

LEGISLATIVE ASSEMBLY OF THE
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A REVIEW OF THE FINANCIAL ADMINISTRATION ACT

BILL 9 - 87(1)

Conducted jointly by

The Standing Committees of Legislation and of Finance

January 6 - 8, 1987

BACKGROUND

In the 9th Session of the 10th Assembly the Government will introduce: An Act Respecting the Financial Administration of the Government of the Northwest Territories and Public Agencies. This bill has been in the planning and drafting stages for several months. On February 6th a joint meeting of the Standing Committee of Legislation and the Standing Committee of Finance was convened to review all aspects of this important legislation. Subsequently, three additional meetings were held. Chairmanship was shared by Mr. MacQuarrie and Mr. Nerysoo.

THE REVIEW PROCESS

The first meeting continued for two days and it was at this time that the most in depth analysis of this legislation was done. The Minister of Finance, Mr. Butters, appeared before the committee to answer questions about all aspects of this bill. Assisting him were Mr. James Nelson, Comptroller General and Mr. Patrick Orr, Legislative Counsel. Questions of a general nature were first asked by committee members. This was followed with a detail examination of the bill - clause by clause.

It was the intention of the committee to advise the Minister of the general concerns of members as well as to make recommendations for change to the Act where the committee felt additions, deletions or clarification were desirable.

The committee would like to acknowledge the considerable help of its Law Clerk, Mr. Fournier, in reviewing several of the clauses that came under discussion. The committee would also like to acknowledge the considerable cooperation of the government in addressing committee concerns and recommendations in a very prompt and thorough manner. A revised F.A.A. was forwarded to the committee chairmen by January 29th which incorporated nearly every committee suggestion. In the following clause by clause review both the committee suggestions and the government's response are indicated.

GENERAL CONCERNS

In questioning the Minister of Finance the Committee expressed several concerns of a general nature. Two major ones, at that time, were:

1. Has the Auditor General of Canada been involved in the drafting of this legislation - has he seen and approved this final draft?

Response: The committee was told that the Auditor General has been involved and that in fact the former Deputy Auditor General, Mr. Harold Hayes, had been contracted to assist in the drafting.

The committee was told that the Auditor General supports the Act as written, however the committee requested that a formal response be obtained from the Auditor General's Office before the Bill is introduced into the House. Mr. Butters sent a letter January 7th requesting, "the views of your Office (the Auditor General's) in respect to the acceptability of the amended Act." The Deputy Auditor General for Canada has since responded that his office is satisfied with the Act as presented.

2. How extensive was the consultation with the agencies, boards and commissions as included in the schedules to the Act in the drafting of the Act? What were the concerns expressed and how were they addressed?

The committee was concerned that all affected organizations be consulted about the implications of this legislation on their operations. In particular, concern was expressed about the response from Hospital Boards, especially as the Yellowknife Stanton Hospital Board had apparently expressed concerns to a member of the committee. Concern was also expressed regarding Boards of Education.

Response: The committee was told that copies of draft legislation had been forwarded to the two major territorial corporations concerned, the NWTTC and the WCB. The early response had been that certain aspects of Part IX, dealing specifically with public agencies, were too restrictive. Mr. Butters and his officials had met with representatives of both bodies and he was satisfied that they were happy with the proposed Bill.

The committee was concerned that it would be asked to approve this bill without hearing more about the concerns of the Hospital Boards and the School Boards. It was suggested that the Government obtain information directly from the various boards as to their interpretation of the impact of this Act. The Minister of Health was sent copies of letters from Stanton Yellowknife Hospital Board and the Fort Smith Hospital Board and at a subsequent meeting of the Committees was asked to report on the consultation process.

Some members were clearly not satisfied that sufficient effort was made to address the concerns of volunteer boards.

The Minister of Education was sent a copy of a letter from the Separate School Board of Yellowknife. At his appearance later before the Committee the Minister provided an answer to each concern expressed by the school board. The Committee was satisfied with the response of this Minister.

CLAUSE BY CLAUSE

The committee reviewed each clause of this bill and several questions were asked by the committee members. For the purpose of this report only those questions that resulted in suggestions for change will be reviewed. It should be noted that some suggestions were given no more strength than that term implies, however some of the suggestions took the form of recommendations by motion. These differences will be noted for the reader.

Section 2.(1) - definitions:

"department" - the committee's suggestion to change the word "and" at the end of (a) to "or" was accepted.

"directive" - the committee recommended that directives be specifically in written form. This change has been accepted.

