
Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law

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This article addresses the potential for conflict between courts and parliamentary bodies (including legislatures) in making determinations as to the validity of legislation on the basis of parliamentary procedure. The decision of the Supreme Court of Canada in *Re Eurig Estate* serves as the catalyst for the discussion. It invalidated regulations requiring the payment of probate fees in the courts of Ontario on the basis of constitutional provisions governing the enactment of financial legislation. The article examines how *Eurig* and the Supreme Court's subsequent decision in *Ontario English Catholic Teachers' Association v. Ontario (A.G.)* impinge on the traditional mutual deference that judicial and parliamentary bodies accord each other, particularly in terms of the procedures for enacting financial legislation. The article evaluates how the courts have considered these matters, both before and after *Eurig*, as well as how procedures for financial legislation have been considered in parliamentary bodies in the form of Speaker's rulings in the House of Commons and the Senate. The procedures relating to the delegation of taxation powers, and what constitutes a tax requiring the observance of these procedures by parliamentary and judicial authorities, are also reviewed. In concluding, the authors call for adherence to traditional notions of procedural autonomy within the separate spheres of activity of the judiciary and Parliament.

Cet article étudie les conflits potentiels entre les tribunaux et les agences parlementaires (y compris les corps législatifs) en ce qui concerne la détermination de la validité de la législation en fonction de la procédure parlementaire. La discussion s'impose surtout depuis la décision de la Cour suprême du Canada dans l'arrêt *Re Succession Eurig*, où des règlements exigeant le paiement de frais pour l'obtention de lettres d'homologation devant les tribunaux ontariens ont été invalidés suite à l'interprétation de règles constitutionnelles sur l'adoption de lois en matière de création de taxes. Cet article étudie l'impact de la décision et la décision ultérieure de la Cour dans l'affaire *Ontario English Catholic Teachers' Association c. Ontario (P.G.)* sur la déférence que s'accordaient mutuellement le pouvoir judiciaire et le Parlement, notamment au niveau des procédures pour adopter des lois en matière de finances. L'article examine l'approche des tribunaux par rapport à cette question, avant et après *Eurig*, ainsi que la façon dont les procédures d'adoption de lois en matière de création de taxes ont été abordées par les agences parlementaires sous la forme de décisions de la présidence à la Chambre des communes et au Sénat. Les auteurs abordent également la question des procédures liées à la délégation des pouvoirs de taxation et des types de taxes qui exigent le respect de ces procédures par les autorités parlementaires et judiciaires. En concluant, les auteurs font appel au respect des notions traditionnelles d'autonomie procédurale dans les secteurs d'activité des pouvoirs judiciaire et législatif.

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Introduction

In *Re Eurig Estate*¹ the Supreme Court of Canada invalidated regulations requiring the payment of probate fees in the courts of Ontario. The decision has generated a flurry of commentary and discussion in the context of estate planning.² Many have also recognized the potential impact of the decision on the operation of a wide range of other revenue-generating provisions in delegated legislation. Its effect on the relationship between the courts and primary legislative bodies (Parliament and the provincial legislatures), however, remains largely undiscussed. This aspect of the decision turns on provisions in the *Constitution Act, 1867*.³ Section 53 governs the origination of taxation and spending bills, while section 54 requires a royal recommendation for spending bills. By invoking section 53 as a basis for invalidating the regulations, the majority in *Eurig* has moved these arcane provisions out of the precincts of Parliament and into the courts and chambers of judges. The purpose of this article is to review this development and speculate on where it will lead. The article begins by considering the relationship between parliamentary bodies and the courts in matters of legislative procedure. It reviews the recent judicial consideration of procedures for financial legislation, in particular *Eurig* and the Court's subsequent decision in *Ontario English Catholic Teachers' Association v. Ontario (A.G.)*.⁴ The article then examines how these procedures are viewed in Parliament, notably by the Speakers who rule on them. Finally, the article notes the differences between the approaches taken by the

¹ [1998] 2 S.C.R. 565, (*sub nom. Eurig Estate v. Ontario Court (General Division), Registrar*) 165 D.L.R. (4th) 1 [hereinafter *Eurig*], rev'g (1997), 31 O.R. (3d) 777, 96 O.A.C. 354 (C.A.) [hereinafter *Eurig* (C.A.)], aff'g (1994), 20 O.R. (3d) 385, 5 E.T.R. (2d) 304 (Gen. Div.) [hereinafter *Eurig* (Gen. Div.)].

² See B. Spencer, "Estate Planning, Wills and Trusts" (1999) 23:4 Can. Law. 41; R.B. Thomas & S.W. Bowman, "Ontario Probate Fees: If You Thought You Were Being Taxed, You Were Right" (1998) 46 Can. Tax J. 1278; B. Corbin, "Re *Eurig*: Ontario Strikes Back" (1998) 13 Money & Fam. L. 93; M. Fitz-James, "Estates and Trusts" (1998) 22:11 Can. Law. 13; W.D. Goodman, "Unlawful Taxes and the Supreme Court's Decision in *Eurig*" (1999) 31 Can. Bus. L.J. 291.

³ (U.K.), 30 & 31 Vict., c. 3, ss. 53, 54, reprinted in R.S.C. 1985, App. II, No. 5. The provisions read as follows:

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.

⁴ 2001 SCC 15, 196 D.L.R. (4th) 577 [hereinafter *OECTA*], aff'g (1999), 44 O.R. (3d) 7, 172 D.L.R. (4th) 193 (C.A.) [hereinafter *OECTA* (C.A.) cited to O.R.].

courts and the Speakers, and concludes with a plea for judicial deference to parliamentary bodies on these matters.

I. Parliament and the Courts

Judicial and parliamentary bodies have traditionally steered clear of each other when it comes to the way they operate (proceedings and procedure), as opposed to the end products of their operation (laws and decisions). Although legislatures have reversed court decisions and courts have invalidated legislation, they have generally respected each other's right to function as each sees fit. In Parliament the *sub judice* rule prevents debate on matters that are before the courts.⁵ By the same token, the courts have recognized the right of legislative bodies to control their own proceedings.⁶ For example, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,⁷ McLachlin J. said:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.⁸

Section 9 of the *Bill of Rights, 1689* also recognizes that Parliament and the courts are to operate in separate spheres, stating “[t]hat the freedom of speech and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.”⁹ The Supreme Court of Canada in the *Reference Re Resolu-*

⁵ See e.g. A. Fraser, W.F. Dawson & J.A. Holtby, *Beauchesne's Rules & Forms of the House of Commons of Canada with Annotations, Comments and Precedents*, 6th ed. (Toronto: Carswell, 1989) at 153-54.

⁶ See e.g. *British Railways Board v. Pickin*, [1974] A.C. 765, [1974] 1 All E.R. 609 (H.L.); *Drewery v. Century City Developments (No. 1)* (1974), 6 O.R. (2d) 288, 52 D.L.R. (3d) 512 (H.C.); *Reference Re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525, (*sub nom. Reference Re Canada Assistance Plan (B.C.)*) 83 D.L.R. (4th) 297. But see K. Swinton, “Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege” (1976) 14 Osgoode Hall L.J. 345.

⁷ [1993] 1 S.C.R. 319, (*sub nom. Speaker of the House of Assembly v. Canadian Broadcasting Corp.*) 100 D.L.R. (4th) 212 [hereinafter *N.B. Broadcasting* cited to S.C.R.].

