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(HANSARD)

Tuesday, June 12, 2012

The Honourable NOËL A. KINSELLA
Speaker

CONTENTS

(Daily index of proceedings appears at back of this issue).

Debates Services: D'Arcy McPherson, National Press Building, Room 906, Tel. 613-995-5756
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THE SENATE

Tuesday, June 12, 2012

The Senate met at 2 p.m., the Speaker in the chair.

Prayers.

[*Translation*]

VISITORS IN THE GALLERY

The Hon. the Speaker: Honourable senators, before proceeding to Senators' Statements, I would like to draw to your attention the presence in the gallery of Yvon Poitras, General Manager of the New Brunswick Maple Syrup Association, his wife Laurette Poitras, and his daughter Nancy Cyr Caron, and of Patrick Lévesque, producer and owner of Érablière de la Montagne Verte and Chantal Lévesque.

They are guests of the Honourable Senator Mockler.

On behalf of all honourable senators, I welcome you to the Senate of Canada.

SENATORS' STATEMENTS

SUPPORT FOR VICTIMS OF CRIME

Hon. Pierre-Hugues Boisvenu: Honourable senators, it is an honour for me to talk to you today about two events I attended on Thursday and Friday in the magnificent City of Quebec, which I invite you all to visit this summer.

The first event was indeed a first. On June 7, for the first time in its history, the Barreau du Québec welcomed a Minister of Justice from the Conservative government to open its annual conference. The Minister, the Honourable Rob Nicholson, delivered a wonderful speech in both official languages. I would like to commend his delivery and share with you some of his comments.

The minister explained how the law has evolved since Canada adopted the first Criminal Code in 1892:

> Our government has gone to great lengths to ensure that our criminal justice system keeps pace with our evolving Canadian society and values.
>
> As Minister of Justice, I have had occasion to listen to the victims and I understand how their lives have completely changed as a result of the criminal acts committed against them.

The minister talked about the many things he has done to better support victims of crime, including $13 million in permanent funding for the Victims Fund plus $7 million over five years to increase victims' access to justice. It is also important to remember that our government will provide stronger support for victims' groups, which now speak out loudly and clearly on behalf of victims across Canada.

Finally, the minister mentioned our government's commitment to increasing public confidence in our institutions and restoring balance to the justice system.

Do I need to remind you, honourable senators, that the evolution of rights and the presence of victims in our justice system have been constantly diminishing since this first Criminal Code was passed? Since that time, victims have gone from being major players to passive, powerless observers. We want to restore the confidence of victims of crime.

The second activity took place last Friday at the Citadel in Quebec City. I had the pleasure of making a presentation at the Governor General's Canadian Leadership Conference.

The Governor General's Canadian Leadership Conference was created to broaden the perspectives of future leaders in business, unions and public administration so that their decisions are based on a practical understanding of the influence of their organizations on the general welfare of the community and Canadians.

I had the privilege of making my presentation to the Quebec 2 study group, which was made up of 15 people from various communities across the country. They were chosen because of the contribution they make to the quality of life in their respective spheres of activity.

As you may have guessed, my presentation was on permanent rehabilitation, victims' expectations of the government and the action we have taken to date and that we hope to take in the coming years, including the establishment of a victims bill of rights to strike a real balance between the rights of criminals and the rights of victims in our Canadian justice system.

At this meeting, I found that most of the participants — who were very representative of the population of Canada — supported our justice and public safety policies. It is also important to note that we have great leaders in Canada who deserve to be recognized.

The Governor General's Canadian Leadership Conference will wrap up this evening with a reception on Parliament Hill, where many participants will have the opportunity to be welcomed by the speakers of both houses.

[*English*]

CANADA-JAPAN INTER-PARLIAMENTARY GROUP

Hon. Mobina S. B. Jaffer: Honourable senators, this past May I had the honour of joining Senator Tkachuk and the Canada-Japan Inter-Parliamentary Group on a visit to Japan. Upon our arrival, our delegation was warmly received by the Canadian

Ambassador to Japan, Jonathan Fried, and his staff. We also had the pleasure of having Christopher Burton, Sayaka Noguchi and Stephane Beaulieu accompany us throughout our stay. I thank them for all they did for us to make our time in Japan so memorable.

• (1410)

I would also like to take this opportunity to thank His Excellency Ambassador Kaoru Ishikawa and his staff, who helped me prepare for the trip.

While in Japan, our delegation was introduced to the Japanese Diet League by the speaker, who graciously met with us many times. Many Diet League members helped explain to us Japan's parliamentary system and the impact of the Great East Japan Earthquake and Tsunami. We also had the pleasure of meeting Messrs. Goto, Murata, Ohata, Kawagoe and Kuwabara, Ms. Tanioka and Ms. Kamei, who travelled with us.

Honourable senators, when I was young, my mother always taught me that your first relative was always your neighbour, as in an emergency they would be the first people to help you. As a senator from British Columbia, I have always felt a connection to our neighbours in Japan, and I have often embraced their culture, cuisine and art. In fact, my grandson Ayaan does not know that sushi and teriyaki originated in Japan; he thinks they are Canadian foods.

Unfortunately, when tragedy struck Japan, I was under the mistaken belief that I understood the soul-destroying impact the Great East Japan Earthquake and Tsunami had on the Japanese people. It was not until a few months ago, when a container with a motorbike was found on British Columbian shores, that the loss the people of Japan suffered truly hit home. In my household, my husband, Nuralla, a biker, was upset thinking of the pain of a fellow biker.

While in Japan, I began to further understand the loss the Japanese people suffered. Honourable senators, nothing prepared me for what I saw. While visiting the affected areas, we literally saw hills of debris, concrete, steel and peoples' belongings. We saw temporary portable homes with young children playing outside. We saw the remains of school buildings, which had damaged walls and shattered windows. In my mind, I can still hear the young schoolchildren and their teachers who were trapped inside the school walls desperately crying for help.

In Minami Sanrikucho, we saw a red steel structure and were told it was the disaster centre, which was supposed to withstand tsunami. We also heard of Miki Endo, now known as "the voice of an angel," for bravely saving thousands of lives by broadcasting warnings of tsunami until she was swept away and lost her life.

Honourable senators, I share with you what I saw in Japan to give you a better understanding of the great loss our neighbours in Japan have suffered. The Japanese people are resilient, and this is poignantly signified by the one pine tree that is standing in the tsunami area where once there was a forest.

Honourable senators, if our neighbour is our first relative, then we need to be there for the people of Japan. I have every confidence that they will get through this difficult time. However, we need to help support them on their journey to recovery.

THE SENATE

TRIBUTE TO DEPARTING PAGES

The Hon. the Speaker: Honourable senators, before calling for Tabling of Documents, I would like to salute two of our departing pages, Michael Molzan and Martine L'Heureux.

