Dividing Bills: A Viewpoint from the Senate

Hon. Allan J. MacEachen, PC

On July 6, 1988, the Senate informed the House of Commons, that it had divided into two parts Bill C-103 (An Act to increase opportunities for economic development in Atlantic Canada). The Senate passed the first part without amendment, and retained the second part for further consideration.

The government, however, declined to deal with the bill in its new divided form. A government motion was passed by the House of Commons and a message sent to the Senate, stating that the splitting of Bill C-103 was viewed as an infringement of the privileges of the House of Commons.

In the Autumn, 1988, issue we published the rulings of Senate Speaker Charbonneau and House of Commons Speaker Fraser with regard to the splitting of Bill C-103. The issue of resolving disputes between the Houses is likely to be an ongoing one during the present Parliament so we are now reprinting a slightly edited version of Senator Allan MacEachen's remarks of July 26, 1988, analyzing the procedural and constitutional implications of what transpired.

In my opinion the message from the House of Commons cannot be accepted as a serious effort by the government to deal with the issues raised by Bill C-103. It can be questioned from two angles: first, the assertion that "grants of aid and supplies" are set out in Bill C-103; second, the assertion the Senate has "altered the ends, purposes, considerations, conditions, limitations and qualifications" of the yet to be identified "grants of aid and supplies". What we have are assertions and assertions alone – no proof, no identification of the relevant clauses of Bill C-103.

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The alleged Senate misdemeanours have all been committed "contrary to Standing Order 87" we are advised by the Minister of State (Treasury Board), the author of the message. I shall return to this point in some detail later, but it should be obvious to all that the Standing Orders of the House of Commons do not establish the powers of the Senate. The latter come from the Constitution and cannot be added to, or subtracted from, by the Standing Orders of the House of Commons.

It cannot be emphasized too strongly that the message introduced in the House of Commons by the government, and passed, is not based on the ruling of the Speaker of the House of Commons, which was given three days after the message of Mr. Lewis was put on the notice paper. In fact, the Speaker of the House of Commons did not pronounce on the question

raised in the message of the government, namely, the financial privileges of the respective houses.

I quote from Mr. Speaker Fraser's ruling:

> "The Speaker of the House of Commons by tradition does not rule on Constitutional matters. It is not for me to decide whether the Senate has the Constitutional power to do what it has done with Bill C-103",

I should note that the Speaker of the Senate in his ruling of June 7, 1988, did pronounce on the matter, and found that splitting Bill C-103 in the Senate "would be in contravention of Section 53 of the Constitution Act, 1867".

Mr. Speaker Fraser did find a breach of privilege in that the Senate message did not seek the concurrence of the House of Commons in dividing Bill C-103.

Senator Flynn with the concurrence of all of us, deleted the request for the agreement of the House of Commons which was contained in our original message. I do not think any of us can fail to accept our responsibility jointly for removing the request for concurrence which had been in the message to the House of Commons as originally read by our Speaker.

It is worth quoting two paragraphs from Mr. Speaker Fraser's comments because two important conclusions flow from them:

> A Canadian precedent does exist for a consolidation of two Commons Bills into a single legislative measure by the Senate. That took place on June 11, 1941, with a message from their Honours, from the Senate, asking for the concurrence of this House. The Commons agreed with the Senate proposal, that is, a proposal to take two Bills from this place and put then into one Bill. The Commons agreed with the Senate proposal waiving its traditional privilege, and a single Bill was eventually given Royal Assent. I underline that that was the act of this House in waiving its tradition of privilege and accepting the invitation of the Senate to put Two Bills together.
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> If it is admitted that the Senate can consolidate two Bills, why then can it not divide one Bill into two or more legislative measures? The answer is at least in part in the message. In the 1941 case just alluded to the Senate specifically sought the concurrence of the House for its action. Apparently it was the disposition of this place to accept it. In the message received last Friday relating to Bill C-103, the Senate does not seek the Commons' concurrence in the division of the Bill; it simply informs this House that it has done so, and returns half of a Bill.

So we did sin in not seeking the concurrence of the House of Commons but I would call that a venial sin. It seems to me, as I said earlier, two conclusions flow from Mr. Speaker Fraser's ruling which are of interest to us in examining the fall-out, procedurally and constitutionally, from a motion to divide a bill.

The first conclusion is that in the future the Senate need not be inhibited on those rare occasions where circumstances justify its dividing a Commons bill, provided the proper request for concurrence is made.

The second conclusion that I draw is that the precedent of 1941, cited by the Speaker, whereby the Senate consolidated two House of Commons bills into one, did not encounter the objection that the consolidated bill had originated in the Senate, as was contained in the ruling of our Speaker in the case of dividing Bill C-103 into two bills.