⁸ *Ibid.* at 389. See also *Zündel v. Boudria* (1999), 46 O.R. (3d) 410, (*sub nom. Zündel v. Liberal Party of Canada*) 181 D.L.R. (4th) 463 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 593, online: QL (SCCA).

⁹ (U.K.), 1 William & Mary, Sess. 2, c. 2.

*tion to Amend the Constitution*¹⁰ has accepted that this provision is “undoubtedly in force as part of the law of Canada.”¹¹

Views about the appropriate spheres of courts and parliament were greatly influenced by the political events and constitutional changes of the seventeenth and eighteenth centuries. The law of Parliament was seen as a separate law, distinct from the common law. For that reason it was the common belief that “judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti* [according to the laws and customs of parliament].”¹²

The concept of parliamentary privilege also demonstrates the demarcation between the courts and Parliament. Through parliamentary privilege, the legislature maintains its formal internal autonomy from external forces such as the public, the executive, and the courts. The privileges of Parliament include those rights necessary for free action within its jurisdiction and the necessary authority to enforce those rights if challenged. Among the most important privileges of the members of a legislature is the enjoyment of freedom of speech in debate. Although originally intended as protection against the power of the Crown, it was later extended to protect members against attack from all sources. This freedom of speech may not be impeached or questioned in the courts, and statements made within the precincts of Parliament cannot be the subject of an action for defamation or contempt.¹³ Members are liable to censure and punishment only by the House itself for a breach of its rules.

If the judicial and parliamentary spheres are separate in many respects, there are also several points at which they appear to overlap. For example, there may be an overlap between Crown privilege, which protects the confidentiality of cabinet confidences, and parliamentary privilege, which includes the right to obtain documents and require the attendance of witnesses. As Professor de Smith has said, “[T]here may be at any given moment two doctrines of privilege, the one held by the courts, the other by either House ... and [there is] no way of resolving the real point of issue should

¹⁰ [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of Constitution of Canada*) 125 D.L.R. (3d) 1 [hereinafter cited to S.C.R.].

¹¹ *Ibid.* at 785.

¹² Sir E. Coke, *Fourth Part of the Institutes of the Laws of England* (1797) at 14, cited in Sir D. Linnon *et al.*, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22d ed. (London: Butterworths, 1997) at 155 [hereinafter *Erskine May*].

¹³ See *Roman Corp. v. Hudson's Bay Oil and Gas Co.*, [1972] 1 O.R. 444, 23 D.L.R. (3d) 292 (C.A.), *aff'd*, [1973] S.C.R. 820, 36 D.L.R. (3d) 413. See also Fraser, Dawson & Holtby, *supra* note 5 at 20-22.

conflict arise.”¹⁴ With the Supreme Court’s decision in *Eurig* there now appears to be an additional area of overlap, relating to parliamentary procedures for the enactment of financial legislation.

II. Procedures for Financial Legislation

The procedures for enacting financial legislation have been codified to some extent in sections 53 and 54 of the *Constitution Act, 1867*.¹⁵ These provisions apply not only to the federal Parliament, but also to the provincial legislative assemblies by virtue of section 90 of the same act. They are the culmination of centuries of struggle in England between the House of Commons and the House of Lords and between the Crown and Parliament.¹⁶ The results of this struggle are now an integral part of Canadian parliamentary culture. As Bourinot has written, “All the checks and guards which the wisdom of English parliamentarians has imposed in the course of centuries upon public expenditures now exist in their full force in the parliament of the dominion.”¹⁷

Procedural questions relating to financial legislation involve not only the origination of bills, but also the adoption of a ways and means motion. This motion is a necessary preliminary to taxation measures, including the “the continuation of an expiring tax, an increase in the rate of an existing tax, or an extension of the incidence of a tax so as to include persons not already payers.”¹⁸ Bourinot indicates that the fundamental principle underlying all parliamentary rules and procedures dealing with financial legislation is that

when burthens are to be imposed on the people, every opportunity must be given for free and frequent discussion, so that parliament may not, by sudden and hasty votes, incur any expenses, or be induced to approve of measures, which may entail heavy and lasting burthens upon the country.¹⁹

If a bill imposing a tax does not originate in the House of Commons and is not preceded by a ways and means motion, the Speaker of that House may rule it out of order. The Supreme Court of Canada’s decision in *Eurig*, however, now suggests that

¹⁴ S.A. de Smith, “Parliamentary Privilege and the Bill of Rights” (1958) 21 Mod. L. Rev. 465 at 470, citing D.L. Keir & F.H. Lawson, *Cases in Constitutional Law*, 4th ed. (Oxford: Clarendon Press, 1954) at 125.

¹⁵ See *supra* note 3.

¹⁶ See E.A. Driedger, “Money Bills and the Senate” (1968) 3 Ottawa L. Rev. 25; J. Small, “Money Bills and the Use of the Royal Recommendation in Canada: Practice Versus Principle?” (1995) 27 Ottawa L. Rev. 33.

¹⁷ Sir J.G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. (Toronto: Canada Law Book, 1916) at 404.

¹⁸ *Erskine May*, *supra* note 12 at 777.

¹⁹ Bourinot, *supra* note 17 at 404-405.

the Speakers are not the only ones who may rule on procedural matters relating to financial legislation.

III. Judicial Consideration of Procedures for Financial Legislation

Eurig involved probate fees imposed by regulations under section 5 of the *Administration of Justice Act*.²⁰ The appellant attacked the validity of the regulations on a number of bases, including sections 53 and 54 of the *Constitution Act, 1867*. The Supreme Court of Canada allowed the appeal. Although it did not draw any conclusions about section 54, the majority's conclusions about section 53 are startling.

A. Concept of a Tax

In *Eurig* Major J., writing for a majority of the Court, held that the fees were taxes, as that concept has been elaborated in constitutional case law dealing with the division of powers, most notably *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.²¹ *Lawson* held that a charge is a tax if it is imposed under the authority of Parliament, by a public body, for a public purpose, and is enforceable by law.²² Even if a charge meets all four criteria, however, it may still not be considered a tax "in the constitutional sense" if it can be characterized as a regulatory charge.²³ This characterization depends on the purpose of the charge. If its primary purpose is raising revenue for general governmental purposes, it is a tax. If, though, the charge is imposed for a specific regulatory purpose, it is not a tax. Regulatory charges are imposed to defray the cost of certain programs or services. The amount of the charge must reasonably relate to the cost of providing the service.²⁴ It may be a regulatory charge even if it has some revenue-raising aspect to it, as long as this aspect is ancillary or necessarily incidental to the regulatory characteristic.²⁵

²⁰ R.S.O. 1990, c. A.6.

²¹ [1931] S.C.R. 357, [1931] 2 D.L.R. 193 [hereinafter *Lawson* cited to S.C.R.].

²² *Ibid.* at 363.

²³ *Labourers' International Union of North America v. Ontario Construction Secretariat* (1996), 31 O.R. (3d) 261 at 267, 95 O.A.C. 374 (Div. Ct.) [hereinafter *LIUNA* cited to O.R.].

²⁴ See *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257 [hereinafter *Agricultural Products*]; *Reference Re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004, 136 D.L.R. (3d) 385 [hereinafter *Exported Natural Gas*]; *Allard Contractors v. Coquitlam (District of)*, [1993] 4 S.C.R. 371, 109 D.L.R. (4th) 46 [hereinafter *Allard* cited to S.C.R.]; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, 137 D.L.R. (4th) 449 [hereinafter *Ontario Home Builders* cited to S.C.R.].