Michael is this year's Deputy Chief Page and comes from Edmonton, Alberta. He has just completed his undergraduate degree in political science and history at the University of Ottawa. Michael will be travelling next year while teaching in Japan. Afterwards, he plans to return to university to complete graduate studies or to go to teachers college.

[*Translation*]

Martine L'Heureux was born and raised in Rimouski, Quebec. She has just finished her final year at the University of Ottawa, where she completed the Conflict Studies and Human Rights program with a minor in Political Science. Martine is passionate about Latin America and will go to Honduras this summer to take advantage of new opportunities.

[*English*]

ROUTINE PROCEEDINGS

STUDY ON ISSUES RELATED TO INTERNATIONAL AND NATIONAL HUMAN RIGHTS OBLIGATIONS

SEVENTH REPORT OF HUMAN RIGHTS COMMITTEE TABLED

Hon. Mobina S. B. Jaffer: Honourable senators, I have the honour to table, in both official languages, the seventh report, interim, of the Standing Senate Committee on Human Rights entitled: *Level the playing field: A natural progression from playground to podium for Canadians with disabilities*.

(On motion of Senator Jaffer, report placed on the Orders of the Day for consideration at the next sitting of the Senate.)

[*Translation*]

QUESTION PERIOD

OFFICIAL LANGUAGES

REDUCTION OF SERVICES

Hon. Maria Chaput: Honourable senators, my question is for the Leader of the Government in the Senate.

On October 20, 2011, I shared my concerns regarding the possible effects of the likely budget cuts on official language minority communities. I mentioned that the 5 per cent to 10 per cent reductions could disproportionately harm these minority communities.

At that time, I raised the fact that a number of departments still do not understand that they have an obligation to promote linguistic duality.

Consequently, the government must ensure that the individual reductions in each department do not, when taken as a whole, create a situation where official language communities are unintentionally harmed by cuts that, in total, exceed 5 per cent or 10 per cent.

I was right to be concerned, honourable senators. And yet, this is just the beginning of the reductions. Let us look at the French communities in Manitoba, and I will give you a few examples.

On April 5, 2012, I asked a question about Katimavik, a program for our youth that has been cancelled. French communities in Manitoba were involved in the program, and many young people participated and also came to our communities.

On April 25, 2012, I asked a question about immigration. Manitoba successfully promoted francophone immigration under the provincial nominee program. Our goal was to ensure that seven per cent of the 70,000 qualified immigrants who settled in Manitoba spoke French. That was good. Now we no longer have any control over francophone immigration, which has been centralized at the federal level.

On May 10, 2012, I asked a question about the National Film Board, which had cut the position of producer responsible for French documentary productions in the West — abolished after 40 years in existence.

This week, on June 8, 2012, Parks Canada eliminated interpretive services at 27 historic sites across Canada. In Manitoba, these services have been eliminated at the only French-language site in the province: Riel House, the Métis historic site closely connected to the story of Louis Riel. The site has been open since 1979, but interpretive services will now be eliminated.

My question is this: if federal departments continue to cut without taking the specific needs of these communities into account, and if they continue to use criteria designed for the majority without gauging the impact on official language minority communities, there will be tremendous repercussions on those communities.

Are the departments being indifferent or just careless? What happened to respect for parts IV and VII of the Official Languages Act? Has anyone analyzed the cumulative effect of these cuts to departments and organizations on official languages communities?

If so, may I have a copy? If not, why not? Would that not be an important analysis to do?

[Senator Chaput]

[*English*]

Hon. Marjory LeBreton (Leader of the Government): Honourable senators, of course I must disabuse the honourable senator of the notion that the government has not paid close attention to our obligations, indeed our desire for and our commitment to Canada's linguistic duality and our full support of Canada's two official languages.

• (1420)

I was a member of the special committee of Treasury Board that went through all the expenses presented by all the departments and that also oversaw all the departmental suggestions on savings the government might bring into being. We specifically applied an overview with respect to official languages to ensure that official languages programs and other similar ones were not unduly or unfairly affected or overrepresented in the work of our committee.

The honourable senator can cite many programs, and I can get up and cite many initiatives the government has taken in support of our official languages, of which the success we have had with the roadmap is just one.

Regarding the stories about Riel House National Historic Site, this site is not closing. Many of the sites that are under Parks Canada are moving to a self-guided approach. We have all been through self-guided sites. The sites are open, people attend them and, with new-age technology, they are able to get a fuller story. One need only go to the museums in Ottawa to get an audiovisual version of a truer picture of history.

We are not closing the Riel House National Historic Site. The method of engaging visitors at this site and other sites will focus on using print and electronic media, which we are finding to be more informative and less costly than guided activities.

[*Translation*]

PARKS CANADA

REDUCTION OF SERVICES

Hon. Maria Chaput: Honourable senators, in the case of Riel House, I do understand that the building itself is not closing. What Parks Canada is doing is cancelling the contract it had with the St. Boniface Historical Society to provide that service.

It cost Parks Canada $56,000 a year to have someone on site from March until the end of October to recruit volunteers, coordinate fundraising activities and provide personalized service in French in Manitoba to promote that province's Métis community. That service will no longer be provided. I understand: the house will remain open and there will be information panels, but the staff member will no longer be there to recruit volunteers and plan promotional activities during the summer months.

Does this not have a negative effect on the promotion of this historic site, which is dedicated to Louis Riel's story? Is this not contrary to what the federal government should be doing to support these communities?

[*English*]

Hon. Marjory LeBreton (Leader of the Government): To the contrary, honourable senators, with respect to the Riel House and other similar sites, Parks Canada, in moving to the new system, is not eliminating its ongoing work with the communities involved. As a matter of fact, Parks Canada has committed itself to working closely with all local communities, businesses and tourism industries in the areas of the various sites, first, to profile a site and, second, to maximize in a positive way the impacts of any changes it makes. Parks Canada has not walked away from the community and it will be working with the community.

As honourable senators know, of course, the mandate of Parks Canada is the protection, promotion and presentation of Canada's natural and cultural heritage. Nothing that we are doing through this process in any way undermines the very good work that Parks Canada does. All of us at different periods in our lives have been the recipients of this great work.

As I have pointed out in this place before, times have changed. There are new technologies and ways to explain our history and heritage to our visitors and to attract people to our sites. We have many examples of how people are more informed and better educated on the very important role that these figures played in our history by taking their time, reading the material that is presented before them or having the advantage of an audiovisual presentation, whereas oftentimes a guide will simply point out a thing and then hustle people along to the next site. We have evidence that this new system is, in fact, working in a positive way to better inform Canadians of our great heritage, history, culture and the various figures in our history who have played a very important role in the ongoing development of Canada.

