

Canadian Institute for the Administration of Justice
National Seminar on
LEGISLATIVE DRAFTING AND SUBORDINATE LEGISLATION
November 17, 1989

Special Warrants

a paper presented by
Merrilee Rasmussen

Abstract

This paper provides an overview of the controversy surrounding the use of special warrants in Saskatchewan in 1987 and in Ottawa in 1989. The discussion generated by these issues reflects on the nature of the institution of parliament in Canada at both the national and provincial levels. The tendency of the discussion to confuse law and convention -- legality and legitimacy -- suggests an inappropriate narrowness of approach to statutory interpretation in the context of the use of special warrants.

INTRODUCTION

It is a fundamental principle of a parliamentary democracy that parliament controls the use of public money. To achieve this objective, parliament is required to provide its prior approval to expenditures by the executive. It is because of this principle -- originating in the *Bill of Rights* of 1688-9¹ and complemented by statutory recognition today in many Canadian jurisdictions,² -- that a complicated process (comprising the budget speech and the tabling of estimates and their exhaustive review by the parliament or its committees) is followed before final approval of the executive's plans for expenditure is granted. Recently in Canada, the issue of parliamentary control over executive spending has surfaced as a matter of contention.

¹ The *Bill of Rights* is an English statute which forms part of the received law of Canada and is still in force in this country. This fact was affirmed by the Supreme Court of Canada in *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1982), 125 D.L.R. (3d) 1 at p. 30. The relevant provision of the *Bill of Rights* reads as follows:

Levying of money for or to the use of the Crown, by pretence of Prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be so granted, is illegal.

²The requirement, when explicitly stated, is generally framed as a prohibition against the making of payments out of the consolidated fund without the authorization of Parliament or the Legislature. See, for example: Canada, R.S.C.1985, c.F-11, s.26; B.C., 1981, c.15, s.18; Manitoba, C.C.M., c.F55, s.39; New Brunswick, R.S.N.B.1973, c.F-11, s.30; Nova Scotia, R.S.N.S.1967, c.242, s.20; P.E.I., 1980, c.21, s.24; Newfoundland, 1973 No.86, s.22. It is sometimes implicitly recognized as, for example, in Saskatchewan's *Financial Administration Act* which prohibits a department from incurring expenditures in excess of its "appropriation" -- a defined term which requires legislative approval in an *Appropriation Act* or some other statute, and which includes a special warrant which is a deemed appropriation.

This current struggle between the legislative and executive branches of government centres on a dispute about the scope of the authority granted to government to finance executive expenditure through the use of special warrants. The special warrant power is a statutorily provided exception to the requirement for prior approval by parliament that, under specific and limited circumstances, permits approval instead pursuant to a Cabinet directive. The assumption of governments that law and convention are entirely separate from one another has precipitated two of the more dramatic confrontations on this issue: the first occurring in Saskatchewan in 1987, the second arising in the Senate in 1989. This paper explores the symbiotic relationship between law and convention and their application to statutory interpretation in the context of this dispute.

THE ISSUE in SASKATCHEWAN

Prior to 1987 in Saskatchewan it had been the norm that the Legislature was called into session in November and sat long enough to deal with the Throne Speech and to permit the introduction of the major pieces of the government's legislative programme. The session was then adjourned so that when it reconvened in the spring it was free to deal with the other important event in the legislative calendar -- the budget address. The government's fiscal year ends on March 31 and usually the new budget, and the detailed estimates on which it is based, are presented to the Legislature prior to that time. In 1987 that didn't happen. More significantly, there was no indication that the Legislature would be recalled in the near future to permit it to happen. Not surprisingly, however, in the meantime government's need for money

had to be met. This was accomplished through the use of special warrants.

Special warrants have been used frequently in Saskatchewan, and as a matter of course, to provide for any shortfall between the estimates of expenditures that are approved at the beginning of a fiscal year and the actual expenditures that are required by the end of the fiscal year. They have also been used in this manner to fund programs of assistance for damage caused by unforeseen natural disaster such as flood, drought or storm. The important difference in Saskatchewan in 1987 was that special warrants were being used at the *beginning* of the fiscal year to finance *ordinary* expenditure. This was unusual.