²⁵ See *Exported Natural Gas*, *ibid.*; *Ontario Home Builders*, *ibid.* But note that in a recent Australian case, *Airservices Australia v. Canadian Airlines International*, [1999] H.C.A. 62, 167 A.L.J.R. 392, the High Court considered whether it was necessary for charges to relate to particular services

In deciding the constitutional validity of legislation that imposes a charge, courts have used the pith and substance analysis to determine the purpose. They have asked: Is the legislation imposing the charge, in pith and substance, in relation to taxation? Is the charge imposed to raise revenue for government purposes? Is it imposed to defray the cost of a regulatory program? If there is a revenue-raising aspect, is this aspect ancillary to the regulatory scheme?²⁶

Major J. concluded in *Eurig* that the probate fees were taxes because they met the four criteria in the *Lawson* test and were not regulatory charges, since “[t]he evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service.”²⁷

The distinction between a regulatory charge and a tax has been revisited by the Supreme Court in *Westbank First Nation v. British Columbia Hydro and Power Authority*.²⁸ The Court held that certain bylaws passed by the Westbank First Nation imposing levies and penalties on a provincial utility company constituted taxation measures, not regulatory charges. Since the company was an emanation of the Crown, it was immune from taxation because of section 125 of the *Constitution Act, 1867*.²⁹

On the one hand, the Court found that the charge was not connected to a regulatory scheme and that some of the factors necessary for the finding of a regulatory charge were absent. In particular, the scheme did not form part of a detailed code of regulation, and there was no relation between the revenue generated from the charge and the cost of any services provided. The Court also noted that the band had complete discretion in spending the revenue and that there were no restrictions imposed in this regard.³⁰ On the other hand, the Court held that the charges bore all the hallmarks of a taxation measure: they were imposed under the authority of the legislature, they were levied by a public body for a public purpose, and they were enforceable by law.³¹

for a characterization as regulatory. In holding that it was unnecessary that there be a precise correlation between charges and expenses, the court stated that “there is no reason why a fee for services should be limited to a fee which merely seeks to recover expenses or outgoings” (*ibid.* at para. 72).

²⁶ See *Lawson*, *supra* note 21 at 363-64; *LIUNA*, *supra* note 23 at 267-68; *Exported Natural Gas*, *ibid.* at 1070-75; *Allard*, *supra* note 24 at 401-406; *Ontario Home Builders*, *ibid.* at 981, 1017-18.

²⁷ *Eurig*, *supra* note 1 at para. 22.

²⁸ [1999] 3 S.C.R. 134, 176 D.L.R. (4th) 276 [hereinafter *Westbank*].

²⁹ *Supra* note 3. Section 125 reads as follows:

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

³⁰ *Westbank*, *supra* note 28 at paras. 37, 38.

³¹ *Ibid.* at para. 45.

B. Delegation of Taxation Powers

Once it is established that a charge is a tax, the next question is whether there is authority to impose it. In *Eurig* Major J. decided that the Lieutenant Governor in Council did not have this authority. This aspect of his decision rested on two bases.

The first was that the enabling act did not delegate a power to impose taxes.³² This conclusion reflects the general strictness with which taxation legislation is interpreted, as has often been recognized in the context of delegated legislation.³³ If Major J. had concluded on this point, his decision would have been unexceptional. He also, however, considered section 53 of the *Constitution Act, 1867* and suggested that the fees were invalid because they were imposed by a regulation of the Lieutenant Governor in Council, rather than by a bill passed by the legislative assembly. He wrote:

In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.³⁴

It is not at all clear what “imposing a tax on its own accord” means in this context. Taxation powers can only exist if there is statutory authority for them. It is impossible for a body other than a legislature to impose a tax without this authority. It might be argued that Major J. was merely identifying a constitutional basis for the interpretive presumption that taxation powers must be clearly conferred by enabling legislation. It is difficult to imagine, however, why it was necessary to find such a basis, since the presumption is already so well entrenched in the rules of statutory interpretation. In addition, the reference to the “details and mechanism of taxation” suggests that Major J. considered section 53 to prohibit the delegation of control over anything more than this. The implication is that parliamentary bodies must provide some guidance on how taxes are to be imposed, but this leads to the question of how much guidance is enough, and what is to be gained by having the courts rule on the sufficiency of this guidance?

³² *Eurig*, *supra* note 1 at paras. 38-42.

³³ See e.g. *R. v. National Fish Company*, [1931] Ex. C.R. 75 [hereinafter *National Fish*]; *A.G. v. Wilts United Dairies* (1922), 91 L.J.K.B. 897, 25 Digest 132, 519 [hereinafter *Wilts Dairies*].

³⁴ *Eurig*, *supra* note 1 at para. 30.

Major J. characterized section 53 as “a constitutional imperative that is enforceable by the courts.”³⁵ He also rejected the argument that any legislation inconsistent with section 53 should be considered to be an indirect amendment to this section:

Subsection 52(1) of the [*Constitution Act, 1982*] effectively requires any provincial legislation that seeks to amend the constitution of the province to do so expressly. ... Nothing in the *Administration of Justice Act* purports to amend the constitutional requirement for imposing tax legislation set out in s. 53.³⁶

He concluded this discussion of section 53, though, with a comment indicating that his remarks on the permissibility of delegating taxation powers were *obiter*:

While these provisions authorize the Lieutenant Governor in Council to impose fees, they do not constitute an express delegation of *taxing* authority. Whether the province may delegate its taxing authority was not fully argued before this Court, is *obiter* in the result, and should be considered only when the issue has been raised in the courts below. Of relevance to this appeal is that the Act clearly does not authorize the imposition of a tax, albeit direct.³⁷

Major J.’s foray into the parliamentary procedure for passing financial legislation is unprecedented. The issue was not addressed by the lower courts, which considered only whether the charge was a tax or a fee.³⁸ Major J. rejected the rulings and dicta of previous Canadian cases,³⁹ and did not mention that the High Court of Australia ruled that the courts have no power to enforce comparable provisions in the constitution of that country, their jurisdiction being confined to laws, not “proposed laws”.⁴⁰

Another significant omission relates to the position of the United States Supreme Court on a similar origination provision found in article I, § 7, of the U.S. Constitution.⁴¹ In *Skinner v. Mid-America Pipeline Co.*, the court held that this clause “implies nothing about the scope of Congress’ power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted.”⁴² The next year, however, in *United States v. Munoz-Flores*,⁴³ the court considered whether a requirement to pay a monetary “special assessment” to the Crime Victims Fund established by the *Victims of Crime Act of 1984*⁴⁴ was invalid because the act had originated in the Senate. A

³⁵ *Ibid.* at para. 34.

³⁶ *Ibid.* at para. 35.

³⁷ *Ibid.* at para. 39.

³⁸ See *Eurig (C.A.)*, *supra* note 1; *Eurig (Gen. Div.)*, *supra* note 1.

³⁹ See *Agricultural Products*, *supra* note 24 at 1291; *R. v. Irwin*, [1926] Ex. C.R. 127.

⁴⁰ See *Victoria v. Commonwealth* (1975), 7 A.L.R. 277 at 347, 134 C.L.R. 338 (H.C.).

⁴¹ This clause provides: “All Bills for raising revenue shall originate in the House of Representatives.”