Senator Chaput: Speaking of Riel House, a former archeologist at Parks Canada said:

> . . . the government may have thought it could get away with some of the cuts it's making to Parks Canada because many of the areas don't have advocates to plead their case to the public.

That is what this gentleman said.

[*Translation*]

In the case of Riel House, could the government step in and ensure that Parks Canada continue to fund this unique Métis heritage site in Manitoba?

[*English*]

Senator LeBreton: Honourable senators, it is easy for each and every one of us to get up and quote an unnamed individual who is not happy or has something to say about any government program, whether it is this government or a previous government. That is an easy thing to do. Many people support what the government is doing and many people who do not. It comes as no surprise that people will have views one way or the other. The honourable senator did not name the individual, and I do not know on what basis this individual said these things.

Parks Canada is an organization that is celebrated as one of the most well-run and excellent departments of the Government of Canada. I have already explained to honourable senators that Riel House National Historic Site is not closing. Parks Canada is very much involved in this historic site. I do not know how else I can explain it other than that Parks Canada is continuing to treat Riel House as the national historic site that it is, has been and will be in the future.

HUMAN RESOURCES AND SKILLS DEVELOPMENT

EMPLOYMENT INSURANCE CONSULTATIONS

Hon. Terry M. Mercer: Honourable senators, last week Minister Finley kindly let us all know that she and her Conservative colleagues speak for everyone when it comes to the changes to the Employment Insurance system. The minister confirmed last week that there will be no consultations with Canadians or any members of other parties. Conservative MPs are the ones she consulted after they travelled across the country and that suits her just fine.

The Leader of the Government in the Senate knows full well that only about 30 per cent of Canadians voted for the Conservatives, which means about 70 per cent voted for other parties. When it comes to EI, the Conservative dictatorship continues, because they just will not listen to Canadians' input on anything.

Would the leader kindly tell us what gives her party the right to make decisions for Canadians without even consulting them?

Hon. Marjory LeBreton (Leader of the Government): First, honourable senators, I am glad the honourable senator is not doing my taxes because it was almost 40 per cent of Canadians who voted for our government — slightly more than those who voted for one of the Chrétien majority governments, I might add.

• (1430)

Honourable senators, first, I do know that Minister Finley has been consulting with her ministerial counterparts in the provinces. There have been many opportunities in the House of Commons for members of the opposition to question the minister. There have been committee meetings. I think it is unfair for Senator Mercer to characterize Minister Finley as an individual who only listened to one side of the debate.

We must understand that the government's motive is for jobs, the economy and the long- and short-term prosperity of our country, and also an economy where Canadians have created 760,000 jobs. However, we also recognize that systems that served us well in the past do need to be reviewed, amended and changed to meet the needs of future generations.

Minister Finley has done an excellent job of explaining the government's position. She has consulted her provincial and territorial counterparts. She appeared before committee in the other place and brought her officials. I am not sure if she has appeared before committee here. As well, she has conducted many information sessions across the country and has participated in news conferences with the media where they have been free to ask her any questions they wished.

It is very unfair of Senator Mercer to characterize Minister Finley as being anything but open and consultative on this issue, because she certainly has been.

Senator Mercer: I hate to be unfair, but on a technicality, to His Honour, when we are asking questions and Senator LeBreton is answering questions, it would be appreciated if the person at the desk next to her does not carry on a separate conversation. I am not talking about heckling — that is part of the game — but when there is another conversation, those of us who are hearing-impaired and listen through the hearing device are getting two conversations. Perhaps we could watch that in the future.

Conservative MPs are also saying that while they are hearing from worried Canadians over the changes, most just want clarification of how the reforms will affect them. What happens when my MP, the Honourable Scott Brison, hears the same thing from his constituents? There is no mechanism for consultation with the government for Mr. Brison. This is a shameful way of treating Canadians and the constituents of Kings—Hants.

When will this government realize that it must work with all parties and all Canadians on reforms instead of running the country like a dictatorship?

Senator LeBreton: Honourable senators, the government was elected last May. Members of the official opposition were elected — of course, the NDP. Members of the Liberal Party were elected. They all serve in a democratic institution called the House of Commons in the Parliament of Canada. They are all party to the debate and discussions in the House of Commons. They are all free to attend committee meetings. They certainly are free, and have done so, to make their views known, and that is all fine.

As I pointed out, the government's focus is on jobs, the economy and short- and long-term prosperity. The changes that we introduced in the budget and the budget implementation bill are all geared toward putting us on the proper path to future prosperity.

It is in the interests of Canadians and Canadian taxpayers that we do this. There is nothing preventing anyone in the House of Commons or in this chamber from getting up and freely expressing their views, going to committees, making themselves heard and representing their constituents. None of that has changed. This is the way it has been in this place since I have been kicking around here since 1962. Nothing has changed. It is quite incorrect to suggest that people somehow or other are no longer free to make their views known. That is just not the case.

Hon. Sandra Lovelace Nicholas: Honourable senators, there has been talk that the government has consulted with leaders in provinces. Were there consultations with Aboriginal leaders?

Senator LeBreton: Honourable senators, I participated myself in an important meeting in January where ministers of the Crown and a huge delegation of Aboriginal leaders from all over the country participated in a host of areas, including education and ensuring that young Aboriginal Canadians have the same opportunities available to them as are available to other Canadian citizens.

I would suggest to the honourable senator that working with, seeking solutions and advancing the interests of Aboriginal Canadians is an area where this government really deserves a great deal of credit.

Senator Lovelace Nicholas: Honourable senators, there could have been meetings last year or January, whenever the leader said they were, but to my knowledge to this day, whatever the government promised the Aboriginal people, nothing has happened. Nothing has come of it.

Senator LeBreton: I will be very happy to provide the Honourable Senator Lovelace Nicholas in writing with a long list of achievements of this government with regard to our ongoing work with Aboriginal communities and Aboriginal leaders. Of course — and it really is a first — Aboriginal people are represented in this government to the extent that they have never been represented in the government before in the history of the country. Two ministers of the Crown and several members of Parliament are Aboriginal, and they work very closely with our government.

I will personally undertake to provide information to Senator Lovelace Nicholas regarding a number of areas, including education, health, safety and access to resource development. We have had excellent ministers — Prentice, Strahl and now Duncan. We have an excellent parliamentary secretary in the person of Greg Rickford from northern Ontario, who has worked with the Aboriginal community all his life.

I would be very happy and proud to bring the senator up to speed on all the things we have done in support of our Aboriginal citizens.

Hon. Jane Cordy: In her reply to Senator Mercer, the leader said that Minister Finley has consulted with her provincial counterparts. Interestingly enough, a couple of weeks ago the Atlantic premiers got together — Premier Ghiz from Prince Edward Island, Conservative Premier Dunderdale from Newfoundland and Labrador, Conservative Premier Alward from New Brunswick and Premier Dexter from Nova Scotia — and all said that they had received no consultation, none, from the minister.

