MONEY BILLS AND THE USE OF THE ROYAL RECOMMENDATION IN CANADA: PRACTICE VERSUS PRINCIPLE?

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In current parliamentary practice, bills which require the royal recommendation are referred to as 'money bills'. The only bills guaranteed to the executive in the Constitution Act, 1867 *are true appropriation bills, but the term 'money bill' has come to mean much more than that: it has been loosely used to cover a variety of meanings, depending on the context in which it is employed. The result is that an extensive definition of money bill has effectively restricted the powers of the Senate and of private members, in a manner which the Constitution itself does not prescribe. The definition of a 'money bill' has been perpetuated, in part, by the form in which the royal recommendation has taken in recent years, as well as the reliance in parliamentary practice, upon speakers' rulings, precedent and authorities which do not address the constitutional issue. The legal effect of this practice is examined in this paper.*

The powers and privileges of the Senate, private members and the House of Commons with respect to financial legislation are circumscribed by sections 53 and 54 of the Constitution Act, 1867, *and by convention. The House of Commons asserts the same exclusive and extensive privileges with respect to financial legislation as does the British Commons. The Senate has not conceded that it is subject to the same disabilities as the Lords in England. The legality of this debate is explored, and it is suggested that there are strong objections which can be raised as against a simple adoption of the practice and position of the Houses in Britain.*

It is suggested that the legislative process with respect to financial legislation is, quite arguably, open to constitutional challenge.

Dans la pratique parlementaire actuelle, les projets de loi qui nécessitent la recommandation royale sont appelés « projets de loi de finances ». Les seuls projets de loi de finances que le pouvoir exécutif peut adopter en vertu de la Loi constitutionnelle de 1867 *sont les vrais projets de loi de crédits. Cependant, le terme « projets de loi de finances » en est venu à désigner beaucoup plus que cela : il a été utilisé de façon plutôt impropre pour englober différents sens, selon le contexte où il est employé. Il s'ensuit qu'une définition étendue de « projet de loi de finances » a effectivement restreint les pouvoirs du Sénat et des simples députés, d'une manière non prévue par la Constitution elle-même. La définition de « projet de loi de finances » s'est perpétuée, en partie, à cause de la forme qu'a prise la recommandation royale ces dernières années et du fait qu'en vertu de la pratique parlementaire, on se fie aux décisions du président de la Chambre, aux précédents et à la doctrine qui n'abordent pas la question constitutionnelle. Cet article examine l'effet juridique de cette pratique.*

Les pouvoirs et les privilèges du Sénat, des simples députés et de la Chambre des communes, en matière de lois de finances, sont circonscrits par les articles 53 et 54 de la Loi constitutionnelle de 1867 *et par la convention. La Chambre des communes revendique les mêmes privilèges étendus et exclusifs, en matière de lois de finances, que les Communes en Grande-Bretagne. Le Sénat n'a pas admis qu'il est sujet aux mêmes restrictions que la Chambre des Lords. L'auteur examine la légalité de ce débat et laisse entendre qu'on peut soulever de fortes objections comme celle relative à l'adoption pure et simple de la pratique et de la position des Chambres en Grande-Bretagne.*

On pense que le processus législatif s'appliquant aux lois de finances pourrait bien faire l'objet de constestations en vertu de la Constitution.

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I. INTRODUCTION

The *Constitution Act, 1867*[1] prescribes the legislative process for financial legislation. Section 53 provides: "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." Section 54 requires a royal recommendation for any "Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost". The royal recommendation is a message from the Governor General, an exercise of the prerogative of the Crown in financial matters. It is a recommendation of the appropriation that would be effected by a bill, not of the bill itself.

Bills which appropriate money may be divided into two types: supply bills are those which appropriate funds requested by cabinet to meet annual expenditures;[2] statutory appropriations are those bills containing clauses which authorize expenditures for purposes other than those provided for annually.

The use of the royal recommendation with respect to a supply bill is straightforward.[3] These bills arise from votes set forth in the Estimates recommended to the House of Commons in a message from the Governor General. Supply bills normally are not debatable. Since 1971, Speakers have ruled that measures requiring legislation cannot be included in the Estimates.[4]

Statutory appropriations are authorized without the need for annual approval of Parliament.[5] The authorization is effected by a clause in the bill, which typically states: "All expenditures for the purposes of this Act shall be paid out of moneys appropriated by Parliament." Expenditures authorized by statutory appropriation include such things as judges' salaries, transfer payments to the provinces for health and education, payments for welfare or social security purposes, pensions, subsidies and allowances. The number of statutory appropriations has been increasing over the years. In the 1989-90 fiscal year, they accounted for over two-thirds of the total expenditures in the Estimates tabled.[6] These bills are, in effect, the most prominent kind of legislative activity. Since 1968, the royal recommendation for these bills has been by printed

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[1] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867)* [hereinafter *Constitution Act, 1867*].

[2] Interim supply bills are often required by governments, and are treated, procedurally, as supply bills.

[3] See Standing Senate Committee on National Finance, "Estimates 1989-90 / Royal Recommendation" in *Journals of the Senate*, No. 52 (13 February 1990) at 568-79 [hereinafter *Royal Recommendation*]. See also J.B. Stewart, *The Canadian House of Commons: Procedure and Reform* (Montreal: McGill-Queen's University Press, 1977) at 112.

[4] See e.g. *House of Commons Debates* (10 March 1971) at 4127; *House of Commons Debates* (10 December 1973) at 8608-09; *House of Commons Debates* (7 December 1977) at 1643; *House of Commons Debates* (21 March 1984) at 2308. See also D. Lidderdale, ed., *Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament*, 19th ed. (London: Butterworths, 1976) at 747-48.

[5] The amount is included in the Estimates for information only, and the amount does not appear in the associated supply legislation.

[6] Standing Senate Committee on National Finance, "The Estimates, 1989-1990" in *Debates of the Senate*, No. 40 (29 November 1989) at 775-78.

notice.[7] Since 1976, the recommendation has been in a standard form,[8] which states neither the purpose nor the amount of the recommended appropriation.

The requirement in the *Constitution Act, 1867*, that there be a royal recommendation means private members are prohibited from taking the initiative on a bill described in section 54. Once the royal recommendation has been attached to a bill, they cannot move to increase the government's proposals for payments or costs, nor can they move to change the purpose for which the royal recommendation has been attached to the bill; similarly, they cannot, in committee, introduce amendments to any bill without a royal recommendation where those amendments would necessitate a royal recommendation being annexed to the bill.[9] The determination of whether a bill requires a royal recommendation is therefore directly relevant to the powers of the private member in the legislative process as to that bill.

Similarly, the requirement that a bill described in section 53 originate in the House of Commons means the Senate's powers are restricted with respect to financial legislation. The scope of that restriction is a matter of long-standing dispute between the Chambers. The House of Commons asserts the same exclusive and extensive privileges

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[7] See *Standing Orders of the House of Commons* (Ottawa: Supply and Services Canada, September 1994) s. 79(2) [hereinafter *Standing Orders, September 1994*].

[8] The standard form of the royal recommendation is as follows:

> 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...

See *Royal Recommendation, supra* note 3 at 572.

[9] Until the current Parliamentary session, private members were precluded from introducing bills into the House of Commons if they required a royal recommendation. The Standing Order governing the matter was 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.

See *Standing Orders of the House of Commons*, (Ottawa: Supply and Services Canada, June 1993). This Standing Order has been amended 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*, printed in or annexed to the bill and recorded in the *Journals*.

Supra note 7.

This amendment means that private members may now introduce, into the House of Commons, bills which will require the royal recommendation attached to them at some time before the bill goes to Senate. These bills may be debated in principle, sent to committee, and ultimately can be, because of government support, sent to Senate with royal recommendation annexed.

This change in the Standing Orders, however, does not address the continuing difficulty that private members have in initiating amendments to bills at the committee stage. Another change in Standing Order 76 in the current session has made it possible for a bill to go to committee after first reading, before the bill has been adopted in principle. One might have thought that this procedure would have given private members greater initiative, but it seems that the Standing Orders fail to permit the private members to move an amendment in committee — should that amendment pertain in substance to a matter for which a royal recommendation would be appropriate. Similarly, the private member is restricted if the bill sent to committee was sponsored by the government, and therefore already had the royal recommendation attached. In addition to being precluded from moving amendments where a royal recommendation would be required, private members cannot move any amendments which go to the purpose for which the royal recommendation was attached to the bill.

in relation to financial measures as does the British Commons.[10] The Commons in Britain has asserted that all bills for granting aids and supplies must begin in that House, and that the Lords cannot change or alter the ends, purposes, considerations, conditions, limitations, or qualifications of such grants.[11] The Senate does not concede that it is subject to the same disabilities to which the Lords in England have been subject,[12] and insists on its power to amend, by reduction, an appropriation or taxation bill originating in the House of Commons.