⁴² 490 U.S. 212 at 221, 109 S. Ct. 1726 (1989).

⁴³ 495 U.S. 385, 110 S. Ct. 1964 (1990) [hereinafter *Munoz-Flores* cited to U.S.].

⁴⁴ 18 U.S.C. § 3013.

majority of the court rejected the argument that the origination clause raised a “non-justiciable political question” of the kind that the court in *Baker v. Carr*⁴⁵ had decided was unreviewable. The majority also rejected the conclusion of Stevens J. that the second clause of article I, § 7, provided for bills to become law even when they were improperly originated.⁴⁶ The majority, however, concluded that the provision in question was not one for raising revenue and so there was no violation of the origination clause.

Munoz-Flores raises a number of important factors bearing on the judicial review of the origination of bills. These factors relate to respect for democratic institutions, the ability of these institutions to determine origination questions and enforce origination requirements themselves, the impact that non-observance of these requirements may have on individual rights, and whether origination questions involve standards that are amenable to judicial determination. Although the Supreme Court of Canada viewed the U.S. justiciability doctrine with some skepticism in *Operation Dismantle v. R.*,⁴⁷ the factors mentioned in *Munoz-Flores* are still relevant to the two-step approach to justiciability that Wilson J. formulated in the former case. She wrote that the first step is to determine who “as a constitutional matter” has the decision-making power; the second is “to determine the scope (if any) of judicial review of the exercise of that power.”⁴⁸ The majority judgment in *Eurig* took no notice of these issues, let alone the factors to be considered in determining them.

⁴⁵ 369 U.S. 186 at 217, 82 S. Ct. 691 (1962). In that case the court said:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

⁴⁶ Stevens J. supported his conclusions with the following reasons:

First, the House is in an excellent position to defend its origination power. ... Second, the House has greater freedom than does the Judiciary to construe the Origination Clause wisely. ... Third, the House is better able than this Court to judge the prejudice resulting from an Origination Clause violation ... Fourth, the violation complained of by respondent is unlike those constitutional problems which we have in the past recognized as appropriate for judicial supervision (*Munoz-Flores, supra* note 43 at 403-406).

⁴⁷ [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.].

⁴⁸ *Ibid.* at 471.

It is difficult to know what prompted the majority in *Eurig* to overcome the traditional judicial reserve about treading into parliamentary affairs. Perhaps the best explanation lies in its characterization of section 53 as embodying the principle of "no taxation without representation". This elevates it from a mere rule of internal procedure to a constitutional protection for the purses of citizens. In this the majority was clearly following the lead staked out in the legislative language cases that extend from *Quebec (A.G.) v. Blaikie*⁴⁹ to *R. v. Mercure*.⁵⁰ In these cases the Supreme Court found that provisions such as section 133 of the *Constitution Act, 1867*⁵¹ are much more than rules of internal procedure. They recognize the fundamental importance of language as the medium for participating in law-making activity and for communicating the law. Their importance in advancing democratic values and the rule of law provides the rationale for their judicial enforcement.

Another important parallel between *Eurig* and one of the language rights cases, *Mercure*, involves the form of constitutional amendments. Both cases rejected the notion of implied repeal, which Pigeon J. had previously accepted in *Agricultural Products*,⁵² asserting that amendments to constitutional provisions must be express, identifying how the text of the provisions is changed. This rejection of implied repeal dovetails with the majority's suggestion in *Eurig* that section 53 prevents parliamentary bodies from delegating unfettered power to impose taxes. Both views insist on a minimum level of detail in statutes. Constitutional amendments must be made in express terms, while the delegation of taxation powers must be accompanied by a legislative framework to structure or constrain them.

As noted above, Major J.'s comments on the delegation of taxation powers were *obiter*. It is, therefore, worth noting the strong dissenting judgments of four members of the Court. Binnie J. held that section 53 deals with "bills", not regulations,⁵³ while Bastarache J. noted the extensive authority supporting a legislature's authority to

⁴⁹ [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394 [hereinafter *Blaikie*].

⁵⁰ [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1 [hereinafter *Mercure*].

⁵¹ *Supra* note 3. Section 133 reads as follows:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

⁵² *Supra* note 24.

⁵³ *Eurig*, *supra* note 1 at paras. 64-66.

delegate powers⁵⁴ and argued that at most section 53 (if it applies at all to a unicameral legislature) requires enabling provisions to be in bills originating in the lower house.⁵⁵ This interpretation is confirmed by the generality of its reference to bills “for” appropriating public revenue or imposing taxes.⁵⁶

Eurig raises questions, not only about section 53 of the *Constitution Act, 1867*, but also about other constitutional provisions relating to parliamentary procedure. It remains to be seen what approach the Court will take to the requirement of a royal recommendation under section 54 of the *Constitution Act, 1867*, or indeed, to the other rules expressed in sections 34 to 36 and 44 to 49, which deal with matters such as quorum and majority votes. Should these provisions be judicially enforced too?

Arguably, they should not because they are directed exclusively to the internal functioning of Parliament and do not confer rights or benefits on anyone outside this institution. For example, section 54 protects the right of the Crown to initiate spending legislation and acts as a flag to make members of Parliament aware of the spending implications of bills.⁵⁷ It is difficult to see in it any more noble principle that benefits the public generally apart from providing greater control over the spending of public money. It was originally included in pre-Confederation colonial constitutions out of concerns regarding the fiscal responsibility of the nascent elected bodies. Surely the governments and parliamentarians of a mature constitutional democracy today need no help from the courts in overseeing public spending.

C. The Wake of Eurig

It has not taken long for *Eurig* to be argued and applied in other cases.⁵⁸ The most notable example is *OECTA*, which involved paragraph 257.12(1)(b) of the *Education*

⁵⁴ *Hodge v. R.* (1883), 9 A.C. 117 at 131-33 (P.C.); *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 at 722 (P.C.); *Irving Oil v. Provincial Secretary of New Brunswick*, [1980] 1 S.C.R. 787, 109 D.L.R. (3d) 513.

⁵⁵ *Eurig*, *supra* note 1 at paras. 50-61.

⁵⁶ See J.M. Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992) at 44.

⁵⁷ See J.M. Keyes, “When Bills and Amendments Require the Royal Recommendation” (1997-98) 20:4 Can. Parl. Rev. 15.

⁵⁸ See *e.g.* *Westbank*, *supra* note 28; *OECTA*, *supra* note 4; *Urban Outdoor Trans Ad v. Scarborough (City of)* (1999), 43 O.R. (3d) 673, 63 C.R.R. (2d) 165 (Sup. Ct. J.); *Balders Estate v. Halifax (County of) Registrar of Probate* (1999), 181 N.S.R. (2d) 201, 42 C.P.C. (4th) 241 (S.C.). See also the dissent in *Farhat v. Ordre des opticiens d’ordonnances du Quebec*, [1998] A.Q. No. 3661 (C.A.), online: QL (QJ), leave to appeal to S.C.C. refused (1999), 249 N.R. 391 (note) (S.C.C.). For cases considering *Eurig*, see *Re Antigonish (Town of) Waste Disposal Charges Bylaw* (1999), 7 M.P.L.R. (3d) 165 (N.S. S.C.); *Howard Estate v. British Columbia* (1999), 26 E.T.R. (2d) 210 (B.C. S.C.); *Lalonde*

Quality Improvement Act.⁵⁹ The act delegated to the minister of finance the power to set the rate of school taxes.⁶⁰ There was no doubt that the Ontario legislature intended to delegate power to fix the rate of taxes, rather than fees. It was argued, however, that the delegation of this power was contrary to sections 53 and 54 of the *Constitution Act, 1867*.