STATUS OF THE LEGISLATIVE ASSEMBLY

NOTE: At this point in the review the committee members expressed considerable concern that the Speaker, as a Minister; the Clerk as a Department Head; and the Legislative Assembly as a Department would all become subject to the directives of the Minister of Finance and the FMB. The Minister of Finance explained that the purpose of including the Assembly and its officers was to ensure that the financial operations of government were consistently applied and that the need to have a set of rules, of guidelines, applicable in all areas of government was most important. While recognizing the need for sound financial management consistent with the methods adopted by government the clear separation of the Legislative Assembly from the bureaucracy and the recognition of its special status were considered paramount. It was suggested that perhaps certain exclusions or a separate section concerning the Assembly might be considered. The committee recommended that: Government and committee lawyers attempt to determine a way to address the concerns of both sides in a mutually acceptable fashion.

In response to this recommendation the following changes were made:

a) In the definition of "minister" delete the phrase "and includes the Speaker of the Legislative Assembly with respect to the Office of the Legislative Assembly".

b) In the definition of "expenditure officer" include (c) to read "the Speaker of the Legislative Assembly with respect to the Office of the Legislative Assembly".

c) In the definition of "public officer" add, for greater certainty, the words "but does not include the Speaker of the Legislative Assembly".

At a subsequent meeting of the Committee the Law Clerk advised Members that the Speaker was not satisfied with these changes and that he was going to ask the MSB to review the legislation.

On March 4th the Speaker, as Chairman of the MSB wrote the Government House Leader with recommendations for changes to the Act. In particular, the MSB wanted the budget of the Legislative Assembly left alone, solely for the approval of the House, without changes by the FMB.

The government response to the Committees was that the Executive did not agree with the recommendations outlined in the Speaker's letter and that no changes would be made.

The Committee adopted a motion asking that the Law Clerk draft appropriate motions of amendment, either to this Act or the Executive and Legislative Assembly Act, that can be introduced in the House.

CLAUSE BY CLAUSE - DEFINITIONS - CONTINUED -

"public money" - in line 9 part (a)(iii) the word "and" becomes "or" and in the next line part (b) the word "all" which previously came before special purpose funds has been deleted.

NOTE: This change reflects the additional changes made in the definition of "special purpose fund". The committee had expressed concern that these two definitions allowed for the money of public agencies (particularly the WCB fund) to be controlled by the government and/or the Minister of Finance.

"special purpose fund" - the government has made a change which we are told is to ensure that special purpose funds do not include the monies of public agencies. The new definition has the phrase, "but does not include money that belongs to a public agency". However the change goes on to read, "unless it is paid to the government under or pursuant to a law, trust, undertaking or contract and the Government considers it to be a special purpose fund". In the opinion of the committee's legal advisor this change is satisfactory.

"record" - the committee felt that the definition of record might be too broad and that confidentiality regarding certain aspects of an employee's history (such as medical records) was a concern in that any record kept by any arm of government would be open to scrutiny. It was suggested by the government that the definition not be changed but that, whenever authorities are given within the Act to use or see records, any restrictions Members feel should be introduced be included in the particular section giving the authority.

"interpretation" - in order to further address the committee's concerns about the control over public agencies by way of directives or over funds etc. the government has made a change in this section to clarify that a public agency is not 'necessarily' a 'territorial agency'. The terms "public agency" and "territorial corporation" have been included in the definition to clarify that employees are not "necessarily" employees of the Government. The committee's legal advisor finds these changes satisfactory.

Section 3.(4)

The committee felt that the Secretary to the FMB should be a member of the public service and asked that this requirement be clearly stated. The change to shall appoint, "a member of the public service" has been made.

Section 4.(1)

The committee asked that 'may' become 'shall' to make clear that the duties of the Board are not discretionary. This change was made. Concern was also expressed that section (f) allowed the FMB to investigate and act on "any other matter referred to it by the Executive Council". The government responded that the qualifier in the preamble to 4.(1), that the board act on matters related to financial management and administration, was sufficient restriction on the powers of the Board. The committee in turn responded that if the matter was expressed in the preamble that section (f) was unnecessary and could be deleted. The committee did not specifically ask for the change and the government has not deleted or modified the section.

Section 4.(2)

The committee asked that "may" become "shall" and this change was made.

Section 7

Further to the concern regarding the definition of "record" the words "under section 6" have been changed to read "under this Act" to ensure confidentiality under any section of the Act that allows information or records to be obtained.