The powers and privileges of the Senate, private members, and the Commons are circumscribed by the *Constitution Act, 1867*, and by convention. Speakers' rulings, parliamentary debates, and the authoritative procedural texts[13] reveal the practice with respect to the use of the royal recommendation. In current parliamentary procedure, bills which require the royal recommendation are referred to as 'money bills'. It seems that the phrase "any Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost" in section 54 has been interpreted as if it actually read "any money bill". The difficulty, however, is that the phrases are not coterminous: 'money bill' appears, rather, to be a flexible term that conveys a variety of meanings, depending on the context in which it is employed. This definitional ellipsis ignores the fact that the only bills guaranteed to the executive in the *Constitution Act, 1867* are true appropriation bills. What is the legal effect of this extensive definition of 'money bill', which has restricted the powers of Parliament in a manner which the Constitution itself does not seem to prescribe? Are sections 53 and 54 effectively procedural, and therefore alterable by Parliament?

The use of the royal recommendation in circumstances that go beyond the requirements of section 54 appears to be a result, primarily, of an unclear conception of the proper use of the royal recommendation, which has simply been perpetuated through the years. This, it is suggested, is a function largely of the terminology employed, an unclear notion of infringing the financial initiative of the Crown, the Standing Orders

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[10] See *Standing Orders*, *supra* note 7 at ss. 1, 79-80. In 1678 the British Commons resolved:

> all aids and supplies, and aids to [H]is Majesty in Parliament, are...the sole gift of the Commons; and all Bills for the granting of any such aids and supplies ought to begin with the Commons: and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants; which ought not to be changed or altered by the House of Lords.

Cited in J. Hatsell, *Precedents of Proceedings in the House of Commons*, vol. 3 (London: Luke Hansard & Sons, 1818) at 122-23 [hereinafter *Precedents of Proceedings*].

The Lords were in fact completely excluded from participation in matters of taxation and supply. They cannot alter the incidence of taxation, nor can they alter its duration, mode of assessment, levy, collection, or management. See B. Cocks, ed., *Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament*, 17th ed. (London: Butterworths, 1964) at 830-31.

[11] See *Precedents of Proceedings*, *ibid.* See also S.A. Walkland, ed., *The House of Commons in the Twentieth Century* (Oxford: Clarendon Press, 1979) at 355-59.

[12] See "The Report of the Special Committee appointed to determine the Rights of the Senate in matters of Financial Legislation" in *Journals of the Senate of Canada*, vol. 54, (15 May 1918) at 194-204 (Chair: W.B. Ross), adopted by the Senate May 22, 1918 [hereinafter *Ross Report*]. See also *Royal Recommendation*, *supra* note 3.

[13] See e.g. A. Fraser, W.F. Dawson & J.A. Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada*, 6th ed. (Toronto: Carswell, 1989); D. Lidderdale, *supra* note 4; J.G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. by T.B. Flint (Toronto: Canada Law Book, 1916) [hereinafter *Parliamentary Procedure*].

and Rules of the Chambers, and the form that the recommendation has taken in recent years.

II. Terminology

Although the phrase 'money bill' is often used to describe financial legislation, by parliamentarians, authors, and even the courts, one looks in vain for a precise definition of the term.[14] It is not to be found in the Constitution,[15] the Standing Orders of the House of Commons or the Rules of the Senate.

Other sources are of little more help. The *Ross Report* defines a money bill as a bill "appropriating any part of the revenue or imposing a tax."[16] The several editions of Beauchesne reveal various uses of the term.[17] Dawson acknowledges that different definitions of money bills "have been advanced to suit the convenience of the moment."[18]

The effect of the difficulty of definition is most tellingly stated by J.P. Josef Maingot, Q.C., former Law Clerk and Parliamentary Counsel to the House of Commons. Appearing as a witness to the Standing Senate Committee on National Finance in 1989, he stated:

> The difficulty is on[e] of definition. What is a money bill?...In Canada, the definition I always went by, whether for a private member or for the government, was that it was a bill that involved an appropriation of public revenue or a new charge on the public revenue, and that the House had by custom considered and treated it as a money bill. *The definition of "appropriation" that you find in the dictionary is not the definition that is used for the purpose of defining whether or not a bill is a "money bill", because a money bill, by custom in the Canadian House of Commons, includes what may indirectly and prejudicially affect the public revenue*....That is what rules; that is what

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[14] The same cannot be said for other jurisdictions. In the United Kingdom, a money bill is defined in the *Parliament Act 1911* (U.K.), 1 & 2 Geo. 5, c. 13, s. 1(2) as follows:

> A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them.

A money bill has been described in the United Kingdom as in "[t]he ordinary parliamentary signification....a bill the main purpose of which is either to impose a charge upon the public funds or to impose a charge upon the people...the statutory use and the ordinary parliamentary use...overlap rather than coincide....[T]he resulting ambiguity must be frankly recognized. C. Gordon, ed., *Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament*, 20th ed. (London: Butterworths, 1983) at 856-57.

In Australia, it has a definite meaning as well. See *Commonwealth of Australia Constitution Act* (U.K.), 1900, 63 & 64 Vict. c. 12., ss. 53-56.

[15] See *Constitution Act, 1867, supra* note 1 where ss. 53-57 are preceded by the phrase "Money Votes; Royal Assent".

[16] *Ross Report, supra* note 12 at 194.

[17] See e.g. A. Beauchesne, *Rules and Forms of the House of Commons of Canada*, 3d ed. (Toronto: Canada Law Book, 1943) at 163; Beauchesne, *supra* note 13 at 183-86.

[18] R.M. Dawson, *The Government of Canada*, 5th ed. by N. Ward (Toronto: University of Toronto Press, 1970) at 296 (footnote 53).

> governs, namely, the custom and the practice. If you are looking for a structured definition of "money bill," that is difficult to find. [Emphasis added][19]

Later in his testimony, he went on to say:

> [In] Canada "money bill" is, presumably, the most appropriate term to talk about in terms of appropriating money, whether you are providing in a statute that you can spend specific money or whether you provide a statute that the money may be appropriated by Parliament. *It has to do with money because you are talking about a royal recommendation and in those terms people have historically thought that that refers to when you are going to spend public money or appropriate money.* It has not been structurally defined specifically because they have relied on rulings in the past in terms of what it did or did not include....[The] definition I gave you earlier is as good as any, and that is: To spend public money or what, perhaps, by custom has been considered a money bill. [Emphasis added][20]

A Law Clerk is concerned, not so much with the question 'what is a money bill?', as with the question 'what is the current opinion as to how the speaker may rule?'. Once a bill is labelled as a money bill, it must have the royal recommendation. The test in section 54, that it be a "bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost..." is not applied.

Graham Eglinton, another witness to the same committee, described the term money bill as a phrase "used loosely...to cover taxing measures and appropriations".[21] He said that those who use the term "probably have different meanings, one from the other, in their own minds".[22] His view was that the term is not helpful at all in understanding the constitutional arrangement affecting Parliament.

Given the difficulties that the use of the phrase has perpetuated it would seem better avoided. It is imprecise and vague. 'Money bill' is used variously, to represent any one of many different types of financial legislation, including such measures as supply bills, bills for statutory appropriations, taxation bills, and bills which have incidental expenditures necessary for implementation of the legislation. This is in striking contrast to the terminology which is employed in the United Kingdom. There, a money bill is defined as a public bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with those subjects specifically enumerated in the *Parliament Act 1911*.[23] It is unclear whether section 54 has been misinterpreted in practice, or simply ignored in favour of precedent. In any event, the result has been that any bill that can loosely be classified as a money bill might be ruled as out of order in Parliament if it lacks the message from the Governor General. Furthermore, should the Senate attempt to introduce or amend a bill that can be classed as a money bill, it may encounter objection to, and rejection of, its efforts by the House of Commons.

Surely, in terms of constitutional legality, the question is simply this: 'Is this a bill which is "for the appropriation of any part of the Public Revenue or of any Tax or Impost"?' If so, it requires the royal recommendation. Otherwise it should be treated as

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[19] *Proceedings of the Standing Senate Committee on National Finance*, No. 15 (19 October 1989) at 14-15.

[20] *Ibid.* at 21.