The Court of Appeal dismissed the relevance of section 54, "as it concerns the appropriation of taxes, and not the imposition of taxes,"⁶¹ but it grappled with the suggestion of the majority in *Eurig* that section 53 limited the scope for delegating taxation powers:

Major J. was of the opinion that "the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature." If we are to accept that Major J. subscribes to the converse of this proposition, it means a new tax can be imposed by the Lieutenant Governor in Council *with the authorization of the legislature*. Applied to this appeal, it follows that having established the education tax the legislature could delegate to the Minister the power to prescribe the tax rates without running afoul of s. 53. However, Major J. later concluded that because the legislature did not delegate the authority to the Lieutenant Governor to impose a probate tax, it was unnecessary to address whether it could constitutionally delegate its *total* responsibility to impose a tax. With great respect to Major J., it would appear that he did address this issue at least implicitly, in the passage quoted from his reasons in the first sentence of this paragraph.

It is important to observe that the issue which Major J. declined to address was the narrow question of whether s. 53 precludes the legislature from delegating to a subordinate authority the total power to impose a tax—be it a probate tax or an education tax, or any other tax. Given the facts of *Eurig*, it was unnecessary for him to consider the issue that arises in this appeal—the delegation of one component of the power to impose a tax.⁶²

Having found that Major J. did not address the situation involved in the case at hand, the Court of Appeal looked at the reasons of the four dissenting judges in *Eurig* and relied on them to confine the scope of section 53 so that it did not prevent the delegation of power to set tax rates. The court also characterized this as a delegation

v. *Ontario (Commission de restructuration des services de santé)* (1999), 48 O.R. (3d) 50, 181 D.L.R. (4th) 263 (Div. Ct.).

⁵⁹ S.O. 1997, c. 31.

⁶⁰ The tax was imposed by the act, *ibid.*:

257.7(1) Subject to the regulations, the following shall in each year levy and collect the tax rates prescribed under section 257.12 for school purposes on the property indicated ...

⁶¹ *OECA* (C.A.), *supra* note 4 at 43.

⁶² *Ibid.* at 44.

of “authority to provide for the details of a tax through regulation,” adding that “the amount of the tax, or tax rate, is a detail, or component, of the tax.”⁶³

This approach is difficult to square with other case law suggesting that the rate of tax is a fundamental aspect of the imposition of a tax.⁶⁴ It is also worth considering whether there is a workable distinction between the imposition of a tax and the establishment of its “details”. The Court of Appeal identified the various elements involved in the imposition of a tax,⁶⁵ but apart from its conclusion about the rate it gave little guidance on which elements or how many of them must be established in a statute.⁶⁶ Finally, the decision raised, but did not answer, the question of how the broad taxation powers that have been historically delegated to municipalities are to be treated under section 53. Does the electoral mandate of municipal bodies mean that delegation of taxation powers to them accords with the principle of no taxation without representation? But how can it, when the delegate in *Eurig* was also an elected body (the provincial cabinet acting through the Lieutenant Governor in Council)?

In March 2001 the Supreme Court of Canada answered these questions with its appeal decision. Writing for the Court, Iacobucci J. first dismissed the relevance of section 54, noting that it “has nothing to do with the actual imposition or levying of

⁶³ *Ibid.* at 46.

⁶⁴ In *Air Canada v. Dorval (City of)*, [1985] 1 S.C.R. 861, 19 D.L.R. (4th) 401 [hereinafter *Air Canada* cited to S.C.R.], a statute authorized municipal councils to “impose by by-law and collect certain annual dues or taxes on all or some trades, manufactures, financial or commercial occupations ... carried on or followed in the city” (*ibid.* at 863). The city of Dorval passed a bylaw that imposed a tax on all businesses, but provided that the rate of tax was to be set by resolution of the council. The Supreme Court found that this amounted to an illegal transformation of the city’s power and that the rate had to be set in the bylaw itself:

It [the council] enacted provisions in accordance with the Act by making certain of the choices offered to it. However, it did not exercise its power respecting the rate. To use the language of Laskin J. in *Brant Dairy Co.*, the Council, in which the power to set a rate by by-law was vested, redelegated to itself the power to set it by way of resolution.

The Council did not have the power to thus make a redelegation to itself (*ibid.* at 871).

Air Canada suggests that the rate is a fundamental feature of the imposition of a tax, and that if a tax is to be imposed through a particular legislative process (in this case the bylaw process), the rate must be set through that process as well.

⁶⁵ The court held:

In our view, the power to impose a tax consists of the intention to legislate in respect to all acts necessarily included in the creation of the tax, as well as all acts consequent to its creation, such as the purpose of the tax and its nature, the tax base, the class of persons required to pay it, the rate of the tax or the formula to enable the taxpayer to calculate the amount of the tax, and the means for the collection of the tax (*OECTA (C.A.)*, *supra* note 4 at 40).

⁶⁶ *Ibid.* at 40-41.

any tax or impost.”⁶⁷ He then confirmed that “the fundamental democratic principle of ‘no taxation without representation’ is guaranteed by s. 53 of the *Constitution Act, 1867*.”⁶⁸ He cited the passage noted above from Major J.’s decision in *Eurig* that this provision “prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.”⁶⁹ He also noted that the Court in *Westbank* had already reaffirmed the view that section 53 is judicially enforceable,⁷⁰ and he went on to say that, although “the tax rate is the defining feature of a tax,”

The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of “no taxation without representation” will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature. The democratic principle is thereby preserved in two ways. First, the legislation expressly delegating the imposition of a tax must be approved by the legislature. Second, the government enacting the delegating legislation remains ultimately accountable to the electorate at the next general election. ...

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation.⁷¹

Iacobucci J. supported these conclusions by referring to the dissenting opinion of Bastarache J. in *Eurig* that “[t]he provincial legislature is entitled to delegate taxing powers to its subordinate bodies, including the Lieutenant Governor in Council.”⁷² He went on to cite further authority to support the delegation of taxation powers to any

⁶⁷ *OECTA*, *supra* note 4 at para. 70.

⁶⁸ *Ibid.* at para. 71.

⁶⁹ *Ibid.*

⁷⁰ The Court in *Westbank* held:

[T]he Canadian Constitution (through the operation of section 53 of the *Constitution Act, 1867*) demands that there should be no taxation without representation. In other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent (*supra* note 28 at para. 19).

⁷¹ *OECTA*, *supra* note 4 at paras. 74, 75.

⁷² *Ibid.* at para. 76, citing *Eurig*, *supra* note 1 at para. 55, citing the cases noted in *supra* note 54.

administrative body the legislature sees fit, including municipalities, school boards, and Aboriginal band councils.⁷³ The only limitation on the delegation of power is that the delegating legislature must possess the power in the first place. So, for example, a provincial legislature cannot delegate power to levy an indirect tax.

The Supreme Court has now clearly resolved the questions arising from *Eurig* about whether a legislature (or Parliament for that matter) can delegate taxation powers. In affirming that “the fundamental democratic principle of ‘no taxation without representation’ is guaranteed by s. 53 of the *Constitution Act, 1867*,” however, the Court has left open the possibility that this provision may be applied by the courts to constrain legislative action in other ways, most obviously to review whether bills originating in the Senate should have originated in the House of Commons. To appreciate the implications of this review, it is necessary to understand how parliamentary bodies function when it comes to the creation and imposition of taxes.