In early April 1987, Dr. Howard Leeson, professor of political science and head of that department at the University of Regina, wrote to Saskatchewan's Lieutenant Governor alleging the existence of a constitutional convention requiring the Government to present its budget and estimates to the Legislature prior to the beginning of the fiscal year to which they related and requesting the Lieutenant Governor to take action to recall the Legislature.³ The Lieutenant Governor suggested that the use of special warrants in this manner over a protracted period of time would indeed be inappropriate but replied that the situation had not yet progressed to the point where he should intervene.⁴

³*Globe and Mail* (national edition), April 29, 1987.

⁴According to press reports, the Lieutenant Governor indicated that "he would take appropriate action if he thought the government intended to use financial special warrants 'for an indefinite period of time'" (*Leader-Post*, April 24, 1987). The Minister of Justice agreed that the "Lieutenant Governor would be justified in intervening if the

On April 28, 1987 the Leader of the Opposition, Allan Blakeney, requested a "detailed legal opinion" from the Legislative Counsel and Law Clerk⁵ with respect to the specific matter of the alleged constitutional convention as well as the question of the legal validity of the special warrants that the government was using in order to finance its on-going operations after April 1, 1987.

Special warrants are authorized in Saskatchewan pursuant to *The Financial Administration Act*. An unambiguous and basic feature of the authorizing provision is the limitation on the use of special warrants contained in subsection (2): they are not available while the Legislature is actually sitting. The provision reads as follows:

33(1) Where the Legislative Assembly is not in session and a matter arises for which an expenditure is not foreseen or provided for or is insufficiently provided for, the Lieutenant Governor in Council:

- (a) on the report of the member of the Executive Council responsible for the matter stating that there is no appropriation for the expenditure or that the appropriation is exhausted or insufficient and that the expenditure is urgently required for the public good; and
- (b) on the recommendation of the minister [of Finance];

may order a special warrant to be prepared for the signature of the Lieutenant Governor providing for the expenditure of the amount estimated to be required.

(2) For the purposes of subsection (1), the Legislature is not in session where it:

- (a) is prorogued or dissolved; or

provincial Government did not schedule a budget until this fall" (*Globe and Mail* (national edition), April 30, 1987).

⁵At the time, this position was held by this writer.

(b) is adjourned for an indefinite period or to a day more than seven days after the Lieutenant Governor in Council made the order directing the preparation of the special warrant.⁶

Given the sitting traditions of the Saskatchewan Legislature, it was unlikely that a special warrant would have been *possible* at the beginning of a fiscal year because the House would normally have been sitting at that time. On investigation this hypothesis is borne out. Only on four occasions in Saskatchewan history prior to 1987 had the Legislature *not* been sitting at the beginning of the fiscal year. There were thus only these four times at which the 1987 situation could possibly have been duplicated; *none* of them saw special warrants used in the same way as in 1987.⁷

The practices surrounding the use of special warrants are a consequence of the fact that their use is a legislated exercise of the major Crown prerogative that Parliament fought to achieve control over - - the spending power. This history determines not just the existence or non-existence of a convention concerning the presentation to the Legislature of a budget and estimates, but also the meaning to be attached to the statutory provision that provides the legislative

⁶Section 33 of *The Financial Administration Act* (originally enacted as *The Department of Finance Act, 1983*, S.S.1983, c.D-15.1, and now located in the looseleaf tables and statutes of Saskatchewan as chapter F-13.3). The section contains a final subsection which "deems" a special warrant to be an "appropriation" in order to satisfy the legal requirement for parliamentary approval in a technical manner.

⁷Those occasions were: 1906, 1908, 1982 and 1985. Special warrants were used only in 1908 and 1982. The 1908 occurrence is not explained in contemporary accounts. In 1982, special warrants were used during a period of dissolution and change of government. This instance is discussed more fully later.

authority under which special warrants are issued. That is, the special warrant power cannot be properly understood without acknowledging the fact that it is a statutory exception to the basic rule that parliament must provide its prior approval to executive expenditure.

Furthermore, the specific wording of this statutory exception is modelled on amendments to legislation that were first enacted in 1866 by the Province of Canada as a result of illegal government spending necessitated by Fenian raids.⁸ Considering the dramatic circumstances that gave legislative birth to these words in the special warrant power, it is reasonable to construe the authority it grants in a narrow fashion. Obviously, the Legislature *should* approve expenditures if the Legislature is available. The special warrant power was not enacted with the objective of handing back the spending power to the Crown.