[21] *Proceedings of the Standing Senate Committee on National Finance*, No. 14 (5 October 1989) at 13 [hereinafter *Proceedings of October 5*].

[22] *Ibid.*

[23] See *supra* note 14.

any other legislation. Similarly, one must ask, 'is this a bill "for appropriating any part of the public revenue or for imposing any tax or impost?"' If so, it must originate in the House of Commons. Otherwise it should be treated as any other legislation. But how are the bills set out in sections 53 and 54 properly to be defined, given their constitutional significance?

III. The Constitutional Framework: Interpretation and Application of Sections 53 and 54

A. *The Constitutional Provisions*

Sections 53 and 54 of the *Constitution Act, 1867* provide:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 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 53 deals only with bills that must originate in the House of Commons.[24] These are bills for one of two purposes: to appropriate any part of the public revenue, or to impose a tax. Section 54 is directed to the House of Commons alone. It states that, in effect, an appropriation must first be recommended to the House of Commons by the message of the Governor General in the session in which the bill is introduced. The appropriation is of one of two things: any part of the public revenue, or any tax or impost.[25] The section has nothing to do with the actual imposition or levying of any tax or impost. It further provides that, "it shall not be lawful" for the House of Commons to pass a bill described in section 54 without a royal recommendation.

B. *"A Constitution Similar in Principle to that of the United Kingdom": Principle, Precedent and Constitutional Conventions*

The claim that the House of Commons has the same exclusive and extensive privilege with respect to 'money bills' as does the British House, is founded upon three

[24] The drafting of section 53 of what is now the *Constitution Act, 1867*, *supra* note 1, embodied the only point that was conceded by the House of Lords: that the taxing measure must begin in the House of Commons.

[25] The appropriation of a tax or impost was, at the time of enactment of the *British North America Act, 1867*, *supra* note 1, considered by some to be, already, history. Eglinton suggests that it was placed in the Constitution because it was an "accepted way of proceeding two centuries before, it was...in the minds of the draftsmen and therefore it was put in there." *Proceedings of October 5*, *supra* note 21 at 16. One may take issue with this interpretation, particularly given the fact that this is a constitutional instrument.

This section specifically provides for the royal recommendation when there is an appropriation of a tax or impost, not when there is merely an imposition of a tax or impost. The difference in wording between sections 53 and 54 must be given meaning. The question of when there is an appropriation of any tax or impost in Canadian practice is not clear. It was thought that the Consolidated Revenue Fund in Britain was the very thing that obviated the need for appropriating taxes to specific purposes. This does not, however, prevent the government from appropriating a tax to a specific purpose.

propositions.[26] First, it is asserted that the preamble to the *Constitution Act, 1867* requires an interpretation of the Canadian Constitution that is consistent with British practice, in order to ensure that the two constitutions are similar in principle. Second, having regard to history and precedent, it is argued that there existed, at the time the Canadian Constitution was enacted, a British constitutional convention regarding money bills which was 'imported' into Canadian law via the preamble of the *Constitution Act, 1867*. Finally, it is argued that the Commons alone has the right to decide what money is to be granted, and what taxes imposed, on the theory that representation and consent form the basis of the power of the Commons to grant money, and impose taxes.

Driedger[27] has argued that the words "with a Constitution similar in Principle to that of the United Kingdom" in the preamble must be given effect, and that it is more logical,

> having regard to history, precedent and convention, to interpret the preamble to the B.N.A. Act and section 53 thereof as endowing the House of Commons of Canada with all the ancient privileges of the British House of Commons with respect to financial measures.[28]

This interpretation places a very heavy burden on a few simple words. Could it be said that the preamble itself, with only the additional words of section 53, imports into the Canadian Constitution all of those practices of the British Houses, in the name of ensuring that we have constitutions 'similar in principle'? It could as easily be said that the constitutions are 'similar in principle' without the extensive privileges asserted by the Commons in the United Kingdom.[29] The preamble to the Constitution may aid in the interpretation of individual sections, but it cannot override the wording of those sections, or they would be meaningless. It is suggested that there would have to be more explicit wording to import into the Constitution, via the preamble, those British practices which may have legal and constitutional validity in the United Kingdom, but which would necessitate that one ignore the actual wording of specific sections of the Canadian Constitution. Ignoring this actual wording in favour of an elusive attempt to ensure constitutions which are 'similar in principle' is at best questionable.

There are good historical reasons for denying that the preamble places the Senate on the same footing as the Lords. Over a hundred years ago, Lord Durham cautioned that second Chambers in the colonies not be compared to the House of Lords. He stated:

> The analogy which some persons have attempted to draw between the House of Lords and the Legislative Councils seems to me erroneous. The constitution of the House of Lords is consonant with the frame of English society; and as the creation of a precisely similar body in such a state of society as that of these Colonies is impossible, it has always appeared to me most unwise to attempt to supply its place by one which has no point of resemblance to it, except that of being a non-elective check on the elective branch of the legislature.[30]

It is evident from this that, in Lord Durham's view, it was not warranted that there be exacting parallels in the powers of the two upper chambers.

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[26] See E.A. Driedger, "Money Bills and the Senate" (1968-69) 3 Ottawa L. Rev. 25 at 40-41.

[27] *Ibid.* at 44.

[28] *Ibid.* at 44-45.

[29] This is something which Driedger admits. *Ibid.* at 27.

[30] See C. Lucas, ed., *Lord Durham's Report*, vol. 2 (Oxford: Clarendon Press, 1912) at 325.

One might recall the words of Lamer C.J.C., in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*:[31]

> While the Constitution of Canada is undoubtedly founded upon many of the same broad principles as is the Constitution of the United Kingdom, the two are far from identical.... [The] different paths of evolution of government in the two jurisdictions led to significant differences in the branches of government themselves from the very beginning. And there is no question that in recent years we have diverged further still with the patriation of Canada's Constitution in 1982. "Similar in principle" does not mean identical in the powers it grants.[32]

More than one hundred years ago, one of the primary purposes of the Senate was articulated: the protection of various sectional interests in Canada in relation to the enactment of federal legislation.[33] As was noted in *Reference re Legislative Authority of Parliament of Canada*,[34] one of the fundamental features of the Senate is to ensure regional and provincial representation. Moreover, this feature was determined by the British Parliament in response to proposals submitted by three provinces.[35] The Senate did not evolve from a struggle with the Commons as did the House of Lords. It was created with defined and exceptional purposes, unique to Canadian geographical and political circumstances.

One may also question whether it is appropriate to permit such a vague preamble to resolve conclusively the precise difficulties of interpretation of individual sections, especially given the fact that history and precedent do not always provide clear and undisputed interpretations of the *Constitution Act, 1867*.

It is also questionable whether there was a convention extant at the time of the drafting of the Canadian Constitution, which was simply imported into Canadian constitutional law. The existence of a constitutional convention reserving extensive privileges to the United Kingdom House of Commons is not a matter of undisputed fact. Despite the conflict between Lords and Commons, the English practice over the years was that the Lords continually gave way to the Commons position, and the practice was reduced to writing in reservation of privileges in the resolutions of the Commons.[36] These were resolutions of the House of Commons, however, and not of the Lords. The House of Lords did not acknowledge the restrictions that were, as a matter of political reality, increasingly placed upon it over the years. So, as a matter of practice, one must acknowledge that for an extended period of time the Commons got its way despite the protests of the Lords. The Lords capitulated. Was this enough to establish a convention?

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[31] [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 [hereinafter *Broadcasting Corp.* cited to D.L.R.].

[32] Lamer C.J.C. was here addressing the argument that the preamble must have incorporated the English *Bill of Rights*, 1689, 1 Will. & Mar. Sess. 2, c. 2, s. I, art. 9. He did say that to "incorporate by way of the preamble the broad principle of the fostering of the independence of the legislative process through the exercise of parliamentary privileges is much more palatable than incorporating a specific article of the *Bill of Rights* of 1689". *Ibid.* at 233. This does not alter the argument that history and precedent cannot be taken in preference to an examination of the significant differences in the governments which have existed from the beginning.

[33] Provincial Parliament of Canada, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (1865) at 35, 38, 88.

[34] [1980] 1 S.C.R. 54 at 67, (*sub nom. Reference re Legislative Authority of Parliament to Alter or Replace Senate*) 102 D.L.R. (3d) 1 at 10 [hereinafter *Authority* cited to S.C.R.].

[35] *Ibid.* at 78.

[36] See e.g. *Precedents of Proceedings*, *supra* note 10.