What Minister Finley did say to the editorial board of the *Chronicle-Herald* was that she did consult, as Senator Mercer said, with all Conservative MPs. One would have to assume, and perhaps the leader can correct this, that my Conservative MPs from Nova Scotia — Peter MacKay, Gerald Keddy and Greg Kerr — all agree wholeheartedly with the changes that have been made to EI in this budget. Would that be correct?

• (1440)

Senator LeBreton: Minister Finley, I believe, commented after the meeting of the premiers of the Atlantic provinces and indicated that she was open to hearing and taking into consideration anything they had to say and any of their views. I took that as an indication that she certainly was paying attention to what they said. It is interesting.

The government has noted that people who have really looked at what the government is proposing with regard to EI have generally received it very well. Our objective is to ensure that the

EI system works for those who require its services and also assists Canadians in finding meaningful work and that the Employment Insurance system is there for the right reasons, to work with Canadians who, through no fault of their own, find that they are out of work, although acknowledging again that there are labour shortages all over the country. The objective here is to ensure that Canadians who are not employed have access not only to support but also to all the latest information about what jobs are available so that they can find meaningful work.

Senator Cordy: The leader did say in her response to Senator Mercer that the minister had consulted with provincial counterparts. She obviously did not consult with the four Atlantic premiers. If she came out after they had their press conference and said, "Well, now I am willing to talk to you and willing to hear your views," then she did not consult, which is what the leader said to Senator Mercer.

The leader also said that people are in favour of the EI system. Every one of the four Atlantic premiers spoke out against it, which surprised me. This was the first time I have heard Premier Alward speak out against the Prime Minister. Certainly I know that Premier Dunderdale has shown extreme frustration with the Prime Minister, but she also spoke out against the changes, as did Premiers Dexter and Ghiz.

However, that was not my question. My question was about my Conservative MPs, Peter MacKay, Gerald Keddy and Greg Kerr, who were consulted by Minister Finley. The minister said in her editorial board to the *Chronicle Herald* that she consulted with her Conservative MPs, so my Conservative MPs from Nova Scotia. Are they in favour of the changes that have been made to EI in this budget bill?

Senator LeBreton: I think the honourable senator is misrepresenting what the four Atlantic premiers said. I read some of the comments. Some of them expressed a concern that they needed more information. Premier Alward has actually put a group together to study the recommendations and the proposals the government has made and how they may impact New Brunswick. That is, of course, a prudent course of action.

My understanding is that Minister Finley consulted many people, not only people who are in politics but also many industries, small and large, as to what would be necessary to ensure that the EI system is sustainable and there down the road for people in the future.

Senator Cordy: Are Conservative MPs from Nova Scotia in favour of the changes that have been made to EI in the budget bill?

Senator LeBreton: Try as Senator Cordy might, I speak in this place for the government. I do not speak for each and every individual member of Parliament. I was not privy to the consultations with MPs. I have not been privy to all of the deliberations that have been taking place in the House of Commons.

I would say that the changes that we are suggesting in order to sustain the EI system are necessary. There is support for these when people really have a look at what we are proposing, unlike in the past when draconian measures were taken by a previous government, completely draining the EI fund, and then as part of the deficit reduction, when they just drained the fund. We have brought in policies that have stopped that.

I would say, honourable senators, in answer to Senator Cordy's question, that people will see that the changes we are recommending are in the interests of all Canadians, including those in Atlantic Canada.

ORDERS OF THE DAY

CRIMINAL CODE

BILL TO AMEND—THIRD READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Di Nino, seconded by the Honourable Senator Wallace, for the third reading of Bill C-26, An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons).

Hon. George Baker: Honourable senators, I will say just a couple of words on this piece of legislation. First, I congratulate all members of the Senate who participated in the deliberations before the committee.

We had Mr. Chen before the committee. Mr. Chen was the grocer who chased down a person he believed had robbed his store. Of course, a law is being changed with this bill, and it is a rather extraordinary change we are making, but I think everyone agrees with it because of the public mood on it. I think there are some inherent dangers, honourable senators, in this bill, although we all agree that the substance of the bill is appropriate given the circumstances. The problem with it is that a citizen's arrest is now being enlarged so that an arrest can be made by a citizen of someone who has committed an offence, but the arrest need not be made while the offence is taking place or immediately after the offence has taken place. We verified in the committee, and everyone agreed, all the legal experts and even the police, that this was giving more power to a citizen than to the police upon arrest. That is the extraordinary part of the bill.

A police officer is not allowed to arrest someone who has committed what is called a summary offence, relatively minor in nature, or an offence for which the person could be prosecuted summarily or indictably, after the fact. That is what the law says as far as the police are concerned. The law as far as the ordinary citizen is concerned was similar in nature. In other words, the arrest could only be made while the offence was being committed. In other words, in the case of the grocery store, if the grocer saw the person stealing something and then arrested them as they were leaving the facility, or a security guard arrested them as they were leaving without paying, that was the existing law.

• (1450)

In this situation, the thief, we will call him — convicted a thief after the incident and received 90 days in jail — came in one day and stole some plants. Then he went home. The grocer saw him, and then the same person came back later on riding a bicycle and dressed in other clothes. Then, of course, the grocer took chase with other employees and tracked him down. Some physical altercations took place. They tied up the thief, rope around his ankles and his arms, and then threw him in the back of a van. The van was then stopped by the police as it was turning in a direction different from where the police were.

How did the court find the grocer, Mr. Chen, innocent of the offence? It is rather puzzling. Given the facts, how could the grocer have been found innocent of the offence?

The court made some very interesting observations. Perhaps I should read into the record some of what the judge felt about this in the beginning. I will read just a couple of paragraphs.

At paragraph 7, of *R. v. Chen*, 2010, Carswell, Ontario, 10187, the judge states:

> From my perspective, relative to the serious criminal cases that stream through this courthouse, this one is a relatively mundane matter . . .
>
> Even from 3,000 miles away, the *Vancouver Sun* noted: "The case has captivated Toronto with most observers demanding to know why an honest grocer struggling to make a buck and protect his merchandise has become a target of punishment."
>
> By any measure this case has legs. It has and continues to fan widespread controversy. One cannot escape it. It has lit up radio talk shows; newspapers, television, the internet have kept this story in the public consciousness for the months leading to the trial. Even on the subway recently, elbows away from me, two individuals were in heated discussion over it.
>
> By the time it reached the courtroom, it had graduated to what the French call a Cause Célèbre. And in like manner as the Dreyfus Affair, modern day Emile Zolas have mounted the barricades with their own versions of J'ACCUSE articles disseminated in almost limitless media vehicles.
>
> While Zola was accusing the French Army High Command of obstruction of justice, here the accusations are directed at the Toronto police for stupidity and lack of judgment. . . .