IV. Parliamentary Consideration of Procedures for Financial Legislation

The entry of the courts into parliamentary procedure relating to financial legislation raises the possibility of conflict with Speakers’ rulings, and if there is such a conflict, the question of which should prevail. The potential for conflict arises not only because judges’ and Speakers’ rulings have traditionally operated quite independently of each other, but also because of their institutional differences.

Courts operate within a relatively rigid system of rules, argument, and precedent. They follow the rulings of higher courts, unless those rulings can be distinguished. In contrast, the procedural system that the Speakers superintend does not have the same rigidity. Procedure is as much a product of practice, custom, and convention as it is of rules and rulings.⁷⁴ The mere fact that a particular procedure has been previously followed makes it a precedent.⁷⁵ Arguments about parliamentary procedure are not the preserve of lawyers, and procedural decisions often reflect their fluid political context. In fact, in the Senate, the Speaker’s rulings can be overturned by a majority vote.⁷⁶

The Speaker does not rule on questions of law. Procedural questions about financial legislation, however, may require the Speaker to consider whether a particular bill

⁷³ *OECA*, *ibid.* at paras. 76-78, citing *Wilts Dairies*, *supra* note 33; *Gruen Watch Co. of Canada v. Canada (A.G.)*, [1950] O.R. 429 at 438, [1950] 4 D.L.R. 156 (H.C.), *aff’d* on this point in *Bulova Watch Co. v. Canada (A.G.)*, [1951] O.R. 360 (C.A.); *National Fish*, *supra* note 33.

⁷⁴ See P. Laundry, *Parliaments in the Modern World* (Aldershot, U.K.: Dartmouth, 1989) at 62.

⁷⁵ See the ruling of the Speaker of the Senate on Bill S-13, *infra* note 93, discussed below.

⁷⁶ *Rules of the Senate*, s. 18(4).

imposes a tax. Speakers have often noted this overlap, as indeed the Speaker of the House of Commons did recently in ruling on Bill S-13:⁷⁷

[T]hough this tax question might be characterized as a question of law and in another context outside this Chamber might be raised and considered as a question of law, in this context it is considered only as an integral part of a question on procedure and parliamentary privilege.⁷⁸

In this section, we consider how the institutional differences between parliamentary bodies and the courts affect how Speakers deal with the concept of a tax and the delegation of taxation powers.

A. Concept of a Tax

There is no shortage of Speaker's rulings on whether a charge is a tax. In these rulings, the most basic indicator of a tax is the payment of its proceeds into the Consolidated Revenue Fund. The fact that they are to be paid elsewhere, however, does not indicate conclusively that the charge is not a tax. If the proceeds are to be used for a public purpose that might otherwise have required financing from the Consolidated Revenue Fund, the charge will be considered a tax. One area where the characterization problem arises frequently is that of industry levies. Charges imposed on an industry for its own purposes have been held not to be taxes.⁷⁹ In determining whether the levy is imposed for the purposes of the industry, the Speakers try to ascertain whether it is for the benefit of the industry. *Erskine May* provides the following examples in the English Parliament of charges that were considered *not* to be for the benefit of the industry:

- the *Air Travel Reserve Fund Bill 1974-75*, establishing a levy to compensate passengers who sustained loss as a result of the financial failure of a travel company, considered a tax rather than a levy because the government had complete discretion to dispose of the assets if the company were wound up;⁸⁰
- the *Merchant Shipping Bill, 1973-74*, establishing a charge to pay for pollution damage; payments imposed to meet the cost of enforcing a new regulatory regime for the general benefit, rather than for the benefit of the industry or profession subject to regulation, such as charges for licences for activities affecting the environment or for adventure activities.⁸¹

⁷⁷ *Infra* note 93.

⁷⁸ *House of Commons Debates* (2 December 1998) at 10788. See also Fraser, Dawson & Holtby, *supra* note 5 at 49.

⁷⁹ *Erskine May*, *supra* note 12 at 779.

⁸⁰ *Ibid.* at 780, n. 2.

⁸¹ *Ibid.* at 779-80.

In contrast, the following examples were characterized as industry charges:

- the *Sea Fish Industry Act 1951*, imposing a levy on persons engaged in the white fish industry to finance the White Fish Authority, and the *Industrial Training Act*, imposing a levy on employers in a particular industry to finance the activities of a training board for that industry.⁸²

There are also examples of a number of other measures*that were considered taxes insofar as they required a ways and means resolution:

- the *Finance Act, 1925*, reimposing certain duties after previous duties imposed in *Finance (No. 2) Act, 1915* were allowed to lapse in 1924; the revival of the expired tax was considered as the imposition of a new tax;⁸³
- the *Finance Act No. 2, 1931*, extending an existing tax to include new classes of taxpayers, considered a new tax;⁸⁴ and
- the charges for services provided by the government if the charges are so disproportionate to the cost of the services or so broadly based as to amount to taxation; charges that escape this characterization have also been described as “a small fee of an administrative character”.⁸⁵

The pith and substance approach used by courts in the determination of a tax in the division of powers context is different from the more flexible approach taken by the Speakers in the procedural context. Unlike the courts, the Speakers do not look at the correlation between the cost of the program and the levy imposed to determine whether the amount of the levy is reasonable—they look only at whether the levy is imposed on an industry and whether it is imposed for the benefit of that industry. For example, levies used to fund a regulatory scheme created for the protection of the public generally would likely be considered taxes by the Speakers, but not by the courts. To the contrary, if a levy were imposed to raise revenue for an industry, without any relationship to the costs incurred in regulating the industry, parliamentary practice suggests that it would be an industry levy, but the courts would most likely find it to be a tax.⁸⁵

B. Delegation of Taxation Powers

The delegation question has been specifically addressed in two rulings in the British House of Commons. In 1917 the chairman of the Committee of Ways and Means did not allow an amendment to a finance bill that would have authorized the

⁸² *Ibid.* at 782.

⁸³ *Ibid.* at 778.

⁸⁴ *Ibid.*, n. 2.

⁸⁵ *Ibid.* at 782.

⁸⁶ See *Eurig*, *supra* note 1 at paras. 38-42.

food controller to make orders amending the relief from duty granted by the bill. The reason given was that “[i]t would allow an authority other than the Committee of Ways and Means to impose taxation.”⁸⁷ Two years later the Speaker of the House of Commons ruled on this question, but reached a different conclusion. Lord R. Cecil submitted that “it is a fundamental rule that this House does not delegate its power of taxation.”⁸⁸ But the Speaker replied:

The third question is whether the House of Commons can divest itself of the responsibility of fixing the rates and amounts of these fines and fees and hand that duty over to an outside body such as a Trade Regulation Committee. It has been part of the unwritten law of Parliament that the goods upon which and the rates at which taxes are to be levied shall be fixed and determined by the House of Commons itself. I am not prepared to say that the House cannot delegate that power to some other body, such as a Trade Regulation Committee. I will only say that at present I am not aware of any similar case. It may be urged that if Parliament is desirous of altering its practice it should be done in some definite, specific and formal manner, and not a mere adjunct to other proposals, just as when we desire to alter our common law we do so by passing a Statute for that express purpose. ...