The requirements necessary for the existence of a convention are a matter of dispute. Dicey formulated only one class of non-legal practice; any non-legal matter relevant to the Constitution was, for Dicey, a convention.[37] This division of the Constitution into just two sources, law and conventions, has been challenged by later writers. Sir Ivor Jennings thought it important to be able to know whether a non-legal *rule* had been established. He proposed this test:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?[38]

According to Jennings, there are some forms of constitutional practice which are not law, and are not conventions either. Jennings' insistence that the actors believe there to be a rule derives from his view that conventions must have a normative character. They are not descriptive, but prescriptive in nature.

Geoffrey Marshall[39] has pointed out that the position taken by Dicey and Jennings leaves two possibilities. One is that conventions are what might be called the positive morality of the Constitution — the beliefs which major participants in the political process, as a matter of fact, have as to what is required of them. The existence of the convention is therefore a matter of historical and sociological fact. Alternatively, conventions are the rules that the political actors ought to feel obliged by, if they have considered precedents and reasons correctly. This permits one to think of conventions as the critical morality of the Constitution.

Sir Kenneth Wheare has divided non-legal rules into two types.[40] First there are conventions, by which he means a binding rule — a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution. Second, there are usages, which are simply usual practices which have not yet obtained obligatory force. A usage may, after repeated adoption whenever a given set of circumstances occurs, acquire obligatory force and thus become a convention. But a convention may, if a sufficient reason exists, arise from a single precedent.

Marshall and G.C. Moodie, however, defend the simple dichotomy of Dicey:

> A rule must *prescribe* something if it is to guide action or state obligations, whereas, according to [Wheare's...] definition....a usage would only describe actual behaviour. But the reasons why a particular action is not mandatory cannot lie in the fact that any statement about it is 'no more than description'. A description is not a weak kind of prescription.[41]

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[37] See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London: MacMillan, 1956) at 24.

[38] I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136.

[39] G. Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 10-12.

[40] K.C. Wheare, *Modern Constitutions*, rev. ed. (London: Oxford University Press, 1962) at 180. See also E.C. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 11th ed. (London: Longman, 1993), c. 2.

[41] G. Marshall & G.C. Moodie, *Some Problems of the Constitution*, 4th ed. (London: Hutchinson, 1967) at 28-29.

The implication is that it is best to view all the non-legal rules of the Constitution as of but one type, even if they are imprecise and variable in obligation. C.R. Munro agrees. He has stated that:

> non-legal rules, call them what we will, may be viewed as on a continuum. Some few may be stated with precision, others are harder to formulate. Some are more or less invariably obeyed, while there are others to which, by degrees, a lesser sense of obligation adheres.[42]

The added requirement that the conduct gives rise to binding rules is not admitted here, nor by some other writers.[43] This view defines conventions as merely descriptive statements of constitutional practice, rather than prescriptive statements imposing a duty to conform to acknowledged patterns of behaviour.

This dispute as to the characteristics of a convention, and the requirement (or not) for an understanding of obligation on the part of the relevant actors, has not been tested in English courts. In Canada, however, the matter has been settled, at least in so far as the courts are concerned.[44] In *Re Amendment of the Constitution of Canada*,[45] the Supreme Court of Canada adopted Jennings' criteria for determining when a convention has come into existence.[46]

If one attempts to apply Jennings' test to the practice of the Houses with respect to money bills, the existence of a convention as between the Lords and Commons can be questioned. At the time that the *British North America Act* was passed, the House of Lords admitted only to the resolution of 1861; that is, that no bill ought to begin in the House of Lords that lays any charge or tax upon the Commons. Even after 1861, when the Commons included all the financial proposals for the year in an annual supply bill, and the Lords was reduced, in practice, to a position of accepting or rejecting the bill, the Lords expressly denied the position of the Commons. It may be said that the most that the Canadian Constitution 'imported' in this regard was an unresolved dispute as between the Lords and Commons.[47]

The dispute has continued in the two Canadian Chambers. In the *Ross Report*, the opinion was expressed firmly that, since section 53 deals only with origination of "bills for appropriating any part of the public revenue, or for imposing any tax or impost", the powers of the Senate regarding amendment are not limited. The *Ross Report* states:

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[42] C.R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987) at 59-60.

[43] See J.P. Mackintosh, *The British Cabinet*, 3d ed. (London: Stevens & Sons, 1977) at 12-22.

[44] See also P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 23-24; H. Brun & G. Tremblay, *Droit Constitutionnel* (Cowansville, Que.: Yvon Blais, 1982) at 47; A. Heard, *Canadian Constitutional Conventions* (Toronto: Oxford University Press, 1991) c. 1.

[45] [1981] 1 S.C.R. 753, (*sub nom. Reference re Amendment of the Constitution of Canada*) 125 D.L.R. (3d) 1 [hereinafter *Re Amendment of Constitution* cited to S.C.R.].

[46] *Ibid.* at 888.

[47] See E. Allyn, *Lords versus Commons: A Century of Conflict and Compromise* (New York: Century, 1931). But see Driedger, *supra* note 26 at 44-45.

The British dispute may also fail on the third of Jennings' criteria. In 1671, in a dispute between the Lords and Commons, the Commons stated that their right was "so fundamentally settled that they could not give reasons for it — for that would be a weakening of the Commons' right and privilege!" See *Precedents of Proceeedings*, *supra* note 10 at 424.

> [Section 53 is] the only limitation of the powers of the Senate in regard to "Money Bills" in the British North America Act. In all other respects the Act leaves with it co-ordinate powers with the House of Commons to amend or reject such Bills.[48]

The inability to increase is acknowledged: "[t]he Senate could not increase this sum without coming in conflict with the prerogative of the Crown to say what money is wanted".[49] In support of its position, the Senate relies on the particular nature of the Canadian union and its role as guardian of provincial rights therein.[50]

Eglinton[51] is of the opinion that the Senate has "complete power to refuse to pass any appropriation and has complete power to amend any appropriation, except that it cannot increase the amount." He told the Senate Standing Committee that the power to amend includes the power to change "the method, object and destination of an expenditure."[52]

The Canadian House of Commons' position attempts to mirror that of the Commons in England. The Standing Orders of the Canadian Commons embody, to a certain degree, this position as against the Senate.[53] The House of Commons has always contended that any amendments made by the Senate and accepted by the Commons constitute a waiver of privilege by the Commons. It has been said that "the House of Commons has taken over, holus-bolus, the restrictions that grew up in the British House of Commons, and the sort of follow-on effect of that is felt in the Senate."[54] Former Standing Order 1 of the House of Commons provided that the "usages and customs of the House of Commons of the United Kingdom of Great Britain and Northern Ireland as in force at the time shall be followed so far as may be applicable to this House".[55] Standing Order 80(1) provides:

> All aids and supplies granted to the Sovereign by the Parliament of Canada are the sole gift of the House of Commons, and all bills for granting such aids and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit and appoint in all such bills, the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which are not alterable by the Senate.

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[48] *Ross Report*, *supra* note 12 at 198.

[49] *Ibid.* See also N. Ward, *The Public Purse* (Toronto: University of Toronto Press, 1962) at 8-10.

[50] See *Ross Report*, *ibid.* at 194-98 regarding the differences between the Senate and House of Lords in constitution, function and representation.

[51] *Proceedings of October 5*, *supra* note 21 at 16.

[52] *Ibid.* This is at odds with *Standing Orders*, *supra* note 7 s. 80(1).

[53] See *Standing Orders*, *ibid.* ss. 1, 79-80.

[54] *Proceedings of October 5*, *supra* note 21 at 15.

[55] *Standing Orders of the House of Commons* (Ottawa: King's Printer, 1927) s. 1. This Standing Order has now been replaced as follows:

> In all cases not provided for hereinafter, or by other Order of the House, procedural questions shall be decided by the Speaker or Chairman, whose decisions shall be based on the usages, forms, customs and precedents of the House of Commons of Canada and on parliamentary tradition in Canada and other jurisdictions, so far as they may be applicable to the House.

Standing Orders, September 1994, *supra* note 7 s. 1.

The wording of this Standing Order is derived from the British Commons resolution of 1678.[56] It has been argued that a Standing Order can embody a constitutional convention.[57]

The Supreme Court has stated that constitutional conventions, though not enforceable by the courts, may be "more important than some laws. Their importance depends on the value or principle which they are meant to safeguard."[58] Though they may not enforce them, the courts can be asked to recognise that a convention exist "to provide aid for and background to constitutional or statutory construction."[59] Can it be said that the Standing Orders which speak to the dispute are a constitutional convention which 'provide aid for and background' to the construction of sections 53 and 54?