Then it goes on. He says at paragraph 13:

> Equally and in a similar vein as the demand for Capt. Dreyfus' return from Devil's Island, persistent voices have demanded a stop of the 'persecution' of Mr. Chen, this "innocent, hard working, honest, businessman." There is even now talk of amending the section of the criminal code on citizen's arrest.

Paragraph 17 states:

> Into this caldron, masquerading as a courtroom, stepped in the witnesses.
>
> The peripheral witnesses seemed to be the most affected. Some looked like they were headed onto the scaffold rather than witness stand. Others had persecution written all over them. One in particular thought his career was on the line. Certain police officers presented so meekly and spoke in such low non threatening voices that one wondered how they could project authority on the streets of Toronto if indeed that was their true demeanour.

It goes on and it then documents the 911 calls from people who said that an individual was being beaten up by up to four persons. They tied him up, placed him in the back of a white van and so on.

How did the judge get over this problem of the law? In other words, the law says a police officer can only arrest someone if they are found in the commission of an offence if that offence is minor in nature, a summary offence. How did the judge get over this?

The judge said at paragraph 49:

> Accordingly, I find this is in fact the same transaction . . .

Just imagine, the offence took place, the thief left, came back on a bicycle later, clothes changed, in order to be then chased and arrested.

The judge said:

> Accordingly, I find that this is in fact the same transaction, the same delict, separated only in time by the lack of carrying capacity on his bike and therefore meets the requirements of . . .

— a citizens' arrest.

Now, because of public pressure, we have a bill that allows a citizen or security guard to arrest someone for an offence that did not take place at the time that the arrest took place, but could take place at a time thereafter. That is the substance of the bill.

During a break at a committee meeting, after some of the witnesses were heard, we were having coffee in the room outside. Senator White was there, a man with great experience in the law, a former chief of police and Royal Canadian Mounted Police officer. The discussion with some of the employees of the Senate was about what was on television. From the description by the media, it concerned a grocer in a convenience store, and these thieves, two fellows, who came in with knives, and the grocer used bear spray. Perhaps honourable senators saw it on television. This was the discussion. The news story said that in fact he used the bear spray. Then he caught one of the robbers over the side of the counter and repeatedly spanked him on the behind with a closed fist.

Of course, on television one could see the grocer's wife assisting by coming out and kicking the head of the thief, but she had slippers on and I would say she weighed about 50 pounds soaking

wet. According to this bill before us, someone of very little weight and of gender could not be accused of an assault under those circumstances.

This was the discussion. I looked over at Senator White to see his reaction and he said, "Did you say bear spray?" The employee said, "Yes, bear spray." He raised his eyebrows, and I knew what he was raising his eyebrows about. I said, "Bear spray is illegal, right?" and he said, "Yes, it is; it is a prohibited weapon in Canada. Anyone using that against people will have to be charged."

I went to case law just to check it out, not that I distrusted him or anything. Then another senator — I think it was Senator Raine — asked, "Well, what can you use to defend yourself?" I think those were her words in the coffee room. What could be used? Senator White said that one cannot use something that is legal to use against bears against a person. That was his description, so I checked the case law and I found this. First, according to the law in Canada today, the reason bear spray is a prohibited weapon is section 84.(1)*(e)* of the Criminal Code. This applies to anything a woman has in her purse.

There is a case of a store in Toronto that was selling pepper spray as protection products for women. The storeowner was charged for selling prohibited weapons. In the judgment of the court, the court agreed.

• (1500)

The court pointed out that a prohibited weapon means, under the Criminal Code, a weapon of any kind being used, or part of it being used, that is declared by order of the Governor-in-Council to be a prohibited weapon.

The prohibited weapon order number 1 of the Governor-in-Council declared this:

> Any device designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of
>
> (*a*) tear gas, Mace or other gas, or
>
> (*b*) any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person.

That is hereby declared to be a prohibited weapon.

The defence in the case pointed out that there is an exception to that law, and that is under the Pest Control Products Act. The defence suggested one should look at the definition of a pest. The judge referenced it:

> . . . "pest" means any injurious, noxious or troublesome insect, fungus, bacterial organism, virus, weed, rodent or other plant or animal pest, and includes any injurious, noxious or troublesome organic function of a plant or animal . . .

Do honourable senators see what the defence was getting at? What is man?

Then the judge turned to the word "pest" in the French version. I had better mention for the quoting people, it is *R. v. Hutter*, 10 O.T.C. 210, Justice Reilly.

He says at paragraph 24 that "pest" is given the equivalent in French of "parasite."

Then he went on to describe what the definition of "parasite" was in the French text. He went through that definition of "parasite."

Then he came to the conclusion that it was so different from the English version of "pest" that he makes this comment:

> It seems clear that bears and dogs do not fall within the French definition of "parasite", and their "control products" would not be subject to registration under the P.C.P.A. The rather intriguing difference between the French and English versions of the Act might lead some to the fanciful conclusion that anglophone bears and dogs are pests, but francophone bears and dogs are not. At least, they are not "parasites".

I am reading out all this just to illustrate that the law, as Senator White has pointed out, is not simple, but I will get to his point in a second. Then the judge goes on to point out that the department of agriculture had seen this problem in the Criminal Code and had amended the Pest Control Products Act to register a number of bear- and dog-control products.

I then kept searching, because I wanted to know whether Senator White was correct. By the way, the pepper spray that is sold to women for protection purposes shows on the label a woman spraying a semi-clad man who appears to have been forced to the ground. The label reads "Super Potent aerosol defence weapon. Stops attackers cold."

> The back of the packaging has an illustration of the same devices that are exhibits 3 and 5, and as well an illustration of a woman spraying a man with the direction "Spray directly into eyes and face of assailant." The label on the back reads in part,
>
> > Pepper gas . . . instantly effective . . . non-lethal . . . has been proven superior to mace-type products . . . in that it will control drunks, psychotics, attack dogs as well as drug abusers and multiple attackers.

I went to find whether Senator White was correct. Sure enough; you never question an experienced police officer.

In *R. v. Weston*, 2008 SKPC 83, canister of bear spray or bear deterrent, paragraph 6:

> A canister of bear spray or bear deterrent, it's a restricted weapon unless used for the purpose of bears. When used against people it would be a restricted weapon.

That is exactly what Senator White said.

The importance of all of this is that when someone sees on television the use of bear spray by a grocer and everyone says it is a marvellous idea, there should have been some follow-up to say, "It is a restricted weapon. You will be charged if it is found in your possession if it is for people and not bears." However, it related to the case we were handling.

Honourable senators, the major problems I have with this bill are two things. First, the law says that if you are arrested unlawfully, if you are not told the reason for your arrest and given rights to counsel, then you have a right to defend against that person. You have a right to use force, even if it is a police officer let alone a citizen.