Of course, in my view, that same reasoning should apply in both cases. In fact, the consolidated bill – which was not regarded as having originated in the Senate simply because it had been united in the Senate – was clearly a money bill, and that is a helpful illumination of procedure in the Canadian Senate.

The Royal Recommendation

Before dealing more specifically with these issues, I wish to refer to the tendency to accept, as it were, blindly by an act of faith, that once a financial recommendation of Her Excellency is attached to a bill, such attachment automatically transforms the bill into a money bill, regardless of its contents. The attachment of a financial recommendation to a bill is not in fact conclusive proof that it is a money bill. The test must be whether it is a bill for the appropriation of any part of the public revenue. If it meets that test, it is an appropriation bill and, accordingly, must, in conformity with section 54 of the Constitution Act, 1867, be recommended by Her Excellency. But this test of content has not been applied. The reverse test has been applied to Bill C-103.

Let me give two examples of the performance of this act of faith in reference to Bill C-103. Mr. Speaker Fraser said:

> "There is a requisite that in a Bill that is going to call upon the expenditure of funds, a financial recommendation of Her Excellency the Governor General is necessary. So this Bill is in a very real sense a financial Bill."

Mr. Speaker Charbonneau said:

> Bill C-103 "is a government bill and a money bill, having been recommended by Her Excellency the Governor General."

The assumption is that because it bears a royal recommendation it is, therefore, a money bill. That is not an entirely satisfactory approach. If it were possible simply to produce a royal recommendation and, therefore, create a money bill, one would not even have to look at the contents of the bill. The contents of the bill dictate whether it is an appropriation bill. If it is an appropriation bill, then a royal recommendation is necessary – not the reverse.

The reasoning in this case has been to say, "Here is a royal recommendation; therefore, it is a money bill." Has anyone stopped to consider who affixes the royal recommendation? Who makes the judgment and what criteria are applied in deciding that a royal recommendation is to be affixed? Are the criteria generally understood or generally accepted? This

is certainly not a public process. It is a very obscure decision-making process, conducted privately.

" I think we are entitled to have reasons, rather than to accept on faith, why Bill C-103 is an appropriation bill. "

The situation becomes less clear if one puts side by side the ruling of Mr. Speaker Fraser and the ruling of Mr. Speaker Charbonneau. Mr. Speaker Fraser refused to make a constitutional judgment while Mr. Speaker Charbonneau did make such a judgment in the words I have read. Mr. Speaker Fraser did not say whether the financial privileges of the House of Commons had been breached, because such a conclusion would be a constitutional judgment, which, in his opinion, is not customary for the Speaker of the House of Commons to make. Mr. Speaker Charbonneau did rule, by implication, if not directly, that the motion made to divide the bill breached the financial privileges of the House of Commons – a finding the Speaker of the House of Commons did not wish to come to.

" In its simplest form, the question comes down to this: Is Bill C-103 an appropriation bill? If it is, the further question must be addressed: Does this fact render it immune from modification by the Senate? That is the import of the message which we have received from the House of Commons. "

I have already argued that the presence of a royal recommendation does not necessarily a money bill make. It is not conclusive proof that it is a money bill.

There is another point that must be made. Bill C-103 does not provide general funding for the Atlantic Canada Opportunities Agency. That funding is provided for in the Estimates. Even Donald McPhail, the president of ACOA, testified in the National Finance Committee that there were no dollars for the agency in Bill C-103.

When one examines Bill C-103, one finds the following provisions that deal with the payment of moneys:

> Clause 5(4): "reasonable travel and living expenses" for the members of the advisory boards that "may" be established. The advisory boards have been established and, presumably, the expenses of their members are being paid by funds provided through the Estimates.
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> Clause 11(4): renumeration for the President of ACOA. He is being paid now " he told us so " by funds provided for in the Estimates.
>
> Clause 18(7): renumeration and expenses for the members of the Atlantic Canada Opportunities Agency Board.
>
> Clause 31(1): a salary for the vice-president and fees for the board of directors of Enterprise Cape Breton Corporation.
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> Clause 31(2): travel and living expenses for ECBC directors.
>
> Clause 32(2): salaries for the employees of ECBC.

There is, of course, clause 57, which, under the Salaries Act, provides for the remuneration of the minister responsible.

In this bill we have authorization for salaries, remuneration and expenses of the president, vice-president, employees, directors, and the minister. Apparently, for this reason, the bill was introduced with a royal recommendation. In consequence, His Honour the Speaker in the other place, referred to the bill as a "money bill", or a "financial bill." If this is a money bill, it is only because the loosest definition has been applied to the term, because the bill does not appropriate a single dollar of the public revenue.