Section 9

Further to the concern over the definition of "record" the committee was concerned that the power of the Minister be restricted to the examination of records that are necessary for him to exercise or perform his duties. This restriction has been incorporated into section 9.(a).

Section 10.(1)

The committee was concerned that the wording of this section allowed the Minister of Finance to name the Department Head of any department. A change has been made that allows him to name a Department Head "to assist him in the performance of his duties".

Section 17.(1) and 17.(2)

The committee noted that the proposed Act had made a change from the old one in dropping the restriction expressed by "notwithstanding" and adding "subject to" any other enactment. It was felt that the control over such matters as interest on late payments and discounts for early payments should rest in the FAA and that if exceptions were to be made in some instances they should be made in the appropriate governing legislation.

The Government made changes as a result. In section 17.(1) interest on late payments will be subject only to the Income Tax Act and consequential amendments will be made to other Acts which will make them "notwithstanding the FAA", where that is appropriate. In section 17.(2) the phrase, "subject to any other enactment" has been deleted and again where it is appropriate consequential amendments will be made to other Acts to allow discounts "notwithstanding" the FAA.

Section 19

The committee felt that the use of the word "may" implied that the Comptroller General could make or not make repayments at his discretion and that it was not clearly understood that "may" was being used to give authority. The word "may" has been replaced with "is authorized to".

Section 22

Members of the committee were concerned that this clause gives considerable power to the Comptroller General while possibly taking away the rights of the person from which funds are being set-off. That is to say there is no requirement of proof of an obligation to the Government before the action is set-off is done. It was suggested that perhaps there should be a requirement that set-off only be used after the legal process had established the government's right. No specific recommendation was made by the committee and no changes have been made by the government. The Committee was later advised that nearly every jurisdiction in Canada has incorporated a similar clause in their legislation.

Section 32.(2)

The committee expressed its concern that the Minister was able to authorize the transfer of funds between activities and suggested "subject to the approval of the FMB". The government has made a change that clearly makes the Board responsible for any such transfers. The Act now states that, "The Board, upon the recommendation of the Minister responsible for an item, may transfer funds...".

Section 32.(3)

An additional concern was that the process of informing the Assembly of such transfers, which are alterations of the budget which it had approved, was not timely. The Act called for notification to be given within the Public Accounts of the government (which usually will mean during the February session). It was noted that the Standing Committee on Public Accounts had recommended specifically that notification of transfers be given at the next session following any such action. In response the government has changed the Act to call for a summary of all transfers to be included in the Public Accounts (section 32.(4)) and for a list of all transfers in excess of \$250,000.00 to be provided to the Assembly at each Session. The committee was not provided with a rationale for the dollar exception and was advised that no such exception was anticipated by the Standing Committee on Public Accounts in response to its recommendation. On further review of this change however, the Committee was satisfied.

Section 33.(2)

The committee noted that the time period for the issuance of a special warrant was changed from two weeks before a session to only one week. The committee asked that this change be removed and that the two week limitation remain in force. The government has done so.

Section 33.(4)

A concern was expressed about allowing the financing of a special warrant by reducing the appropriating of another item - an appropriation voted on by the Assembly in view of the Assembly's perceived need for the item. It was felt that the government should not reduce an appropriation unless it was first clearly satisfied that the affected item was not also urgently required and secondly that the public interest would not be adversely affected by the reduction. The government has added two clauses 33.(4)(a) and 33.(4)(b) that require the FMB to have considered these two criteria before authorizing a reduction in an appropriation to pay for a special warrant.

Section 36.(3)

Members of the committee were concerned that, in financing an overexpenditure in a previous year by reducing the approved appropriation of a current year, the FMB was altering the financial plan approved by the Assembly. The major problem with that process is that notice of such an action would not come to the House. None of these clauses appears to call for a supplementary appropriation bill in regards to subsection (3). Even if such a bill came forward within 15 days of tabling the Public Accounts as required by subsection (4) the result would be that the government might have been operating outside of the approved appropriations for several months (for instance a reduction to an appropriation in June with notification to the House in the following March).

Mr. Butters agreed that the Assembly must get notice of changes to appropriations but no changes have been made in this section.

Section 40.(1) and 40.(2)

As with the earlier changes in the definitions of Minister and expenditure officer these changes recognize the separation of authority of the Speaker of the Legislative Assembly.