It is doubtful that where a conflict exists, such as that between the Senate and Commons, whether merely embodying, unilaterally, a position in the Standing Orders could be regarded as creating a convention which could be relied on for interpretation of sections 53 and 54. This is simply not how conventions are created. It is in the nature of conventions that they may conflict with legal rules, but as the Supreme Court has stated,

> [t]he conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised in a certain limited manner, if at all.[60]

So, should a conflict between the wording of the *Constitution Act, 1867* and the Standing Orders result in an illegality, it is clear that the law must prevail.

Whatever one's views of the existence of a convention between the Lords and Commons regarding this aspect of legislative procedure at the time of the enactment of the *British North America Act*, the *Parliament Act, 1911*[61] has to a large extent resolved the issue, and has broken the legal deadlock in Britain by removing from the Lords the power to veto or delay money bills. As Marshall states,

> [b]efore 1911 the two Houses had legally co-ordinate powers, and there was thus a possibility of deadlock with the emergency creation of Peers as the only available method for resolving it. But the passage of the Parliament Acts has provided a procedure through which a constitutional deadlock can be resolved.[62]

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[56] The resolution is slightly different; it provides that "all aids and supplies, and aids to [H]is Majesty in Parliament..." *Precedents of Proceedings*, *supra* note 10. See *Standing Orders, September 1994*, *supra* note 7 s. 80. This section does not use the wording of the 1866 amendment to the British House of Commons resolutions. That wording has never been adopted by the Canadian House of Commons. See p. 37, above, for a discussion of this issue.

[57] Wheare, *supra* note 40 at c. 8. See also O.H. Phillips, *Constitutional Law of Great Britain and the Commonwealth*, 2d ed. (London: Sweet & Maxwell, 1957) at 65.

[58] *Re Amendment of Constitution*, *supra* note 45 at 883.

[59] *Ibid.* at 885.

[60] *Ibid.* at 881.

[61] The *Parliament Act 1911*, *supra* note 14, did not resolve the question as to the privileges of the Commons and the disabilities of the Lords. It resulted, however, in the ability of the Commons to act without the cooperation of the Lords. Wade and Bradley assert that by the time the Act was passed, the Lords had in effect conceded that they had no power to amend financial bills, but could only reject them. See *Modern Constitutions*, *supra* note 40 at 204. The Act removed any doubt as to their inability in this regard, and for all purposes, overtook the debate as to their powers with respect to financial legislation.

[62] Marshall, *supra* note 39 at 24.

The result is that a money bill as defined in the Act may receive royal assent after having been approved only by the Commons. It is the rule of law; once enacted, that must prevail, and where a convention comes in conflict with a legal rule, the legal rule must prevail.[63] Even if one could argue that a British constitutional convention existed (something which is not admitted here), and that Canada must have 'imported' it, one must acknowledge that legal rights have to prevail. It cannot be ignored that the *Constitution Act* itself must ultimately govern the resolution of the dispute for Canada.

The final argument relies on principle: that the Commons alone has the right to decide what money is to be granted and what taxes imposed, on the theory that representation and consent form the basis of the power of the Commons to grant money and impose taxes. To say, however, that the House of Commons in Canada alone is the body to whom taxation should fall stifles a vital contribution which the Senate might make to debate, and ignores the particular stewardship of the Senate with regard to the provinces.

The only provision in the *Constitution Act, 1867* which limits the power of the Senate as compared with the Commons is section 53. It must be given a meaning which accommodates the responsibilities of the Senate with respect to regional representation. The fact that the Senate is not an elected body does not detract from its constitutional role[64], which must be interpreted in light of the supreme law of Canada. It is this supreme law which has itself established the Senate as an unelected, independent, constitutional body.[65]

One must be just as cautious in assuming that a constitution similar in principle to that of the United Kingdom imports, without more, the procedures, privileges and liabilities of the British Parliament with respect to section 54.

Account must be taken of the historical facts. An amendment to a British House of Commons resolution, adopted in 1866, provided:

> 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. [Emphasis added][66]

This change in the British Standing Order was not included in Section 54 of the *British North America Act*. This is a striking difference which cannot be ignored in the interpretation of our Constitution.

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[63] R. Brazier & J. Robilliard, "Constitutional Conventions: The Canadian Supreme Court's Views Reviewed" (1982) *Public Law* 28 at 34.

[64] See *Constitution Act, 1867*, *supra* note 1 ss. 21-36.

[65] One part of the Constitution cannot be abrogated or diminished by another part of the Constitution, even if that other part is the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See e.g. *Broadcasting Corp., supra* note 31 at 261. See also *Reference re Bill 30, Act to Amend Education Act*, [1987] 1 S.C.R. 1148, (*sub nom. Reference re Act to Amend the Education Act (Ontario)*) 40 D.L.R. (4th) 18.

The Senate must have scope to carry out its prescribed duties, including those legislative in nature, with which it was charged in the *Constitution Act, 1867*, *supra* note 1. In view of the character of the Senate a purposive reading of section 53 is called for.

[66] U.K., H.C., *Commons Journals* (1865-67) at 182.

Section 54 was first set out in its predecessor legislation, the *Union Act, 1840*.[67] Lord Durham initiated the section in order to control the introduction of bills calling for a 'money vote'. His objective was set out in his report on the affairs of British North America. There he stated:

> 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.[68]

His goal was certainly not to provide for those circumstances prescribed by the British Standing Order of 1866. Prior to 1840, the Legislative Assemblies of Canada, clearly did not feel bound by the British rule regarding the initiative of the Crown in money matters. The rule in Canada was changed in 1840 because the procedures in the Assemblies in the colonies were chaotic.[69] The rule was not changed because of the historical situation in Britain. The rule in Canada was a result of Canadian history, not British history; the principles of the rule in section 54 must therefore be Canadian principles, not simply British practice treated as precedent in Canada. The section in the *Union Act, 1840* was substantially repeated in the *Constitution Act, 1867*. There is no mention in either section of the royal recommendation being required for bills which are not appropriation bills, but which may have consequences for which moneys are 'to be

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[67] The provision in the *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35, s. 57 provides:
all Bills for appropriating any Part of the Surplus of the said Consolidated Revenue Fund, or for imposing any new Tax or Impost, shall originate in the Legislative Assembly of the said Province of Canada.

[68] *Lord Durham's Report*, *supra* note 30 at 92-93.

[69] Lord Sydenham reported, in 1840:
You can have no idea of the manner in which a Colonial Parliament transacts its business. I got them into comparative order and decency by having measures brought forward by the Government, and well and steadily worked through. But when they came to their own affairs, and, above all, to the money matters, there was a scene of confusion and riot of which no one in England can have any idea. Every man proposes a vote for his own job; and bills are introduced without notice, and carried through *all* their stages in a quarter of an hour! One of the greatest advantages of the Union will be, that it will be possible to introduce a new system of legislating, and, above all, a restriction upon the initiation of money-votes. Without the last I would not give a farthing for my bill: and the change will be decidedly popular; for the members all complain that, under the present system, they cannot refuse to move a job for any constituent who desires it.
See *Memoir of the Life of the Right Honourable Charles Lord Sydenham, G.C.B.* (London: John Murray, 1843) at 172.

provided by Parliament.'

The position which the Canadian House of Commons takes with respect to financial legislation is largely defended as deriving from both practice and principle as observed in the British Houses. The British House of Commons, however, has relaxed its privilege by Standing Orders.[70] Since 1972, the Lords has been able to adopt a 'privilege amendment' when a bill which contains provisions which deal with charges upon the people or upon public funds is introduced in that House.[71] This 'privilege amendment' simply states:

> Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge.[72]

The restrictions on the Lords' ability to amend has also been relaxed. The Lords may amend provisions affecting pecuniary penalties, forfeitures or fees, where the object of the amendment is to secure the execution of the Act, and where the fees imposed are not payable to the exchequer, or in aid of public revenue.[73] These developments have not been reflected in Canadian practice. One would have thought that if justification for the restrictive practices regarding procedure in financial legislation lies in the fact that we have a 'constitution similar in principle to that of the United Kingdom' then the relaxation of privilege in Britain might, today, assist the arguments of the Senate.

C. *The Courts and the Power to Review*

Generally, once an act of Parliament is passed, it must be taken as law; the courts will not look at the parliamentary procedure behind its enactment.[74] A statute must be assumed to have been passed properly, if it appears to have been on its face.[75] Sections 53 and 54 are directed to parliamentary procedure. Is their enforcement therefore a matter for Parliament, and not for the courts?[76]

In *Reference Re Agricultural Products Marketing Act*,[77] Pigeon, J. suggested that Parliament was free to ignore the provisions of sections 53 and 54. He reasoned that since

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[70] See U.K., *Standing Orders of the House of Commons* (Nos. 77, 78).