Here I refer to *R. v. Wrightman*, 2004 ONCJ 210, at paragraph 13:

> A scuffle ensued and Kelly kicked one of the officers. In acquitting Kelly, the trial judge ruled that the failure of the police to advise Kelly of his rights under Section 10(b) entitled him to resist arrest.

Then quoting:

> A person is not obliged to submit to an arrest if he does not know the reason for it. It is, accordingly, essential that he be informed promptly or immediately of the reasons.

Then Justice McLachlin is quoted at paragraph 16:

> The right to be promptly advised of the reason for one's detention embodied in Section 10 (a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reason for it.

The cases go on and on of violence being used by someone being arrested under the citizen's arrest provisions. *R. v. Bailey*, 2011 ONCJ 69, paragraph 37:

> The Ontario Court of Appeal has recently dealt with the issue of the right of a citizen to resist an unlawful arrest in *R. v. Plummer*. . . . That case involved an unlawful arrest of a cab driver, who engaged in a "scuffle" in resisting his arrest. Justice Rosenberg deals with the issue as follows . . .
>
> > Because there was no power of arrest, the arrest of the appellant was unlawful. . . . a person is entitled to resist an unlawful arrest . . .
> >
> > Further, in attempting to arrest the appellant without legal authority, the officer unlawfully assaulted him.

The cases go on. If you look at *R. v. Wolver*, this is recent, 2011 ABPC 308, it says:

> In *R. v. Milino* . . . the trial Court found that when a woman responded to an unlawful arrest by kicking an officer in the groin, that she used no more force than was necessary.

Here we have this new arrest provision by citizens, to arrest not just when the offence is taking place, which is the power of a police officer, but now to conduct an arrest over a reasonable period of time after that took place. That person doing the citizen's arrest does not know what Senator Dagenais knows, or Senator White, about the proper way of arresting people. That person being arrested by a citizen's arrest has the right by law to resist that arrest and to use as much force as is necessary if those rules are not carried out properly.

• (1510)

There is one other thing that goes with that, which raises my suspicion about this particular bill, and that is that the Law Reform Commission of Canada in 1983 — I remember it well; I was a member of Parliament at the time — came down with a report on people who were unjustly imprisoned. The report said that eyewitness accounts are inherently unreliable. Every court since then has repeated that phrase. The Supreme Court of Canada said Eyewitness accounts are inherently unreliable." You cannot just go on an eyewitness account — you cannot — in arresting someone.

Add that to the fact that a person can legally resist an arrest with force, and there is the potential of a very serious mistake in passing this legislation, although we all agree with passing it. Why do we agree? Because the remedy section of the Canadian Charter of Rights and Freedoms, section 24, says that any evidence that is found in violation of the Charter — if your Charter rights have been violated — will be excluded from trial if, in fact, it would bring the administration of justice into disrepute. What is the definition of "administration of justice into disrepute"? Disrepute by whom? The citizenry of Canada. The reasonable person in Canada. The reasonable person in Canada is demanding that this law be changed.

Honourable senators, with the institutional memory I have going back many years, I remember in 1993 when we passed two laws in response to some major drug cases in this country, where the Supreme Court of Canada said — I forget the names of the cases, but they will come to me — that the police do not have a right, as an investigative measure, to put cameras inside people's bedrooms, homes and hotel rooms to gather evidence. They need a warrant.

There were three or four other cases similar to that. We brought in a law. It was an election year. We brought in a law that enacted 487.01 of the Criminal Code, which says that a warrant can be issued if no other provision in the law would allow that warrant to be issued and, if the warrant were not issued, it would violate a person's search rights under section 8 of the Charter.

In 2004, we added to that production orders. People who use text messaging on their phones in Canada, the power of those warrants on suspicion — let me read something for the benefit of the record. This is a recent case, less than a year ago, with TELUS Communications, a text messaging outfit — excuse the language — that has these phones. I have never text messaged. I do not know how to do it, but I have used email. Emails are the same thing. With respect to iPads, the same thing applies.

TELUS brought an application to the court to allow for the police and anyone else who is issuing production orders to pay for the cost of the production of the orders because it was costing them

millions of dollars. I will read one sentence from *R. v. TELUS Communications*, 2011, Carswell Ontario 1331, paragraph 2:

> **Telus** has received on the order of **ten thousand** search warrants and **production orders**. Only six have been in the form of this General Warrant.

Ten thousand search warrants and production orders for one company. There are several companies that operate emails, iPads and text messaging. The interesting part of it, honourable senators, is this, and I did not realize it. Back in 1993, another law we passed was section 184 of the Criminal Code, tapping a phone. It gave the police the power to tap a phone without a warrant on what is called by police officers "exigent circumstances." Senator Dagenais and Senator White in their previous lives would know everything about exigent circumstances.

That is what we did in 1993, together with this general warrant provision that allowed the police to do anything as long as they could not find a place to do it under any law. The result was 10,000 search warrants in the case of TELUS. One can imagine all the other telephone companies. Warrants for what? Production orders would be issued to a justice. What is a justice? It is not a judge. It could be a provincial court judge, but our understanding is of a justice of the peace. It could be issued to a peace officer. What is a peace officer? A peace officer is a mayor. A peace officer is a reeve. A peace officer is defined under section 2 of the Criminal Code as practically anyone with any authority. A pilot on a plane is a peace officer, according to our Criminal Code. We allow these things to be done. Why? Because of public pressure, election year.

Here is the problem. We regard interference with private communications as being a very serious matter. Section 186 of the Criminal Code says a warrant is needed. However, does that apply to text messaging? Does that apply to the Internet? Does that apply to an iPad? No, it does not. Why? The same reason that TELUS received 10,000 of these requests last year. All of that material that one puts into a text message — let me just read it from the court judgment so honourable senators will believe it.

This all relates to the point concerning this bill, by the way. Here is the description at paragraph 9 from the case of *R. v. TELUS Communications Limited*:

> Text messaging (known more formally as Short Message Service ("SMS")) is a form of communication service using standardized communications protocols and mobile telephone networks to allow for the exchange of short text messages from one mobile phone device to another.
>
> Text messages are always delivered using a cellular phone network. However, many phone companies now permit the initiation of text messages using the Internet. . . .

The same problem, though, arises.

