding consideration in Canada also though application of this test has not always been easy. This has been expanded through procedural practice to where, according to the House's authoritative text on its practices and procedures, *House of Commons Procedure and Practice*:

> [A] bill that…extends [an existing or proposed appropriation's] objects, purposes, conditions and qualifications is inadmissible on the grounds that it infringes on the Crown's financial initiative.[8]

The language of the *royal rec*, introduced in 1976, was much shortened and recommended the bill "under the circumstances, in the manner and for the purposes" set out in the bill. Objects, conditions and qualifications mentioned in *House of Commons Procedure and Practice*, above, are not included and are arguably a further extension of the royal rec requirement. This broad language effectively prevents virtually any substantive amendments to Government bills that have a royal rec attached. Before 1976, the royal rec had detailed language indicating the clauses in the bill that required a royal rec, which would have enabled amendments to avoid offending the royal rec.

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7. Bill C-216, *An Act to amend Unemployment Insurance Act (jury service)*, 1st Sess, 35th Parl, 1994.
8. Audrey O'Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed (House of Commons: Ottawa, 2009) at 834.

If the financial initiative rule applied only where a bill spoke of appropriating funds, application of the rule would be an easy matter. However, bills often do not use appropriation language; in fact, they often avoid this language by design in the hope that they might avoid attracting the *royal rec* requirement. Thus section 54 is applied where, despite the absence of language indicating an appropriation, it is clear that the objectives of the bill cannot be implemented without a new expenditure of public funds. These bills are treated as the equivalent of express appropriations or authorizations to spend additional public funds. Bills that may cause incidental increases to the operating costs of the Government do not need a *royal rec*; these are covered by existing appropriations, that is, they are not a "new and distinct charge" upon the public purse.

Before I joined the House in 1991, legislative counsels had tried including a "non-appropriation" clause in Private Member's Bills that might otherwise attract the *royal rec* requirement. This clause said that no monies shall be expended for purposes of this Act until an appropriation is made for such purpose by the House. In 1978, the Deputy Speaker refused to deal with the clause directly and instead characterised it as an unacceptable way to "elude" the royal rec requirement. Later, the argument developed that the non-appropriation clause was an attempt to do indirectly what could not be done directly. If a private Member could not, directly, introduce a bill that called for the spending of public funds, the Member could not do this "indirectly" by inserting a "non-appropriation" clause.

In my view, the "non-appropriation" clause was doing *directly* what could be done *directly*, that is, it avoided doing *directly* what could not be done *directly* (offending the financial initiative of the Crown). The notion of a clause in a bill doing something indirectly didn't make sense to me. One had to completely disregard this clause in the bill as if it were not there which, in my view, is clearly inappropriate: bills for whatever purpose are to be read in their entirety. However, this is a lawyer speaking and the two Speakers were making procedural rulings. One must remember that the House can do whatever it chooses in its application of s. 54 under S.O. 79(1).

I sought a restrained application of the *royal rec* requirement – some might say, unkindly, a narrow application – perhaps reflecting a bias in favour of my client group, Private Members. Others, such as my learned colleague at the Department of Justice, John Mark Keyes,[9]

9. Chief Legislative Counsel at the Department of Justice from 2005 to 2013.

were attracted to a broader application reflecting, in a similar fashion, their bias in favour of their client, the Crown. I say this with the greatest of respect for John Mark and his colleagues at the Department of Justice. We naturally lean toward the interests of our clients and if you work for the same client long enough, the bias becomes ingrained as an unthinking habit of mind sometimes.

The minority government years, 2004 to 2011, brought increased attention in the House to the *royal rec* requirement. Of particular note from these years are three Private Member's bills, one on employment insurance, one on the Kyoto Protocol and another on the Kelowna Accord.

On February 8, 2005, the Acting Speaker ruled on Private Member's Bill C-280, a bill that amended the *Employment Insurance Act* to provide, inter alia, for 13 new commissioners to be added to the Canadian Employment Insurance Commission. The bill was held to require a royal rec as the existing legislation provided for remuneration being paid to commissioners, which meant that the new commissioners created by the bill would also have to be paid. According to the Acting Speaker:

> Where it was clear that the legislative objective of a bill cannot be accomplished without the dedication of public funds to that objective, the bill must be seen as the equivalent of a bill effecting an appropriation.[10]

On May 17, 2006, former Liberal Prime Minister Paul Martin, sitting in opposition, introduced the *Kelowna Accord Implementation Act*, Bill C-292, seeking implementation of the Kelowna Accord that his Liberal Government had entered into with the provinces, the territories and the leadership of Canada's aboriginal people "to close and ultimately eliminate the gaps between our aboriginal Canadians and non-aboriginal Canadians".[11] The Kelowna Accord was negotiated only a few days before the collapse of the Liberal Government on November 28, 2005. The minority Conservative Government said that the bill, if passed into law, would have significant financial implications for the Government and therefore should be accompanied by a royal rec. Speaker Milliken did not agree when he rendered his ruling on the bill on September 25, 2006.