If one were to accept, upon proof, that Bill C-103 is an appropriation bill, how have we, as I have already asked, "altered the ends, purposes, considerations, conditions, limitations and qualifications of the grants of aid and supplies" by dividing the bill.

We passed, without change, Part I of the bill and held over Part II for further consideration. As far as ACOA is concerned, the minister, president, advisory board members and ACOA directors will still get all their money. They will get it, of course, provided that Parliament has already supplied money to the Crown, or in the future supplies money for this purpose. We have not added any conditions, limitations or qualifications, and yet, that is exactly what the message accuses us of doing. The Secretary of State (Treasury Board) claims that these conditions and limitations relate to "the grants of aid and supplies set out in the bill..." Are we now to learn that, in addition to being a money bill and a financial bill, Bill C-103 is also a supply bill?

The Recommendation contained in the first reading copy of Bill C-103 states:

> "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..."

We have not changed the circumstances, the manner or the purposes. That is a fact.

The message from the House of Commons, in the name of the Minister of State (Treasury Board), was not based on any fact. It was not backed up in the speech made by the minister in the House of Commons. The minister did not disclose which clauses of the bill contained the grants in aid and supplies, nor did he describe how they had been altered by the Senate.

British Practice

At this point, it might be useful to take a look at British parliamentary law and practice on money bills, although it cannot be taken as a complete guide for the Parliament of Canada because of two important reasons.

First, in 1867 it was understood that the new Dominion was to be a federal union and that one of the chief tasks of the Senate was to protect the smaller provinces against both unfair taxation and unfair spending by a government with a large majority in the House of Commons.

Second, in 1911 the United Kingdom Parliament introduced a suspensive veto for both money bills and other bills. This was to reduce the power of the peerage. The provisions of that act do not apply to Canada.

The constitutional powers of the House of Lords are not as great as those of the Senate of Canada. Nevertheless, we would find it highly instructive to examine British law and practice governing what are called "money bills," because what is now being claimed by the Canadian House of Commons goes far beyond what is claimed by the British House of Commons.

British parliamentarians use the term "money bills" in two ways: (a) for the purposes of the Parliament Act, and (b) in making historic claims of privilege relating to what are called "aids and supplies".

Let us look at the definition of a "money bill" for the purposes of the Parliament Act.

According to Erskine May's summary, the Parliament Act defines a money bill as a public bill which contains only provisions dealing with taxation, appropriation, loans and subordinate matters incidental to those subjects. Notice especially the words, "only provisions dealing with taxation, appropriation and loans"!

Using that definition, is Bill C-103 a money bill? Clearly, it does not deal with taxation. Does it, for any purpose, impose charges on the Consolidated Revenue Fund or on any money provided by Parliament? If so, does it deal only with such matters? The answer to all of these questions is "no". The Speaker of the British House of Commons would have had no difficulty in coming to the conclusion that Bill C-103 is not a money bill.

We now come to the restrictions on the House of Lords with regard to money bills arising from the privileges of the House of Commons respecting aids and supplies. This refers to bills that tax and bills that appropriate revenue from the Consolidated Revenue Fund.

The British Commons claims that the House of Lords may not introduce or amend such bills. However, aids and supplies money bills must not contain provisions for other purposes. Erskine May, seventeenth edition, at page 836, states:

> "In former times, the Commons abused their right to grant supplies without interference from the Lords, by tacking to supply bills provisions which, in a bill that the Lords had no right to amend, must either have been accepted by them unconsidered, or have caused the rejection of a measure necessary for the public service. This practice infringed the privileges of the Lords, no less than their interference in matters of supply infringes the privileges of the Commons; it has been met by the Lords by standing order No. 45, embodying a resolution:
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> The annexing of any clause or clauses to a bill of aid or supply, the matter of which is foreign to and different from the matter of the said bill of aid or supply, is unparliamentary, and tends to the destruction of constitutional government."

Erskine May then goes on to say:

> "On no recent occasion have clauses been irregularly tacked to bills of supply." –

Conclusion

I conclude therefore, that Bill C-103 is not a taxation bill; neither is it an appropriation bill. However, if it were – if it did grant aid or supply, as claimed by the message of the House of Commons, it is a bill in respect of which the Commons cannot claim privilege, because the bill contains provisions which neither tax nor appropriate.

As I mentioned earlier, the Minister of State in his message claims that the Senate has contravened Standing Order 87 of the House of Commons.

In his ruling of July 11, 1988, Mr. Speaker Fraser properly emphasized the importance the House attaches to its Standing Order 87. This Standing Order reads:

> "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."