[71] U.K., *Standing Orders of the House of Commons* (No. 78).

[72] See C.J. Boulton, ed., *Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament*, 21st ed. (London: Butterworths, 1989) at 746. Of course, the amendment is fiction. It signals that the bill intends to do precisely what it claims not to be doing. It does so in order that the Commons may retain the privilege to initiate the financial procedure necessitated by the bill's provisions.

[73] U.K., *Standing Order of the House of Commons* (No. 77).

[74] See *The King* v. *Irwin*, [1926] Ex. C.R. 127. See also *Re Amendment of Constitution*, *supra* note 45 at 785. This proposition is questionable. The amending formula in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, is a 'manner and form' provision. It is likely, however, that the courts would review a law passed in violation of it, in view of section 52 of the *Constitution Act, 1982*. The courts have, in fact, reviewed manner and form: See *New South Wales (A.G.)* v. *Trethowan*, [1932] A.C. 526; *Harris* v. *Minister of the Interior*, [1952] 2 S.A.L.R. (A.D.) 428.

[75] *Edinburgh Railway Co.* v. *Wauchope* (1842), 8 Cl. & Fin. 710 at 725; *Lee* v. *Bude and Torrington Junction Railway Co.* (1871), L.R. 6 C.P. 576 at 582.

[76] Driedger, *supra* note 26 at 46.

[77] [1978] 2 S.C.R. 1198 at 1291, 84 D.L.R. (3d) 257 at 322 [hereinafter *Re Agricultural Products Act* cited to S.C.R.].

the sections could be amended by ordinary legislation, they could be taken as having been indirectly amended by an act passed in conflict with them. Professor Hogg takes issue with this holding, and argues that "the fact that the provisions can be amended by the federal Parliament should not justify their disregard (as opposed to explicit amendment or repeal) by the Parliament."[78] He takes the position that the presence of sections 53 and 54 in the *Constitution Act, 1867*, "suggests that they enjoy a higher status than internal parliamentary procedure."[79] This is particularly so in light of the amendment to the Constitution in 1982. Section 52(1) of the *Constitution Act, 1982*, says that the Constitution is the "supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." In view of this provision, Pigeon J. probably would not say today what he said in 1978. It is arguable that given section 52, implied amendment is impossible.

There may be a more fundamental claim against indirect amendment of section 54. Section 41 of the *Constitution Act, 1982* provides that "[a]n amendment to the Constitution of Canada in relation to...the office of the Queen, [or] the Governor General...." can only be made by resolutions of the Senate, House of Commons, and the legislative assembly of each province. If the royal recommendation is a matter "in relation to" the office of the Queen, then it may well be that an amendment to section 54 requires unanimous consent.

In *R.* v. *Mercure*,[80] the Supreme Court rejected indirect amendment. Previously, in *Reference re Manitoba Language Rights*,[81] the court struck down laws because of a constitutional deficiency regarding the obligation to publish bilingual statutes, holding that constitutional requirements cannot be treated as "directory" when they are phrased in "mandatory" language. This is difficult to reconcile with Pigeon's approach in *Re Agricultural Products Marketing Act*. Indirect amendment would mean that sections 53 and 54 are directory only, yet they are phrased in mandatory language.

Laskin C.J., dissenting in *Reference Re Agricultural Products Marketing Act*, expressly rejected the notion that judicial review on the basis of sections 53 and 54 was excluded because these sections established a procedure that spoke to the House of Commons alone, which was for the House to enforce. The appellants had relied on British precedent, and on the preamble to the Act stating that Canada was to have "a constitution similar in principle to that of the United Kingdom". Laskin C.J. stated:

> I do not think that this carries any force against express enactment. It may help to identify constitutional elements just as the British precedents may help to determine what is meant by any of the terms used in ss. 53 or 54, but I do not agree that they can control the determination of the question whether obedience to the prescriptions of those sections is judicially reviewable.[82]

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[78] P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 288.

[79] *Ibid.*

[80] [1988] 1 S.C.R. 234, 2 W.W.R. 577.

[81] *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721, (*sub nom. Reference re Manitoba Language Rights*) 19 D.L.R. (4th) 1.

[82] *Re Agricultural Products Act, supra* note 77 at 1227.

In contrast to the view of Laskin C.J., expressed in *Reference re Agricultural Products Marketing Act*, is the more recent view of Sopinka J., put forward in *Reference re Canada Assistance Plan*:[83]

> The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely procedural requirements in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.[84]

He quoted with approval a passage from Beaudoin,[85] to the effect that the courts have no interest in parliamentary procedure. One may take issue with this reasoning. Section 54 specifically provides that "it shall not be lawful" to pass a bill described therein without a royal recommendation. Effect must be given to these words. If the courts will not review the actions under section 54, then Parliament is free to ignore the prescription that "it shall not be lawful". Surely the Constitution of Canada has greater force and effect than that. Furthermore, given that the Constitution ranks as 'supreme law',[86] practices of the legislature and executive that conflict with it could be held 'unconstitutional' and thus illegal.

Canada's is a written Constitution, in which the legislative powers of Parliament are restricted by sections 53 and 54. By implication, Parliament can introduce any bills other than 'money bills'. It is suggested that the Canadian Parliament is not simply a body that says 'yea' or 'nay' to legislation initiated by the executive. The Senate and House of Commons give advice and consent: section 91 of the *Constitution Act, 1867*. The legislative power is given to one Parliament, consisting of the Queen, an Upper House styled as the Senate, and the House of Commons: section 17. Sections 53 and 54, and the division of powers, are the only restrictions on introduction of policy in the Constitution. Apart from *Charter* considerations, Parliament is subject to no other sections.

The restrictions the House imposes on the Senate and private members by an extensive interpretation of 'money bill' for the purposes of section 53 and 54 may very well infringe the scope of the legislative powers of Parliament, as defined in the Constitution, and be unlawful. The better view seems to be that the courts can look behind Parliamentary 'procedure' in relation to sections 53 and 54, precisely because these sections are not simply procedural. They are also substantive. Any 'implied' amendment may well be unconstitutional.

Should the reasoning of Laskin C.J. prevail, then these sections may well be reviewable by the courts. Should the reasoning in *Reference re Manitoba Language Rights* prevail, then the courts could determine that the Commons in Canada has no capacity to waive the privilege conferred by section 53 or to alter section 54. This could mean that the parameters of the privilege set out in sections 53 and 54, and the consequent effect for the powers of the Senate and private members, could be under

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[83] [1991] 2 S.C.R. 525, (*sub nom. Reference re Canada Assistance Plan (British Columbia)*) 83 D.L.R. (4th) 297 [hereinafter *Re Canada Assistance Plan* cited to S.C.R.].

[84] *Ibid.* at 559.

[85] G-A. Beaudoin, *La Constitution du Canada* (Montreal: Wilson & LaFleur, 1990) at 92.

[86] *Constitution Act, 1982, supra* note 74 s. 52(1).

threat of numerous judicial proceedings — depending on the political exigencies at the time. If, however, the reasoning of Sopinka J. or Pigeon J. prevails, the courts will in any event, not entertain argument with respect to the constitutionality of sections 53 and 54 as interpreted and applied.

There is some indication of how the courts might view the powers of the Senate, were they to determine that the issue is reviewable. In *Re Canada Assistance Plan*, Sopinka J., stated:

> In practice, the bulk of new legislation is initiated by the government. By virtue of s. 54 of the *Constitution Act, 1867*, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the government.[87]

Sopinka J. here gives a restrictive reading of the powers of the Senate, which has itself always drawn a distinction between the power to initiate and the power to amend.[88]

IV. Parliamentary Procedure

A. *The Drafters*

Until very recently,[89] the Law Clerk and Parliamentary Counsel with the House of Commons would advise whether a royal recommendation was required. The Law Clerk would write to the office of the Governor General on behalf of the ministers of the Crown.[90] In making the decision, the Law Clerk of the Commons would follow past practice. This is clear from Maingot's testimony before the Standing Committee:

> The custom and practice of the House of Commons was to define appropriation in the way it was set out in the rules as they came to be over the past number of years and decades.[91]

And, later, in response to further questioning:

> The most important thing for a member to look at when he comes before the house is not necessarily what it says in a particular rule, but what was done under those circumstances in the past. That is how you would find out what a money bill is. You would consider what was done in the past and what was not allowed in the past.[92]

The Law Clerk's concern with the bill was not "in the terms of whether it appropriated money, but, rather, whether it was a money bill."[93] Maingot clearly stated that the definition of appropriation one may find in a dictionary is not the one used for determining whether or not a bill is a money bill. A money bill includes 'what may indirectly and prejudicially affect the public revenue.'