But, upon the assumption—an assumption which I am bound to make—that the House of Commons desires to impose these fines and fees, which, owing to the nature of the circumstances in which we now find ourselves, may vary from week to week, or, at all events, from month to month, how can it be done? It is evidently impossible to bring in a Bill every month to deal with a fresh situation. It seems to me to be reasonable to fix either certain limits, or a ratio which the fine is to bear to the cost of the article, and to give to some authority the duty of fixing the price and applying the ratio or determining the exact figure of the fine, or in some similar fashion.⁸⁹

This Speaker’s ruling lends credence to the majority position in *Eurig* insofar as it emphasizes the exceptional circumstances justifying the delegation of power and the need to indicate clearly that such delegation is being proposed. The ruling also, however, stops short of saying that Parliament has no power to delegate taxation powers, and it does not question the justification given for the delegation, but rather assumes it is justified. In the wake of this ruling, similar provisions have been incorporated into bills founded upon ways and means resolutions, most recently exemplified by sections 2(2), 5, and 97 of the *Value Added Tax Act 1994*.⁹⁰ Furthermore, not all bills delegating taxing powers require a ways and means resolution. The matters given by *Erskine May* as requiring a ways and means resolution include “Delegation of taxing

⁸⁷ U.K., H.C., *Parliamentary Debates*, vol. 95 (2 July 1917) at 828.

⁸⁸ *Ibid.*, vol. 122 (2 December 1919) at 212.

⁸⁹ *Ibid.* at 213-14. This ruling was cited with approval in *ibid.*, vol. 259 (17 November 1931) at 720.

⁹⁰ See *Erskine May*, *supra* note 12 at 779.

powers *within the United Kingdom*”,⁹¹ suggesting, for example, that bills for self-government outside the United Kingdom are excluded. Bills empowering municipal authorities to levy taxes or borrow money are also excluded.⁹²

C. A Cautionary Tale: Bill S-13 (Tobacco Industry Responsibility Act)

The possibility of conflict between parliamentary and judicial rulings is illustrated by the differing rulings of the Speakers of the Senate and of the House of Commons in relation to Bill S-13,⁹³ which was first introduced in the Senate on 26 February 1998. This bill proposed the incorporation of a non-profit foundation (the Canadian Tobacco Industry Community Responsibility Foundation). It also proposed to authorize the foundation to collect a levy on the sale or other disposition of tobacco products, and to use the proceeds for a variety of purposes, principally related to reducing the use of tobacco products by young persons in Canada.

On 2 April 1998 the Speaker of the Senate decided that the provisions authorizing the use of this money did not amount to an appropriation requiring the royal recommendation. The Speaker began his ruling by stating that “[t]he fundamental purpose of the requirement for a Royal Recommendation is to limit the authority for appropriating money from the Consolidated Revenue Fund to the Government.”⁹⁴ He also noted the definitions of “appropriation”, “Consolidated Revenue Fund”, and “public money” in the *Financial Administration Act*,⁹⁵ observing that the definition of “public money” is cast in terms of “all money belonging to Canada”.⁹⁶ The decision turns on this point, since the bill stated that “the Foundation is not an agent of Her Majesty and its funds are not public funds of Canada.”⁹⁷

The Speaker then addressed the question whether the levy actually constituted a tax. He found that the levy did not constitute a tax because it was “imposed on the tobacco industry alone ... to meet an industry purpose beneficial to it.”⁹⁸ This conclusion was based on the language of the bill, which said that its purpose was “to enable and assist the Canadian tobacco industry to carry out its publicly-stated objective of re-

⁹¹ *Ibid.* [emphasis added].

⁹² *Ibid.* at 781.

⁹³ *An Act to Incorporate and to establish an industry levy to provide for the Canadian Tobacco Industry Community Responsibility Foundation*, 1st Sess., 36th Parl., 1998; reintroduced as Bill S-15, *An Act to enable and assist the Canadian tobacco industry in attaining its objective of preventing the use of tobacco products by young persons in Canada*, 1st Sess., 37th Parl., 2001.

⁹⁴ *Senate Debates* (2 April 1998) at 1339.

⁹⁵ R.S.C. 1985, c. F-11, s. 2.

⁹⁶ *Supra* note 94 at 1340.

⁹⁷ *Supra* note 93, cl. 33(1).

⁹⁸ *Supra* note 94 at 1340.

ducing the use of tobacco products by young persons throughout Canada.”⁹⁹ The Speaker also took note of Bill C-32,¹⁰⁰ which had been introduced in the House of Commons without a ways and means motion. This bill provided for the imposition of a levy on blank recording tape and the payment of the proceeds into a fund to benefit composers and recording artists.¹⁰¹

When the bill reached the House of Commons, the government house leader objected that it imposed a tax, and should, accordingly, have originated in that house and been preceded by the adoption of a ways and means motion. The debate focussed on whether the levy was imposed for the benefit of the tobacco industry. On 2 December 1998 the Speaker decided it was not and ruled the bill out of order because it had originated in the Senate.¹⁰² Although he noted both the stated purpose of the bill and the provision that the levy was not payable into the Consolidated Revenue Fund, he concluded:

Surely the lack of credibility referred to [in the bill] is a function of our common sense understanding of the self-interest of the tobacco industry, namely, that, as a commercial enterprise, its primary goal is to expand its markets and thereby to increase profits. Young people would constitute the future growth potential for the industry's market. How could it be to the benefit of the industry to reduce smoking among the very people who constitute its growth market? It is this implausible proposition that underlies the credibility problem to which the bill refers.¹⁰³

The Speaker of the House of Commons also noted the blank tape levy imposed by Bill C-32, and considered it to be an example of a levy imposed on an industry for its own purposes. He found that the bill was therefore “not required to adhere to the usual financial procedures” (including a ways and means motion).¹⁰⁴ The question of whether the manufacturers of blank tapes were the actual beneficiaries, considering that many held no copyright in musical works, was not raised. The benefit was merely asserted to be “clear” with no discussion of whether the existence of copyright laws in actual fact hampers the market for blank audio tapes in any significant way.¹⁰⁵ In other words, is it actually the broader artistic community that benefits?

⁹⁹ *Supra* note 93, cl. 3(1).

¹⁰⁰ *An Act to amend the Copyright Act*, 2d Sess., 35th Parl., 1996 (1st reading 25 April 1996, assented to 25 April 1997, S.C. 1997, c. 24).

¹⁰¹ *Supra* note 94 at 1341.

¹⁰² *House of Commons Debates* (2 December 1998) at 10788.

¹⁰³ *Ibid.* at 10790.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

Yet the Commons Speaker had also cited an English Speaker's ruling as an example of when a levy was found not to be for the benefit of the industry concerned. This ruling involved a bill amending the *Merchant Shipping Act*, which provided for a levy on the shipping industry to be paid into a fund to defray the costs of cleaning up oil spills. The ruling had found that the *Merchant Shipping Act* levy was for a general public purpose (environmental restoration), and as such was a tax. The bill was therefore subject to the rules governing financial procedures.¹⁰⁶ This ruling conflicts with the precedent set in Canada with a similar piece of legislation, Bill C-121,¹⁰⁷ which was introduced without a ways and means motion, even though it too imposed a levy on the shipping industry and established the Ship-Source Oil Pollution Fund under the *Canada Shipping Act*.¹⁰⁸

The differing results in the rulings by the two Speakers demonstrate the fluidity of parliamentary practice. They also turn on how each Speaker determined the purpose of the bill. The Senate Speaker was prepared to rely on what the bill said, whereas the Commons Speaker took a substantive approach, relying on "our common sense understanding" and posing the question "Why is legislation like this required?"¹⁰⁹ The differing approaches raise important questions that go to the heart of the Speaker's role.