The Senate has never, to my knowledge, accepted this particular assertion of privilege by the House of Commons. In his comments the Speaker of the House of Commons cited Standing Order 87 as authority for the proposition that "the Senate is somewhat limited in its review of money bills." It is indeed true that we are somewhat limited in our treatment of such bills, but so is the House of Commons limited. The question is: Where are the limits on the Senate? The Senate has never claimed that it could increase the amount to be given to the Crown for any specified purpose by an appropriation bill, but this does not mean that it has ever concurred in Standing Order 87.

I could refer to a number of Canadian authorities on this point, but I will confine myself to a quotation from the 1987 edition of "The Government of Canada", by R.M. Dawson

and Norman Ward, on the question of Standing Order 87, which has been referred to as the guiding principle in the message we have received from the House of Commons. The authors, who are well known and authoritative – and probably without any strong bias in favour of the Senate – state as follows:

> "It is a fair statement that almost the only attention the Senate has given to this grand assertion is to ignore it. On the theoretical side the Senate has argued that if the constitution was intended to limit the Senate's power over money bills once initiated, it would say so. The Senate has insisted further that it could not discharge its functions as a guardian of provincial or regional rights if it had no power over money bills. What is more important is that the Senate has repeatedly amended bills that contained money clauses, and also bills that dealt exclusively with finance, including income tax bills. The Commons has accepted Senate amendments to money bills, usually adding a futile claim that its acquiescence must not be considered a precedent. The Senate could, if practice is any guide, amend a money bill out of all recognition, so that in effect the bill was rejected." (p. 165)

In 1918, a Special Senate Committee was appointed to determine "The Rights of the Senate in Matters of Financial Legislation". In that same year it presented its report, known as the Ross Report, after its Chairman, Senator W.B. Ross. This committee concluded, and I quote:

> "That the Senate of Canada has and always had since it was created, the power to amend Bills originating in the Commons appropriating any part of the revenue or imposing a tax by reducing the amounts therein, but has not the right to increase the same without the consent of the Crown."

That is the conclusion of the Senate committee on the financial privileges of the Senate, which is supported by contemporary authors – all contrary to the message we have received from the House of Commons.

The same Ross report goes on to explain:

> "That Rule 78 [now #87] of the House of Commons of Canada claiming for that body powers and privileges in connection with Money Bills identical with those of the Imperial House of Commons is unwarranted under the provisions of the British North America Act."

The report then goes on to say:

> "The House of Commons cannot by passing Rules add to its powers or diminish those of the Senate. Rule 78 of the House of Commons is quite outside of the powers of that House."

"It is therefore not a new issue we are faced with. The question is whether we will be as resolute in asserting the privileges of the Senate as were our predecessors in earlier years."

So though, in the words of the Speaker of the other place, the House of Commons "has always considered Standing Order 87... as setting out the special relationship between the... House of Commons, and the Sovereign," the inescapable fact of the matter is that the Senate consistently rejected this unilateral declaration. Consequently, as a matter of principle, and as a member of this chamber interested in maintaining the privileges of the chamber, I cannot find favour with that part of the message from the House of Commons declaring:

> "The Senate has altered the ends, purposes, considerations, conditions, limitations and qualifications of the grants of aid and supplies set out in the Bill, contrary to Standing Order 87..."

If we agreed to this portion of the message, we would appear to be recognizing the paramountcy of Standing Order 87 even over the Constitution of Canada.

I applaud the Speaker and members of the House of Commons for asserting whatever privileges they think they can assert. However I cannot agree to the imposition of their perceived privileges on to the members of this chamber. They cannot, by a House of Commons motion, strip the Senate of its constitutional right to participate fully in the legislative process. The Senate has never accepted this motion; it has never accepted any limitations beyond those already mentioned.

When concluding his remarks on our message to the House of Commons, Mr. Speaker Fraser placed great emphasis on the privileges of that chamber:

> "As Speaker of the House of Commons of Canada I must uphold the privileges of this place at all times, and I must also advocate them privately, publicly, and with vigour."

I say "amen" to that; let them uphold their privileges, but who is to uphold the privileges of the Senate? Who is to advocate at all times, privately, publicly and with vigour, the privileges of the Senate? The senators, I hope. I hope all Senators will join in supporting the traditional privileges and purposes of the Senate, and not for a momentary consideration, accept the conclusions that are contained in the motion from the House of Commons.

This is obviously a very important matter, because there have been procedural and constitutional issues flowing from the act we took in dividing the bill. The issues that have been raised give us an opportunity of addressing some of the fundamental aspects of the relationship between the House of Commons and the Senate at a time when the Senate is exhibiting new vigour in the legislative process.■