Section 44.(2)

The committee was not sure that the wording of this section made it clear who had the authority to make the decisions referred to in clauses (a) and (b) which commit the government, subject to section 46, to multi-year obligations. The government made a change that indicates that the person, that is the government employee or representative with contract authority, will make that decision. The control that the Legislative Assembly has is the proviso clause 46 that states that no contract is binding on the government if in the year a payment is to be made there is no balance in the appropriation to do so. Therefore in voting against an item in a future year budget the contract will be rendered ineffectual and void.

Section 46

One of the concerns of the committee was at which level of appropriation did the funds for a payment have to be available. The government's answer was at the item level and a change making this clear has been made. This means that if a department can identify funds in any of its activities and make a transfer of funds that payment could be made but that funds in another department could not be used for that purpose.

There was considerable concern by committee members that this clause would result in "uncertainty of contract". It was asked how a contractor is supposed to satisfy himself that all the conditions of 44.(2) have been met and that there is sufficient appropriation. Members felt that contractors might be well advised by their legal and financial advisors to avoid entering into such an arrangement. It was suggested that somewhere authority to exempt a contractor from this provision should be considered. Another suggestion was to conduct a review of this type of clause in the legislation of other jurisdictions. It was agreed that legislative counsel and the committee's legal advisor would consult on the wording of this clause to attempt to eliminate any confusion and any "uncertainty" where possible. On further review by the Law Clerk the Committee has agreed that no change is required.

Section 51

The committee noted that the Comptroller General was to provide a statement to the FMB and the Auditor General by September 30th outlining activities that may have taken place contrary to the requirements of this Act. It was felt that this information would only come to the attention of members during the review of the Public Accounts Committee nearly a full year following the end of a fiscal period. The committee asked that some provision be made to advise the House of these occurrences at the same time as the FMB. This change has not been incorporated. Rather a new section 51.(3) calls on the Comptroller General to prepare an interim financial statement to include a statement of assets and liabilities and a statement of expenditures and revenues by September 30th. Section 51.(4) requires that this information - which is different than that being provided to the FMB under Section 51.(1) and 51.(2) - be provided to the Assembly at the "first opportunity", which presumably will be the October Session. The Committee was satisfied that this information is sufficient.

Section 68.(1)

Members noted that the report being prepared regarding guarantees did not provide information on the total value of the obligations being entered into by this government. The committee recommended that "The report of guarantees referred to in section 68. include an accumulated figure for all guarantees and indemnities outstanding at the fiscal year end and that this report be presented in the House". In response to the first part of the recommendation the government has added a part (b) requiring totals be included. In regards to the second part of the recommendation the government has made a change adding 68.(2) which requires that the total amount of contingent liabilities under guarantees and indemnities be included in the Public Accounts.

Section 74

The committee noted that the timeframe for the submission of the Public Accounts, especially in light of the recent rules changes establishing set sitting days for the Assembly, was such that the report of the Standing Committee on Public Accounts, following its review of the Accounts, would not be tabled until some 18 months after the fiscal year ended. The government has responded that by adding section 51.(3) the committee can begin a review of significant items in the Public Accounts within 6 months of the year-end.

Section 78.(1)

Several members of the committee expressed their concern that this section threatened the independence of public agencies by making them subject to the directive of a Minister, through the Executive Council. Government witnesses told the committee that there may be rare times, that to protect the public interest, the government may want to intervene to stop or change certain directions or policies being pursued by an agency. The committee recommended that a change in wording be made to limit the ability of the government to issue directives that dealt with matters of financial administration only.

Two significant changes were made. The first now requires that both the appropriate Minister AND the Executive Council must be of the opinion that the directive is in the public interest. The second is the limitation that the directive may be issued to a public agency, "respecting its financial management and financial administration".

Section 78.(7)

This section has been added in response to a Committee concern that was expressed during discussion of section 96. It requires that any directives issued to a public agency in a year be reported in the financial statements of that agency for that year.

Section 80.(2)

The committee questioned how or why a public agency should ensure that its borrowings do not cause the government's total borrowing limit to be exceeded. The Government has responded by making a change that clearly shows that the FMB in approving the borrowing by a public agency will be responsible for such assurances.

Section 90.(2)

The statement, "members of the board and every officer of a public agency shall comply with this Act" was considered by some members to over-state the need for compliance in making the members and officers of the board subject to all clauses of the Act and not

just Part IX. The government counsel indicated that they would only be subject to those specific clauses that pertained to their financial management functions. The committee suggested that perhaps it would be best to specifically name those sections outside of Part IX that did apply. The change to, "shall comply with this Part" from, "shall comply with this Act", has been made. No clause has been added that names specific clauses in the Act, outside of Part IX, that will also be applicable. However these clauses are noted on each schedule to this Act and the Committee is satisfied with this change.