10. *House of Commons Debates*, 38th Parl, 1st, No 52 (8 February 2005) at 3253,
11. *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (35 September 2006) at 3197-3198 (Hon Peter Milliken).

The Bill, said the Speaker, required the Government to "'take all measures necessary to implement the terms of the [Kelowna] accord' but provided no specific details on those measures". He noted that the measures to be taken by the Government were not described in the Bill. "In the absence of such a description," said the Speaker, "it is impossible for the [Speaker] to say that the bill requires a royal recommendation".[12]

The Speaker noted that implementation of the Kelowna Accord would likely require various legislative proposals, possibly including an appropriation of public funds and when such enabling legislation appears, the Speaker will, he said, "be vigilant in assessing the need for a royal recommendation".[13] In other words, while public funds may eventually be needed, they were not yet being appropriated by this bill.

On May 17, 2006, a Private Member introduced the *Kyoto Protocol Implementation Act*, Bill C-288, which sought implementation of the multi-national Kyoto Protocol on climate change setting greenhouse gas emission reduction targets for 2012. The Protocol had been negotiated by the Martin Liberal Government but not fully implemented before the Liberal Government fell in late November 2005. The new Conservative Government was opposed to the Kyoto Protocol.

Bill C-288 required the Minister of Environment to establish an annual Climate Change Plan in accordance with the Kyoto Protocol and for the Commissioner of the Environment to report to the Speaker of the House on the Government's progress in the implementation of the Plan and required the Government to amend its environmental regulations to meet the requirements of the Kyoto Protocol.

The Government said that Bill C-288, if adopted, would commit the Government to implementation of the Kyoto Protocol and this would require significant expenditures and therefore the bill required a royal rec. The Speaker ruled that the Bill did not need a royal rec as it did not impose upon the Government actions that would entail the spending of public funds:

> [T]he adoption of a bill calling on the government to implement the Kyoto protocol might place an obligation on the government to take

12. *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (25 September 2006) at 3197-3298 (Hon Peter Milliken).
13. *Ibid.*

> measures necessary to meet the goals set out in the protocol but the Chair cannot speculate on what those measures may be. If spending is required, as the government House leader contends, then a specific request for public monies would need to be brought forward by means of an appropriation bill, as was the case in 2005, or through another legislative initiative containing an authorization for the spending of public money for a specific purpose.[14]

The Bill did not specifically authorize any spending for a distinct purpose. “Rather,” said the Speaker,

> the bill seeks the approval of Parliament for the government to implement the protocol. If such approval is given, then the government would decide on the measures it wished to take. This might involve an appropriation bill or another bill proposing specific spending, either of which would require a royal recommendation.[15]

The bill only required the Government to produce a plan on climate change. The Government would have to use its existing staff resources to meet the requirements of the bill but this was not new spending.

The *royal rec* requirement is both a legal and a procedural issue. Under section 54, it was a legal issue and came within my function as a lawyer. As the section was repeated in the procedural rules of the House, it also came within the function of procedural staff. I had to accept, in keeping with the privileges of the House, that ultimately the House could apply section 54 however it saw fit as an internal procedural rule, whether or not, from a legal statutory analysis viewpoint, it was applying the section in accordance with its terms. It was all about reading the actual text of the bill and in some cases very carefully. We eventually developed the approach that where the language of the bill unavoidably constituted an authorization to spend new public funds, a *royal rec* was required; an explicit appropriation or authorization was not necessary though the language of section 54 would suggest this was necessary.

We agreed that a *royal rec* was not required where the bill merely increased the Government’s cost of doing business, as it were, by increasing the responsibilities of a department or agency such as requiring that it submit more reports. In these cases, there is already

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14. *House of Commons Debates*, 39th Parl, 1st Sess, No 54 (27 September 2006) at 3314-3315 (Hon Peter Milliken).
15. *Ibid*.

an appropriation in place for the business of these departments or agencies and the bill is not effecting or authorizing a new appropriation or an increase to an existing appropriation.

It was during the minority government period that the House's practices on the *royal rec* were put to the test and, in my view, were much improved as a result. Closer and more thoughtful scrutiny was given to the *royal rec* requirement. Rather than a pre-emptive decision being taken "en arrière du rideau", the practise developed that in clear cases the Speaker would simply announce that certain bills required a *royal rec* and therefore would not be put to a vote at third reading. With the doubtful cases, the Speaker simply advised the House of his concerns regarding application of the *royal rec* and left it to the Government to make its case in the House for requiring a *royal rec*. The sponsor of the bill and other interested Members could respond to the Government's case and the Speaker would then make a ruling. This enabled the issues surrounding the *royal rec* to become better known and generally improved the understanding among Members (and their staff) on when a *royal rec* is required on a bill. From this approach, considerable procedural jurisprudence developed through the Speaker's rulings that will offer guidance for years to come.