As a result, the phrase in Saskatchewan's statutory provision authorizing special warrants which permitted them to be issued in cases of expenditures that were "not foreseen or provided for or

⁸In 1864, legislation had been enacted to permit special warrants "in the event of any accident happening to any public work or building requiring immediate outlay to repair it". (Province of Canada, *Statutes*, 1864, c.6) When moneys became necessary to equip a volunteer force to repel the Fenian raids, it was clear that a special warrant could not be used to authorize the expenditure. In his budget speech of June 26, 1866, Alexander Galt said:

The government are perfectly conscious of the responsibility they incurred during the year now closing, in violating the provisions of the law in regard to the public expenditure and they do not desire to be again put in that position.

(As quoted in H.R. Balls, "Governor General's Warrants", *Canadian Tax Journal* 1963, p. 186.) The special warrant power was subsequently amended to provide for cases that were "not foreseen or provided for or insufficiently provided for", as well as for accidents to public works.

insufficiently provided for" cannot support an interpretation that would permit a government to simply decline to ask for *any* appropriation to support the expenditures it will inevitably incur and then provide for them all by special warrant.

The opinion provided by the Legislative Counsel and Law Clerk concluded that while the consistent practice of presenting a budget and estimates to the Legislature prior to the time when expenditures on ordinary government financing must be approved suggested the existence of a convention that this take place, it was also arguable that this is simply the most convenient method of complying with the *legal* principle that expenditures must be approved by the Legislature before they are made. However, although the convention might not exist, the lack of legal authority to direct the issue of special warrants with respect to ordinary government expenditures required, in a practical sense, the reconvening of the Legislature in order to grant interim supply, whether a budget and estimates were presented or not.

Shortly after this opinion was made public, Premier Devine announced that the Assembly would resume sitting on June 17, 1987. And, shortly after that, a budget and estimates were presented to the Legislature for its approval.

While the events of 1987 represent a specific anomaly in the use of special warrants in Saskatchewan, it is also instructive to examine the use of special warrants in 1982-83, the first year of the Devine administration.

In 1982 the Blakeney government presented a budget and estimates to the Legislature on March 18, but was defeated at the polls in a general election held on April 26. The new Devine administration reconvened the Legislature on June 16. Between March 19, when the Legislature was dissolved and June 16 when the new Legislative Assembly was called into session, government expenditure was financed by special warrant. However, during the period of an election, between dissolution and the formal return to the writ, there *is* no Legislature. It is precisely to deal with this kind of a special situation that the special warrant exists. It should also be remembered that these special warrants were issued with reference to a budget and estimates that *had* been presented to the previous Legislature, even though the government that had presented them had been defeated. Interestingly, although the Legislature sat several times throughout the 1982-83 fiscal year, interim supply bills -- that is, the prior approval of the Legislature on an interim basis pending completion of the Legislature's review of the estimates -- were never enacted. They were avoided by the simple expedient of scheduling special warrants throughout 1982-83 to obviate the most obvious legal difficulty posed by the legislation authorizing their use (that is, that special warrants were not available while the Legislature was sitting). But the spirit of the requirement, based on the idea that it is the Legislature that *should* approve expenditures, was ignored.

1982-83 is an aberration that might be explainable by virtue of the fact that it was a transitional period during which a novice

administration was in control. The government's immediate return in the next fiscal year to the previously established norm lends credence to this view and suggests that the Devine administration's use of special warrants in this technically "correct" manner was inappropriate, even in its own view.

THE ISSUE in the SENATE

Within three weeks after the Progressive Conservatives' federal re-election on November 21, 1988, Prime Minister Mulroney called the new Parliament into session on December 12, 1988. The speed with which Parliament was called to sit was dictated by the government's wish to enact its free trade legislation prior to January 1, 1989 when it was to be effective. As soon as the free trade legislation was passed on December 30, the House adjourned. Special warrants were issued on January 19, February 16 and March 23 in relation to expenditures for which funds were lacking in the 1988-89 fiscal year (and with respect to which supplementary estimates had been tabled in the House prior to adjournment, but not dealt with). And on April 1, a special warrant was issued in the amount of \$6 billion to fund ordinary government expenditures for the first 45 days of the 1989-90 fiscal year which began on that day.

When the House adjourned on December 30, 1988, March 6, 1989 was named as the day on which the session would reconvene. However, on February 28, 1989 the First Session of the 34th Parliament was prorogued and on April 3, 1989, the Second Session began.