> Today, many people use text messaging as a means of communicating. The popularity of text messaging, particularly as opposed to voice telephone calls, has risen steadily in the past decade. Text messaging tends to be a less expensive alternative to voice calls, particularly during peak daytime hours. . . .
>
> When a cellular phone is turned on, it is constantly exchanging information with a cell phone tower over a pathway called a control channel. The control channel also provides the pathway for the SMS messages.
>
> When the send button is pressed on the mobile device, the text message (SMS) is sent to the cell tower emitting the strongest signal, and then routed to a Mobile Switching Centre ("MSC"). The MSC is the servicing switch, which is the computerized mainframe to the network where the mobile device is registered.
>
> Located within the MSC is a Short Message Service Centre ("SMSC"). A SMSC is responsible for handling the SMS operations of a wireless network. The SMSC utilizes routing engines for the forward capabilities of SMS services. When the message is received at the SMSC, the SMSC will use routing engines to attempt to deliver the message to its destination.
>
> Where the destination phone is not available (for example, if it is turned off or does not have service reception), the text message will remain in the TELUS SMSC until the recipient phone is available. If the recipient phone has not become available within five days, then TELUS will delete that message from its SMSC. In those circumstances, the sender does not receive a message from TELUS that the message was not delivered.

• (1520)

> . . . all text messages are routinely copied and stored in the database. . . . In this regard:
>
> (a) all text messages sent by a TELUS subscriber are copied when they arrive at the TELUS SMSC and the copy is forwarded to the database;

That is what all of these 10,000 production orders were for — on suspicion. When you read the law on this, it is on suspicion. The same thing applies to emails and to your iPhone. What if someone is using his or her phone innocently and that message goes to someone who maybe communicated with someone who is being investigated? All of that record is supplied by a production order that we allowed when we instituted this law — when the public demanded that it be instituted to assist the police.

I looked at this in 1993, and we did not really object. We were the government. We really did not object to it, but we said, "Look, be very cautious of this." Guess what? A month ago, the Supreme Court of Canada struck down section 184.4 of the Criminal Code that allows the police to tape private telephone conversations on an exigent basis without a warrant. The court struck it down less than a month ago.

However, it did not strike down section 487.01 of the Criminal Code, because it has never been tested by the Supreme Court. I am hoping that some young active lawyer will, one of these days, have the nerve to take it on if, in fact, they can get it to the Supreme Court and test the constitutionality of that provision.

Honourable senators, I would like to read something to you that pertains to this Senate and pertains to the great job that Senator Di Nino did on this bill, because he covered all the bases in the bill. Here is why it is important. The Supreme Court of Canada made this judgment less than a month ago; it is *R. v. Tse*, 2012 CarswellBC 985.

The court, in looking at the constitutionality, said it is unconstitutional. Then, in declaring its unconstitutionality, they had to have a test. As a part of the test, they always turn to the intention of Parliament. When the Supreme Court of Canada turns to the intention of Parliament, as they did less than a month ago and declared this unconstitutional, where did they go? Did they go to the House of Commons? No, of course they did not. When did they ever go to the House of Commons to find out the intention of Parliament? They go to the speeches that are given in the Senate by the person sponsoring the bill on behalf of the government. They go to the Standing Senate Committee on Legal and Constitutional Affairs, if it is that committee, or some other committee, as they did less than a month ago in declaring this unconstitutional.

Under the large heading of "Intention of Parliament," they mention the Senate three times — the House of Commons not once — in searching for the intent of Parliament.

I will quote from paragraph 28:

> It is clear from the overall context of the provisions in Part VI of the *Code* that Parliament intended to limit the operation of the authority under s. 184.4 to genuine emergencies. Evidence before the Standing Senate Committee on Legal and Constitutional Affairs was that this emergency power was necessary for "hostage takings, bomb threats and armed standoffs"; to be used "only if time does not permit obtaining an authorization"; and for "very short period[s] of time . . .

That was evidence before the standing committee of what — the house? No — the Standing Senate Committee on Legal and Constitutional Affairs.

It continues:

> . . . to stop the threat and harm from occurring": *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, No. 44, 3rd Sess., 34th Parl., June 2, 1993 . . . situations where "every minute counts" and that the provision was "necessary to ensure public safety": *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 48, 3rd Sess., 34th Parl., June 15, 1993 . . .

Then, the Supreme Court of Canada said that it would declare that section 184.4 of the code, as enacted, is constitutionally invalid legislation and suspended this declaration of invalidity for a period of 12 months.

The Senate will now receive a bill from the government within this 12-month period to try to rectify this problem that was created back in 1993.

I want to congratulate Senator Di Nino for the good job he has done in outlining the purpose of the bill and explaining the immediate necessity and purpose of the legislation to try to short-circuit some of the problems I have raised here today. Senator Di Nino has certainly covered all of his bases.

I recall once meeting a rabbi in an airport out east. The rabbi said, "Senator Baker, I would like to introduce myself. I am a good friend of Senator Di Nino. Do you know him?" I said, "Yes, I certainly do."

About three weeks later, I was introduced to a new priest coming to central Newfoundland. I was introduced to this new priest of the Roman Catholic Church by the existing priest, who said, "This is Senator George Baker, very well known in this area." The new priest immediately interrupted and said, "Do you know Senator Di Nino?" I said, "Yes, I certainly do."

"Well, he is a fine gentleman. What did you say your name was?"

To cap it all off, and this is all a fact — and Senator Di Nino knows it — I was at an occasion in which a member of the clergy of the United Church was being honoured.

Senator Di Nino: Lovely lady.

Senator Baker: Yes, wonderful lady. She was in a wheelchair at the time. She is recognized everywhere as one of the nicest and best people and best members of the clergy that people have ever met. She came over in her wheelchair and said to me, "Senator Baker, I have a very good personal friend in the Senate, and I want to tell you that he is a great man." I said, "Stop it for a minute. Let me guess. Senator Di Nino." She said, "How did you know?" I knew because I had spoken to Senator Di Nino previously, that he had known this person there.

• (1530)

In conclusion, Senator Di Nino has certainly covered all of the bases on this legislation in this place. From the looks of it, he has not only covered all his bases in this place, but he has covered his bases on the road to a higher place.

[*Translation*]

Hon. Mobina S. B. Jaffer: Honourable senators, I rise today to speak at third reading of Bill C-26, regarding citizen's arrest and the defences of property and persons.

[*English*]

This bill amends sections of the Criminal Code to authorize property owners to carry out a citizen's arrest, within a reasonable time, of a person whom they find committing a criminal offence on or in relation to that property. It also seeks to clarify and update provisions of the code that deal with self-defence.

[*Translation*]

I support Bill C-26. However, there are three main observations I would like to bring to your attention, honourable senators, in response to the study conducted by our committee: that one of the

bill's clauses promotes gender stereotypes; that the bill does not take into account the confusing and impractical elements of section 494 of the Criminal Code; and that the state must ensure that individual rights guaranteed by the charter are respected, even when functions of the state are delegated to private citizens.

My first observation has to do with paragraph 34(2)(e) of the bill. I quote:

> In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors . . . (*e*) the size, age, gender and physical capabilities of the parties to the incident;

Honourable senators, why is the gender of the parties to the incident a factor in deciding whether the act committed is reasonable?