The textual approach of the Senate Speaker operates at a distance from the bill, avoiding comment on its merits. This allows the Speaker to maintain the impartiality that is so crucial to his or her office by leaving the merits to be judged by the members. It also leaves open, however, the possibility of form triumphing over substance, a possibility that clearly worried the Commons Speaker. This concern for substance is laudable, and it is one also demonstrated by the courts when they must determine the purposes of legislation or the character of amounts required to be paid under it. But it requires a thorough understanding of the context of the legislation and how it is likely to operate. Deciding these issues at a preliminary stage in parliamentary proceedings on the basis of "common sense" may not necessarily do them justice. For example, Bill S-13 was intended to operate in the context of the prohibitions of the *Tobacco Act*¹¹⁰ on furnishing tobacco products to young persons. Steps to dissuade them from tobacco use would arguably not be contrary to the interests of the tobacco industry because sales to young persons were already illegal. Finally, it should be noted that the application of section 54 of the *Constitution Act, 1867* is scarcely more settled. Although some aspects of this requirement that spending bills be accompanied by a

¹⁰⁶ *Ibid.* at 10789.

¹⁰⁷ *An Act to amend the Canada Shipping Act and to amend another Act in Consequence thereof*, 3d Sess., 34th Parl., 1993 (1st reading 2 April 1993, assented to 23 June 1993, S.C. 1993, c. 36).

¹⁰⁸ R.S.C. 1985, c. S-9, s. 702.

¹⁰⁹ *Supra* note 102 at 10790.

¹¹⁰ S.C. 1997, c. 13.

royal recommendation are clear, others (such as its application to indirect appropriations) are debatable, and as two other recent Speaker's rulings demonstrate, appear to be in a state of flux.¹¹¹

Conclusion

The Supreme Court's decisions in *Eurig* and *OECTA* pose a host of questions about the relationship between the courts and parliamentary bodies because they suggest that the courts may determine questions of parliamentary procedure arising from section 53 of the *Constitution Act, 1867*. They may also open the door to similar conclusions in relation to other procedural provisions, such as section 54.

Although *OECTA* has clarified the delegation issues relating to section 53, this provision is still capable of casting a long shadow, since the Supreme Court has recognized that it constitutionalizes the fundamental democratic principle of "no taxation without representation". Yet this characterization of section 53 surely bears further examination, particularly if it is to be applied beyond the delegation issues considered in *Eurig* and *OECTA*. What is it about the requirement to originate bills in the lower house that supports the principle of no taxation without representation? Why is that principle not adequately safeguarded through the requirement that taxation bills (like all other bills) be passed by the lower house? Is the Senate not a representative body for the purposes of applying the principle?

The Supreme Court has also given little consideration to the threshold question of whether section 53 raises justiciable issues. This is surprising given the position in Australia that the courts have no power to enforce comparable provisions of its constitution¹¹² and the split decision of the U.S. Supreme Court in *Munoz-Flores*, when it considered the justiciability of the origination provisions of the U.S. Constitution.¹¹³

Eurig and *OECTA* may also have implications beyond the origination requirement of section 53. Does the recognition of no taxation without representation as a fundamental principle now invite the courts to inquire, more generally, into the quality of democratic representation when taxation measures are being enacted? And what of the other constitutional provisions noted above that bear on the functioning of Parliament and the legislatures?¹¹⁴ Will they have a bearing on whether legislation is enacted in accordance with this fundamental democratic principle?

¹¹¹ See J.M. Keyes, "The Royal Recommendation: An Update" (1999) 22:2 Can. Parl. Rev. 19.

¹¹² See *supra* note 40 and accompanying text.

¹¹³ *Supra* note 43.

¹¹⁴ See text following note 56.

The conclusion that the courts have a role to play in enforcing constitutional requirements of parliamentary procedure is profoundly disturbing. In countless decisions, courts have recognized that parliamentary bodies must be allowed to manage their own proceedings without interference, including interference from the courts. The limits on their ability to do so relate almost exclusively to the *content* of the laws that they enact and are based on clearly established principles and interests such as the federal-provincial division of legislative powers and the *Canadian Charter of Rights and Freedoms*.¹¹⁵ With the exception of language rights relating to the legislative process, these limits have little effect on how these bodies function. And in turn, Speakers have recognized that they have no jurisdiction to decide such “legal” questions. With *Eurig* and *OECTA*, however, we now have a significantly expanded range of questions capable of being decided by both the Speakers and the courts. The potential for conflict is clear.

The question whether section 53 limits the delegation of taxation powers is now settled, happily in accordance with parliamentary practice, and in a way that stopped short of saying that it cannot be done¹¹⁶ and recognized the acceptability of delegating taxation powers to municipal authorities. This still leaves, however, many significant questions on which conflict may occur, most obviously on whether bills originating in the Senate impose taxes. Given the disagreement between even the Speakers of the two houses on Bill S-13, it is surely not difficult to imagine that the courts may reach different conclusions as well on whether a provision imposes a tax. This is particularly likely because the judicial concept of a tax is rooted in constitutional law cases on the division of powers between Parliament and the provincial legislatures.¹¹⁷ The courts have taken little account of how taxes have been characterized for the purposes of parliamentary procedure.

When one turns to section 54 and the royal recommendation, there are also strong arguments against judicial enforcement. Section 54 protects the right of the Crown to initiate spending legislation, and alerts members of Parliament to the spending implications of bills. It is clearly an internal procedural matter that is virtually unknown outside the parliamentary precincts. This section and the other constitutional provisions dealing with parliamentary procedure should not be judicially enforced, because they are directed exclusively to the internal functioning of Parliament and do not confer rights or benefits on anyone outside its precincts.

At a time when the Supreme Court has taken pains to develop judicial deference to the decisions of administrative bodies, it seems truly odd that it would embark on

¹¹⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

¹¹⁶ See *supra* note 73 and accompanying text.

¹¹⁷ See *Lawson*, *supra* note 21.

an unprecedented review of the procedural decisions of parliamentary bodies. These decisions often reflect their fluid political context. They should not be determined in a judicial forum that strives to distance itself from political matters. In *N.B. Broadcasting* the Supreme Court recognized that the exercise of parliamentary privilege was not reviewable on the basis of the *Charter*. How, then, can it justify reviewing the actions of parliamentary bodies on a basis that falls within the powers of these bodies to manage their own proceedings? Non-legal matters of politics and the propriety of parliamentary procedure should not be the subject of judicial comment. The question here is justiciability involving a concern for the appropriate role of the courts as a forum for the resolution of certain types of disputes.¹¹⁸ A matter is not justiciable if it requires determinations that courts are not intended to make. Courts should retain their traditional reluctance to comment on procedural matters within Parliament and should, as McLachlin J. said in *N.B. Broadcasting*, show proper deference to Parliament's legitimate sphere of activity.¹¹⁹

¹¹⁸ See *Operation Dismantle*, *supra* note 47 at 459.

¹¹⁹ See *N.B. Broadcasting*, *supra* note 7 at 389.