When the first interim supply bill was brought to the Senate for its approval, a debate arose concerning the propriety of the government's actions in issuing the special warrants in the earlier part of 1989. The Senate added an amendment to the bill which purported to validate these special warrants, thus implying that the government's actions were illegal. As required, the amendment was brought before the House of Commons, and after much debate, both inside and outside of the Chamber, the amendment was defeated and the interim supply bill was adopted in its original form.

The question that provoked this dispute was again the question of determining the scope and extent of the authority that is granted to government pursuant to the statutorily provided special warrant power enacted by Parliament. The debates in the House of Commons and the proceedings of the Senate's Standing Committee on National Finance focussed primarily on past practices and conventions surrounding the use of special warrants. The Government's position was that it had all times followed the requirements of the law.

The situation of special warrants federally has its roots in the same legislative history that is applicable in Saskatchewan. The *Bill of Rights* again establishes the primary rule that parliament must approve executive expenditure and the *Financial Administration Act* enshrines that requirement together with the special warrant exception. The present wording of the federal provision authorizing the use of

special warrants differs in significant respects from the corresponding provision in Saskatchewan:

Where a payment is urgently required for the public good when Parliament is not in session and there is no other appropriation pursuant to which the payment may be made, the Governor in Council, on the report of the President of the Treasury Board that there is no appropriation for the payment and the report of the appropriate Minister that the payment is urgently required for the public good, may, by order, direct the preparation of a special warrant to be signed by the Governor General authorizing the payment to be made out of the Consolidated Revenue Fund.⁹

Until 1958, the federal provision paralleled the Saskatchewan provision more closely. The current federal wording results from an amendment which had the effect of altering the introductory "where" clause. That clause had previously read as follows:

Where an accident happens to any public work or building when Parliament is not in session and an expenditure for the repair or renewal thereof is urgently required, or where any other matter arises when Parliament is not in session in respect of which an expenditure not foreseen or provided for by Parliament is urgently required for the public good, . . .¹⁰

According to Hansard, this amendment was made in order to clarify, simplify and modernize the language of the provision.¹¹ The government considered the specific reference to accidents to public buildings to be an anachronism and, in any event, it was not necessary -

⁹R.S.C.1985, c.F-11, ss. 30(1).

¹⁰S.C.1966-67, c.74, s.6.

¹¹House of Commons Debates, 1958 Vol.III, p.2823; 1958 Vol.IV, p.3770.

- nor was it desirable -- to list in this particular way all the events that could occur and give rise to the need for the issuance of a special warrant. The new wording is thus a synthesis of the pre-existing wording in more modern language. However, even if it is considered inappropriate to consult Hansard in seeking answers to these types of questions, in the absence of any evidence of intended change other than the enactment of the amendment itself, the provisions of the *Interpretation Act* with respect to the effect of amendment should apply:

The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament . . . to have been different from the law as it is under the enactment as amended.¹²

The 1958 amendment does not alter the situation; it remains appropriate to characterize the special warrant provision as one that has evolved legislatively out of circumstances which suggest that its use should indeed be limited to "special" cases, not ordinary ones.

In 1989, when the special warrant issue arose as a result of the actions of the Senate, Peter Milliken, Member of Parliament for Kingston and the Islands, spoke at length in the House of Commons in opposition to the government's motion to reject the Senate amendment. He reviewed the concept of parliamentary supremacy and its historical development to become, in Dicey's words "the very keystone of the law of

¹²R.S.C.1985, c.I-21, s.45(2).

the constitution".¹³ He also reviewed the federal government's own practices in the use of special warrants, pointing out

[t]he fact is that in all the cases where these warrants have been used, save one, they were used during the time between the dissolution of Parliament and the commencement of a new Parliament, not a new session or a different session, but a new Parliament. . . .

What we are faced with here today is something quite unprecedented. . . . this is a case where the Government is using Governor General's special warrants to meet ordinary pay day requirements, and using them between the times that Parliament has met and is available to deal with the business of Supply.¹⁴

Hugh Winsor, a columnist for the *Globe and Mail*, provides a similar factual summary:

Special warrants are supposed to be reserved for "unforeseen expenditures urgently required for the public good." They were used once in the nineteenth century to repair the roof of the Parliament Buildings when the House was not in session but never before as a substitute for the normal estimates / supply business.¹⁵

The Senate Committee on National Finance heard testimony on the point from Dr. Eugene Forsey. Dr. Forsey directed his remarks to the issue of constitutional convention. He stated several times that the

¹³A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Tenth edition, 1959 at p.69 as quoted in "House of Commons Debates", *ibid* at p.1697.