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87 *Re Canada Assistance Plan, supra* note 83 at 547.

88 See also Driedger, *supra* note 26 at 45-46.

89 I am advised by the office of the Law Clerk and Parliamentary Counsel that this responsibility has been given over to the lawyers of the Department of Justice, who act for the executive, as of February, 1992.

90 See *Proceedings of the Standing Senate Committee on National Finance, supra* note 19 at 16.

91 *Ibid.* at 18.

92 *Ibid.* at 21.

93 *Ibid.* at 18.

In the Department of Justice, the practice appears to be that the drafter decides if a bill requires the royal recommendation. Then the government house leader's office is advised. Peter Johnson, Q.C., Chief Legislative Counsel to the Department of Justice, testified to the Senate Standing Committee on National Finance in 1989: "There is no central determination of this or second guessing of the drafter."[94] The department's role is "to assist the government house leader's office in determining whether or not the bill will be challenged if it were introduced in the Senate. It is ultimately up to the Parliamentary Counsel's office to decide whether or not the royal recommendation is required...."[95] The department has prepared a guideline for its drafters, based on precedent. Ultimately, Johnson stated:

> 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*. From the Manitoba language reference case, it can be seen that a constitutional deficiency in a law can be serious, indeed, the law can be struck down. 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.[96]

Perhaps if the royal recommendation were obliged to state the precise appropriation and give details so that one could be informed as to why it is being attached to this bill, the practice would cease to be merely a matter of 'playing it safe.' The Senate Committee studying the use and form of the royal recommendation queried whether the form that the royal recommendation has taken since 1976 is sufficient to meet the requirements of section 54. The conclusion was that regardless of how one answers the 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 appropriations are being sought by a recommendation. It seems that a clear statement may not always be possible. The report took the position that the advice given to ministers that the 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 legal analysis undertaken by the drafters has not addressed the fact that playing it safe may very well be in conflict with the requirements of sections 53 and 54. Practice and precedent have chiefly governed those who draft and those who advise as to whether a royal recommendation is necessary. Practice and precedent, however, are derived from speakers' rulings.

B. *Speakers' Rulings and Precedent*

Speakers rely on past precedent, the rules of procedure of the Chambers, and on the authoritative texts to determine their rulings.[97] The authoritative texts, in turn, draw the

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[94] *Proceedings of the Standing Senate Committee on National Finance*, No. 17 (2 November 1989) at 5.

[95] *Ibid.* at 7.

[96] *Ibid.* at 11.

[97] The duties of the Speakers are prescribed by Standing Orders, by the Customs of the Chamber, and by precedent. The Speaker does not rule on constitutional matters: See *House of Commons Debates* (11 July 1988) at 17382-85.

authority for their propositions from speakers' rulings and debates. There have been numerous speakers' rulings with respect to 'money bills', in both the Senate and the House of Commons. The circularity in this authoritative reliance has perpetuated the evasion of the constitutional question with respect to powers, and duties under the *Constitution Act, 1867*.

The examples which are most illustrative of the practice are perhaps the initiatives by both the Senate and private members of the House of Commons to amend certain statutes of Canada to recognize the wartime service of the veterans of the Canadian merchant navy. These veterans were excluded from pension benefits accorded to other Canadian veterans. The bills sought to redress the inequity.

On October 23, 1991, a ruling was made with respect to one of these bills, referred to as Bill S-5.[98] Objection had been taken that the bill extended the purposes and objects of the authorized program expenditures under the *Pension Act*. A clause in the bill provided:

> 15. No payment shall be made out of the Consolidated Revenue Fund to defray expenses necessary for the implementation of this Act without the authority of an Act of Parliament for such purpose.

This clause is one of a type commonly known as a 'basket clause'. Notwithstanding this section, the bill was ruled out of order. Argument had been made that the Senate could initiate bills of expenditure for novel purposes, since it is not under the restriction of section 53, and that the requirement that bills which have implications for future expenditure have the recommendation is beyond the provisions of section 53. After conceding that there was a strong case to be made that Bill S-5 was procedurally acceptable, the Chair stated:

> However, after carefully reviewing the parliamentary authorities, the Chair has concluded that this interpretation of the general rules and practices of financial procedure is much too narrow. Our parliamentary tradition, strictly adhered to over many years, consistently indicates that bills emanating from private members which bind the House to future legislation appropriating monies is not in order in either Chamber of Parliament.
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> ....
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> The Chair does not agree that the concept "the financial initiative of the Crown" emanates solely from Standing Order 80(1) of the House of Commons.[99]

The Chair later approved of interpreting section 54 in terms of the Standing Orders of the British House, citing a passage from Bourinot, in support.[100] The bill was ultimately ruled out of order because it proposed relaxing the conditions, objects and purposes of existing statutes to which spending authorization of the Crown had previously been given. The basket clause was held to be an unacceptable way of eluding the procedural requirement. The justification for this rule was that if Bill S-5 were enacted, the beneficiaries of the amendments would feel that Parliament would then be obliged to

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98 See *Debates of the Senate* (23 October 1991) at 493-95.

99 *Ibid.* at 494.

100 See *Parliamentary Procedure*, *supra* note 13 at 406-08.

directly appropriate monies.[101] The Chair cited Erskine May[102] in support of the proposition that "a charge [on the public revenue] is also involved by any proposal whereby the Crown would incur a liability or a contingent liability payable out of money to be voted by Parliament."[103] The ruling was appealed to a vote of the Senate,[104] and adopted there by a vote of 34 to 33.

A similar bill was introduced in the House of Commons by a private member, known as Bill C-251.[105] This bill was somewhat different than the Senate bill. It purported to achieve the same purposes by amending the *Department of Veterans Affairs Act*.[106] That Act already had a section which provided: "Subject to such appropriations as Parliament may provide...."[107] Bill C-251 sought to add merchant seamen to the list of those eligible for benefits, such benefits being necessarily subject to an appropriation act.[108]

The Speaker advised that he had some procedural difficulty with Bill C-251 and, nine days after the Senate ruling, discussion followed in the Commons.[109] In support of the bill, an analogy was drawn between basket clauses for the purpose of motions relating to taxes and expenditure, which normally state: "That the government consider the advisability of...", and the basket clause in legislative provisions. It was submitted that there is no real difference in these two uses of the clause, since there would be no automatic expenditure of funds; a royal recommendation would still be required. The government, in order to pay the pensions, would have to bring in an estimate in the usual way.

A Speaker's ruling of January 6, 1912 was cited. It dealt with a bill that provided for additional commissioners under the *Inquiries Act*,[110] to be paid out of the Consolidated Revenue Fund. The Speaker had ruled that it did not need the royal recommendation:

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[101] This seems a specious argument given the fact that Parliament has no difficulty with passing a law conditional upon its being brought into force by proclamation, or by Order in Council. There is no substantive difference in having a law conditional upon an appropriation act.

[102] See *supra* notes 4 & 14.

[103] *Debates of the Senate*, *supra* note 98 at 494.

[104] See *Rules of the Senate* (Ottawa: The Senate of Canada, 1990) Part IV: Voting.

[105] *House of Commons Debates* (1 November 1991) at 4410. Today, of course, the private member would not be obliged to use a basket clause to introduce such a bill. Standing Order 79(2) has amended the previous Standing Order by deleting the requirement that the royal recommendation be printed "in the votes and Proceedings when any such measure is to be introduced..." See *supra* note 9 and accompanying text. That private member might, however, hope to use such a basket clause to move an amendment in committee.

[106] Bill S-5 sought to amend the *Pension Act*, R.S.C. 1985, c. P-6, the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3, the *Civilian War Pensions and Allowances Act*, R.S.C. 1985, c. C-31 and the *Department of Veteran Affairs Act*, R.S.C. 1985, c. V-1. The proposed amendment to this last Act was quite different from the one introduced in the House of Commons.

[107] *Department of Veteran Affairs Act*, *ibid.* s. 5(g).

[108] The practice of the Treasury Board is to take statutes such as this, that do not have an appropriation clause but that require expenditure, and provide for the expenditures in the Annual Estimates. See the testimony of Allan Darling, Deputy Secretary, Program Branch, Treasury Board, before the Standing Senate Committee on National Finance. *Proceedings of the Standing Senate Committee on National Finance*, No. 16 (26 October 1989) at 5-21. Darling suggested that the decision as to whether the funding of a board is by annual appropriation or by statutory appropriation depends on the degree of independence which the board is to have from the government of the day. Generally, the administrative or incidental costs of a program should be subject to annual appropriation.