Since the return of majority Government in 2011, the *royal rec* issue has not been so prominent. The Government side can simply vote against a Private Member's bill that it felt offended the Crown's financial initiative (though it might raise the issue in the hope that the bill might be disposed of without a vote).

Ultimately, one's approach to the *royal rec* requirement will turn on what one thinks makes for good government. This was Lord Durham's concern. The choice is between the British model, as we have it in Canada, where the financial initiative is with the Crown exclusively and the American model where the financial initiative is exercised by both the executive branch and the legislative branch.

Lord Durham thought the public interest would be best served if public spending were kept in the hands of the Crown. In his day, however, the Crown, in the person of the Governor, was not under the control of the Government of the day. Admittedly, the Governor acted more in the interests of the Colonial Office in London than the larger public interest as we know it today, but at least he could act independently of his ministers. Canada advanced to responsible government in 1848 where this independence was given up, and properly so, but the independence of the Crown, that is, the Governor, from

the politics of the day was fundamental to Lord Durham's thinking. His objective was to remove public spending from self-serving partisan politics. The financial initiative of the Crown as we have it today merely limits the self-serving to the party in power. At best, we have only a partial solution to the concerns of Lord Durham.

What the financial initiative rule does do, however, and this is important, is assign fiscal responsibility and accountability to the Government. With its exclusive control over national finances, the Government will get the blame for deficits or the credit for surpluses – as it should. However, we must remember that there is much political smoke and mirrors in the Crown's exercise of its financial initiative and I think it's fair to say that the House is not very effective in its oversight role on Government spending. I'm not at all sure, 175 years later, what Lord Durham would recommend were he looking at us today.

With regard to those two bills that became the *Kelowna Accord Implementation Act* (S.C. 2008, c. 23) and the *Kyoto Protocol Implementation Act* (S.C. 2007, c. 30), these bills were, in my opinion, legislative nullities *ab initio.*[16] In a perfect parliamentary world, which will never emerge, these bills would have been ruled out of order at first reading. The Kelowna Accord bill did not propose measures implementing the Accord, which it could have done, of course (leaving aside the *royal rec* issue for the moment), but rather legislated for the Government to take legislative action that would implement the Accord. In my view, a bill cannot legislate the legislating of a matter, however worthy the matter might be seen by some. Moreover, a Government cannot by force of law be compelled to legislate on a matter. A bill that legislates legislative action is not doing anything; thus, a legislative nullity.

Similar considerations apply with respect to the Kyoto Protocol bill. It, too, proposed only that the Government legislate (through regulations) implementation of the Kyoto Protocol. The bill did not legislate measures designed to implement the Protocol.

Bills are parliamentary instruments by which legislative assemblies legislate, that is, make laws by which public policy objectives are made into laws that are enforceable in the courts. These two bills legislated only for the making of laws; they did not themselves make

16. SC 2008, c 23; SC 2007, c 30.

laws though they had the look and feel of doing so, that is, they took the form of legislative bills. They were empty legislative vessels, as it were.

As I have said, the legislative lawyers and the legislative clerks at the House had some great debates on Private Member's bills and the *royal rec* especially during the minority government years when this was a contentious issue. I remember desperately saying to those that I thought were too inclined to require a *royal rec* that it was not good enough that you could *smell* money, damn it! You had to see language that indicated that public funds were being appropriated or new spending was being necessarily authorized. In each case, one had to look closely at the language of the bill to determine what the bill was doing.

In other words, it was not good enough to rely on what the language of a bill may – I say "may" – be implying or inferring. It is not good enough, in my view, to adopt the approach of the Government's Chief Legislative Counsel, Peter Johnson, appearing before the Senate National Finance Committee in 1990, that the *royal rec* was required on any bill that involved public spending. What does involve mean? A mere inference of some spending is too vague and saying that public funds are involved in any legislative implementation is too broad, in my view.[17]

On the other hand, insisting on legislative language that indicated a clear intention to use public funds, as I had done, was too narrow. It seems to me that the balanced view is to require a royal rec on bills where implementation will unavoidably require a new or an increased expenditure of public funds from the Consolidated Revenue Fund, beyond incidental costs for which funds have already been authorized by an appropriation. Here as elsewhere, however, the Devil is in the details.

17. Senate, Standing Committee on National Finance, *Minutes of Proceedings* (October 1989) at 17A-1.