¹⁴"House of Commons Debates", Vol. 131, No. 31, 2nd Session 34th Parliament, May 15, 1989, at p. 1700. Note that subsection 30(5) specifically authorizes the use of special warrants in periods other than dissolution periods. I do not quote Mr. Milliken with the intention of suggesting that this is a *legal* limitation on the use of special warrants (which would be clearly wrong), but to illustrate the apparent "narrowness" of the actual use of special warrants which narrowness reflects on the meaning of "urgency" in the context of subsection 30(1).

¹⁵"Refresher course in parliamentary power result of latest wrangling", *Globe and Mail* (national edition), p.A2.

government's use of special warrants in the circumstances of 1989 was an aberration. His point was that Parliament was available and should have been summoned to grant supply; the integrity of Parliament is more important than the inconvenience of the executive.

This is a special use in a new set of circumstances. . . . As far as I know, this particular thing has never happened before, namely that Parliament has been summoned and then the events that have been described took place [that is, a failure to bring in a bill for interim supply prior to prorogation], and special warrants have been issued.¹⁶

The Government's position turned on its view that it had met the three legal conditions necessary to authorize the issue of a special warrant pursuant to section 30 of *The Financial Administration Act* because:

- (1) Parliament was not, in fact, sitting;
- (2) the President of the Treasury Board had stated that there was no appropriation available from which the expenditures sought could be made; and
- (3) the "appropriate Minister" had asserted that the expenditures were "urgently required for the public good".

The Opposition position was derived from two principles: firstly, that the strict words of the statute are conditioned by the accepted practices surrounding the use of the power granted by the statute and, secondly, that the *fact* that Parliament wasn't sitting and no appropriated moneys were available (a situation whose existence was already required by conditions (1) and (2)) could not, without the

¹⁶Proceedings of the Standing Senate Committee on National Finance, Second Session Thirty-third Parliament, Issue No. 3, May 10, 1989.

existence of some other independent fact, constitute the *urgency* requirement of condition (3). Urgency is something other than a situation in which Parliament hasn't appropriated the money already and doesn't happen to be sitting at the time when the executive requires some more.

No one appears to have specifically addressed the question of the meaning to be ascribed to the opening clause of subsection 30(1): "Where a payment is urgently required for the public good when Parliament is not in session and there is no other appropriation pursuant to which the payment may be made". Implicitly, the Government has asserted that it is the appropriate Minister's making of a statement to the effect that urgency exists that *determines* that urgency exists. It can be asserted, however, that that would be the meaning of the provision if the opening clause were not there at all. And, on the assumption that Parliament only includes words in its enactments in order that they should have some meaning, it follows that the clause must require something else -- something more than the appropriate Minister's statement.

Also implicit, the Opposition position suggests that the clause requires the existence of an urgency in the minds of Canadians generally (urgency as a matter of "subjective" fact) and not just in the mind of the appropriate Minister. And the answer to that question is to be found in the consistent practices surrounding the use of special warrants. In other words, our restrained use of special warrants in

Canada is not derived from convention; the convention is derived from our understanding of the legal limitations on their use.

CONCLUSION

In both the Saskatchewan and the Ottawa instances, governments have demonstrated a narrow approach to understanding statutes that ignores the relationship between convention and law and fails to recognize that a parliament is not just a majority of seats in a legislating assembly. This subtlety provides the flexibility that is a significant strength of the Westminster parliamentary model. The participants in these recent debates about the use of special warrants have, in adopting their positions, precipitated a discussion about legality versus legitimacy which cannot be dismissed either as just politics or as just legal technicality.

Indeed, these issues raise questions of significance concerning both the nature of the institution of Parliament and the activity described as statutory interpretation. As long as we understand the objective of the latter to be a search to discover the intention of the former we are compelled to strive for a closer understanding of what parliament is. And if we are trying to understand what parliament is seeking to achieve in its pronouncements as laws, we must be prepared to conduct the activity of reading statutes in the same context as that in which they are written. *That* context requires that we consider more than just the words on the page.