[109] *House of Commons Debates*, *supra* note 105 at 4410-20.

[110] R.S.C. 1985, c. I-13.

> The most that can be said is that under its provisions something may have to be done which may [give] 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 for every bill conferring a power upon the government in the exercise of which expense might be incurred, it comes under the rule
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> ....
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> [No] resolution is necessary.[111]

Arguments were put forward, but a ruling has not followed with respect to the propriety of this bill. The matter was superseded by a government initiative to support legislation effecting amendments so as to include merchant seamen among those eligible for pensions. Since no ruling was made, one can only speculate as to how the ruling might have gone. It is suggested that despite strong arguments in favour of the bill's procedural propriety, it would have been ruled out of order. This view is more in keeping with current practice by which such bills are ruled out of order for infringing the financial initiative of the Crown.[112] These decisions invariably rely on Erskine May's text,[113] the established English authority, which states that a bill which tries to 'elude' the requirement of the royal recommendation with a basket clause, will nevertheless fail. In England, it is clear that bills that require "money to be provided by Parliament" are out of order. Such rulings in Canada are an unquestioning acceptance of English authority without analysis, unsupported by section 54.

Even before the recent amendment to the Standing Orders, sometimes, in considering bills that appear to fall foul of these rulings, the Speaker has allowed debate subject to a recommendation being obtained before a vote is permitted.[114] On occasion, the Senate has amended bills that have a royal recommendation attached, and the House of Commons has accepted them.[115] The Commons is explicit in most instances that in accepting the amendments of the Senate, it is merely waiving the privilege and that the decision is not to be taken as a precedent. At other times, it refuses to accept such amendments, and stands upon principle.[116]

Government practice which puts the royal recommendations on bills that may not legally require it may have contributed to these rather far-reaching rulings of the speakers. For example, a royal recommendation was attached to Bill C-21, but the

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[111] *Supra* note 105 at 4413.

[112] See e.g. *House of Commons Debates* (9 November 1978) at 975-82, regarding Bill C-204, *An Act respecting a Canadian Bill of Rights for Children*. The basket clause in this bill provided that "Nothing in this act shall be construed as requiring an appropriation of any part of the public revenue." (at 976).

[113] See *supra* notes 4 & 14.

[114] See e.g. *House of Commons Debates* (8 April 1975) at 4615-16 considering Bill C-234, *An Act to provide Senate representation for the Yukon and Northwest Territories*; *House of Commons Debates* (2 March 1976) at 11430, considering Bill C-272, *Canada-Alaska and Maine Corridors Authority Act*; *House of Commons Debates* (25 January 1977) at 2368-69, considering Bill C-210, dealing with establishment classification boards to control obscene literature; and *House of Commons Debates* (15 December 1975) at 10006, considering Bill C-69, a proposed amendment to the *Unemployment Insurance Act, 1971*. But see *House of Commons Debates* (25 April 1975) at 5227-32, considering Bill C-235, *An Act to amend the Old Age Security Act*, where it was ruled that a private member's bill that required a recommendation could not be considered after first reading.

[115] An example is Bill C-147, *An Act to establish the International Centre for Human Rights and Democratic Development*.

[116] See e.g. *House of Commons Debates*, *supra* note 97, regarding Bill C-103.

Special Senate Committee studying the Bill could find no appropriating clause in the Bill. It appears that the Bill was given the royal recommendation as "a general blessing".[117] Similarly, Bill C-148, *An Act to establish the Canadian Centre for Management Development* was introduced with a royal recommendation. The Senate Committee on National Finance could find no clause appropriating money. The testimony before the committee confirmed that the recommendation had been included as a prudent measure, despite the fact that it appeared that any funds needed to underwrite the costs would have to be appropriated later in an annual appropriation act.[118]

Even in circumstances in which the government decides that an appropriation act must follow in order to cover incidental expenses, the royal recommendation has been attached to a bill that on its face makes no effort to appropriate any monies at all. An example is Bill C-103, *An Act to establish the Atlantic Canada Opportunities Agency and Enterprise Cape Breton Corporation.* The Senate had attempted to divide the bill into two, but the House contended that Bill C-103 was an appropriation bill, which under Standing Order 80(1) could not be amended by the Senate.

The royal recommendation is attached to every appropriation bill: is it not therefore reasonable to leave the recommendation to that bill, and allow free debate with respect to other legislation? Surely the use of the royal recommendation in other circumstances is nothing more than a fetter on the ability of the Senate and private members, without being at all legally necessary.[119]

The Speaker in the Senate is not any more inclined to uphold the arguments of the Senate regarding its powers than is the Speaker of the House of Commons. Both of them rely on the same procedural texts to guide them. On occasion, the Speaker of the Senate has cited for authority a ruling from the 'other place'.[120]

The practice, however, has not always been uniform. Bill C-213, tabled May 31, 1991, was not ruled out of order. Clause 3 states:

> No payment shall be made out of the Consolidated Revenue Fund to defray any expenses necessary for the implementation of this Act without the authority made by Parliament for such purpose.[121]

It is interesting to note that this type of clause has been used in Alberta for the past thirteen years, and has been ruled in order.

The royal recommendation is being required when there is the traditional appropriation clause in the bill, that "all expenditures for the purposes of this act shall be paid out of monies appropriated by Parliament". It is also being required if the bill lacks such a clause, but there will be incidental expenditures, and where there is a possibility that Parliament may be obliged to spend money at any time in the future.

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[117] Senator Stewart, discussing the Committee's findings. *Debates of the Senate* (14 February 1990) at 1127-28.

[118] See *Royal Recommendation, supra* note 3 at 568-79.

[119] It seems not to be practically necessary either: see Darling's testimony before the Senate Committee on National Finance, *supra* note 108.

[120] See e.g. the Speaker's ruling on Bills S-3 and S-4, where the Speaker of the Senate cited two decisions of the Speaker of the House of Commons in deciding that a royal recommendation was necessary on two Senate bills. *Debates of the Senate*, No. 20 (13 June 1989) at 288-89.

[121] See *Debates of the Senate*, No. 20 (24 September 1991) at 365.

However, such expenditures are taken care of quite adequately by the annual appropriation acts. Parliament does not have to pass the appropriation act. These types of bills seem to have suffered the consequences of the label 'money bill.'

V. Conclusion

In the final analysis, it seems that in Canada, we may well have a definition of 'money bill' for procedural purposes which necessitates the use of the royal recommendation, but which is quite different from the requirements for a royal recommendation in the *Constitution Act, 1867*. Without having adopted the British Standing Order of 1866 in our Constitution, the rulings and practice nevertheless seem to apply the rule that any bills that provide for expenditures payable out of monies "to be provided by Parliament" require the royal recommendation. Private members are perhaps unduly excluded from taking the initiative on some bills. The effect of the definition of 'money bill' may have impeded the proper powers of the Senate.

The rulings also seem to be misconceived in their attempt to follow British practice with respect to the liabilities of the upper Chamber. They ignore the differences in the Constitutions, and the very different nature of our parliamentary institutions. There are strong objections which can be raised as against a simple adoption of the practice and position of the Houses in Britain. The Senate's powers must be viewed in light of the *Constitution Act, 1867*, and the particular place of the Senate in the legislative procedures in Canada. In law, it may be that the Senate has vital and important powers with respect to amendment and modification of bills now termed money bills. These are not realized. The Senate may also have important powers in the initiation of bills now labelled, quite loosely, money bills.

The form which the royal recommendation has taken since 1976 has allowed those responsible to seek the royal recommendation without justifying the requirement in accordance with a precise appropriation. This has muddied the waters considerably, and it is suggested, has contributed to the practice of 'playing it safe.'

Speakers' rulings must follow precedent. They rely on the Rules and the Standing Orders of the Houses, the authoritative procedural texts, and on past decisions. They are not directed to the constitutional issue. The procedural texts largely draw their authority from speakers' rulings and the past practice. The result is that the decisions are 'precedent-bound' and cannot address the legal issue of compliance with sections 53 and 54. The legal question can never be resolved internally; that is, as between the two Chambers. Instead, one must look to the courts. These practices may never be tested, but should the courts accept a reference regarding this question, it is suggested that they would have ample authority to find that a 'money bill' for procedural purposes, is not a 'money bill' in law.