Section 91

In this section the committee was concerned that territorial corporations were not being asked to consider an evaluation of the efficiency, economy and effectiveness of the corporation in the statement of their corporate plan. It was noted that the government's Financial Management Board was being required to conduct this type of evaluation and asked for a similar clause to be included in this section. The government added section 91.(3)(e).

It was also noted that operational requirements may result in occasional changes to the operational plans of corporations. It was felt that comparisons, amendments etc., in order to be clear, should be done relative to the last APPROVED plan. The word approved has been added to section 91.(3)(d); 91.(5); and 91.(6).

Section 93.(5)

In this section there is reference to the restricted ability of a corporation to incur expenditures. Some committee members felt that a clause similar to clause 46 of this Act should be included that makes clear that contracts can be rendered void if a capital plan is not approved. The government responded that it, "would look into it" but no changes have been made. On further review the Committee was satisfied that no change was required.

Section 96

The committee asked that a clause be added requiring the listing of all directives issued in the fiscal year. As noted earlier this has been incorporated into section 78.(7).

Section 99.(1)

The committee was of the opinion that the Minister should not be appointing the auditor unless assuming responsibility for his fees, for adherence to contract and tendering regulations, etc. It was suggested that the Minister might reserve the right to approve of the agency's choice of auditor. This change has been included in section 99.(1)(b).

Section 100.(2)

This section called for the tabling of the annual report of territorial corporations at the "next" sitting of the Assembly. It was felt that if a report was received during a session the House should be provided with it immediately, not wait months until the next sitting. The government has made a change from, "at the first session following receipt" to, "at the first opportunity following receipt".

Section 104

Some members were concerned that this clause does not clearly indicate the rights of an employee to defend himself from accusations of negligence and decisions to make recoveries from that employee, nor does it clarify for the Minister the criteria to be reviewed before a recovery is made. The ambiguity over the definition of "negligence" is a concern. The lack of specificity in setting a value or a criteria for when a loss should be recovered in total or in part leaves too much to the discretion of a Minister. The Minister of Finance indicated that he would ask for the section to be reviewed, especially for a comparison to similar clauses in the legislation in other jurisdictions. Both government counsel and the Law Clerk reviewed this clause and the Committee has been satisfied that concern is unwarranted.

Section 107.(v)

The committee questioned the use of Commissioner in this section. It questioned if the clause should state, "...the Commissioner on the recommendation of the Board..."; or, "...that the Minister deems necessary..."; or, "...that the Board deems...". The change that has been made by the government is to replace "Commissioner" with "Board".

Section 120

This is a new section not seen at the review session of the committee. It arises as a result of the changes requested by the committee to section 17 of the Act. It makes section 10 of the Commissioner's Land Act "subject to" the FAA.

Section 135

This section makes a consequential amendment to the Liquor Act. In reviewing the rewritten clause that had been presented the committee suggested that members of the Liquor Board be given the same protective qualifier as given to agencies in section 90. That clause refers to actions taken "in good Faith".

This additional clause is now included in the consequential amendment.

Section 157

In the revised Act that is being reviewed in the Assembly this clause will refer to the Petroleum Products Tax Act. In the draft reviewed by the committee it dealt with a consequential amendment to the Public Service Act which would have allowed the FAA to recognize and create the Department of Finance. These clauses were withdrawn from the FAA in an even earlier draft and therefore the consequential amendment was seen to be unnecessary and has been deleted.

Section 158

This is a new clause in the most recent draft which amends the Petroleum Products Tax Act to be "notwithstanding" the FAA.

Section 179

This is a new section in the most recent draft which amends the Taxation Act to be "pursuant" or "subject to" the FAA.

Section 201

This is a new section in the most recent draft which amends the Tobacco Tax Act to be "subject to" the FAA.

CONCLUSION

The joint committees were pleased generally with the speed and the comprehensiveness of the Government's response to members' recommendations. It is clear that the concerns of these committees have been given careful consideration by the draftors of this legislation.

However, compliments to the Government are tempered by concern that the process of consultation with citizens and organizations is a poor process at best. The desire for confidentiality must be weighed against the value of knowledge gained by and support earned from those who will be affected by proposed legislation. That compliment is further tempered by the Government's decision not to adopt the recommendations of the Speaker and the MSB who are acting to protect the independence of the entire Assembly. **The Joint Committees recommend that Members support the motion of amendment that will be introduced.**