[*English*]

In addition to the size, age, gender and physical capabilities of the parties to the incident, clause 34(2) of the bill also considers "the nature of the force or threat," whether the use of force was imminent and whether "there were other means available to respond to the potential use of force, the person's role in the incident, the use of a weapon, the relationship and history of the interaction between the parties, the nature and proportionality of the person's response, and whether the act committed was in response to an apparently lawful use or threat of force.

While there are often fundamental differences of physical size and strength between the sexes, these differences are already ostensibly considered; size, age and physical capabilities are also listed among the factors.

The inclusion of "le sexe" among the factors, where it is intended only to represent biological differences, would be at best redundant.

The French version of the bill, as I have already noted, reads "le sexe . . . des parties en cause." The English version, however, does not cite the sex of the parties to the incident as a factor. It specifies that the gender of the parties to the incident should be considered. As honourable senators know, in English, "sex" and "gender" mean two different things. The inclusion of gender or "le sexe" among the factors, rather than connoting fundamental biological differences between the sexes, suggests cultural or social distinctions. It is an extension of the gender stereotyping that furthers systemic discrimination.

Honourable senators, gender should not be used in our bills. This is exactly the kind of discrimination that section 15(1) of the Canadian Charter of Rights and Freedoms seeks to extinguish. We would all be mindful of our responsibility as legislators to represent and advance the core Canadian values that the Charter represents, equality rights among them.

Superintendent Greg Preston, who represented the Canadian Association of Chiefs of Police at our committee hearing, testified regarding the inclusion of gender among the factors to be considered:

> I will be very honest. I was quite surprised to see that listed. . . . I thought of size and age, and physical capability was added, but those are all relevant considerations. By itself, I am not sure how gender would assist. . . . Gender by itself really should not be a consideration, by itself. It is the other aspects that one looks at.

Honourable senators, as Minister Nicholson indicated when he appeared before the committee, the list of factors included in clause 34(2) is not exhaustive. That does not change that including the sex of the parties to the incident among the factors to be considered perpetuates a stereotype.

The physical capabilities of the parties, the relationship between the parties, battered wife's syndrome, factors other than sex included in clause 34 provide opportunity for discretion and due consideration of these kinds of particular circumstances.

The minister indicated that the government "was not trying to limit the factors to be considered," and that the factors should be "as expansive as possible." Regardless, honourable senators, there is no reason for this bill to promote gender stereotyping, indirectly or otherwise.

My next point is on indictable offences versus offences punishable by way of summary conviction.

[*Translation*]

My second observation has to do with subsection 494(1) of the Criminal Code and the category of the offence committed.

[*English*]

Bill C-26 does not address subsection 494(1) of the Criminal Code, which reads:

> Any one may arrest without warrant
>
> (*a*) a person whom he finds committing an indictable offence; or
>
> (*b*) a person who, on reasonable grounds, he believes
>
> (i) has committed a criminal offence, and
>
> (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

Honourable senators, as you are aware, offences can be tried summarily or by indictment. The difference involves a considerable degree of nuance. While many criminal offences are also hybrid offences — offences that may be treated as either indictable or summary, subject to the discretion of the prosecutor — the legislative text creating the offence is generally what determines whether the offence is indictable, summary or hybrid.

The difference between an indictable offence and a summary offence is far from readily apparent. There is no obvious difference of the type or kind between the two categories.

As the Supreme Court of Canada said in *R. v. Macooh* [1973]:

> . . . the division which currently exists in our law between indictable offences and other categories of offence only very imperfectly reflects the severity of the offence.

Honourable senators, my concern is this: How will a private citizen, even if this legislation is passed, know whether they are legally permitted to perform a citizen's arrest? This was among the concerns raised by Superintendent Preston. This legislation was intended to clarify the legal context in which a citizen may perform a citizen's arrest.

During our committee's hearing, Rick Woodburn, President of the Canadian Association of Crown Counsel, commented regarding the distinction between categories of offences:

> I am not really sure a lot of times. It is funny to say that, but, when you look at a hybrid offence or a straight indictable offence, we are all looking at our code sometimes. Depending on what you catch them doing, it would be difficult.

These are the words of a Crown counsel who represents the government, a person who should know the difference between indictable and summary offence.

Paul Calarco, a member of the Canadian Bar Association, a lawyer, further commented regarding the ability of the citizen to distinguish categories of offences:

> There is great concern. I think it is impossible for the citizen to know, and you also have to distinguish between 494(1) and (2). Subsection 2 permits the arrest without warrant of a person found committing a criminal offence on or in relation to the property. A criminal offence is wider than an indictable or a hybrid offence, as the case may be.
>
> This can create a great deal of confusion; there is no doubt in my mind about that.

• (1540)

Honourable senators, even if this bill should pass, the citizen would need to first establish in the heat of the moment, acting instinctively, whether the offence they are witnessing is an indictable or a summary offence. As Joseph Singleton, a homeowner who had been a victim of a break and enter, testified in front of the committee regarding the bill:

> . . . I feel that undefined grey areas still exist. . . . upon hearing a startling noise or seeing something out of the ordinary, a concerned citizen or homeowner would instinctively investigate to protect their property, to quell curiosity. . . .

Honourable senators, it is not reasonable to expect the citizen or homeowner to investigate by first verifying with their easily accessible copy of the Criminal Code to ensure that the offence they believe to be witnessing is indeed an indictable offence. When a person feels threatened, they act instinctively. This bill fails to remedy this reality.

Let me provide honourable senators with an example, one that Superintendent Preston highlighted during his testimony, which reasonably corresponds to the example of a startling noise or something out of the ordinary that Mr. Singleton referenced. Section 177 of the Criminal Code reads as follows:

> Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

I repeat: "an offence punishable on summary conviction," honourable senators.

Let us assume that the property in question does not belong to the person who witnesses the offence. Maybe the person is visiting a family member, socializing at a friend's place or staying with a neighbour. This hypothetical case is an example of self-defence, not defence of property.

Some of us in this chamber are trained lawyers and, in the heat of that moment, when some unidentified person is prowling outside, perhaps even fearful for our loved ones' safety, we might forget what exactly section 177 says regarding whether night prowling is an indictable offence or a summary offence.

There is no provision in Bill C-26 that addresses this confusing and impractical element of the Criminal Code, nor the contradiction between subsections 494(1) and (2).

[*Translation*]

The third point I would like to raise is the following. The Charter guarantees have to be considered in the context of all arrests.

Last Thursday, our committee received a written submission from Abby Deshman, Director of the Public Safety Program at the Canadian Civil Liberties Association

[*English*]

The Canadian Civil Liberties Association's submission was received toward the end of our committee's deliberations, but I believe it raises some very pertinent points regarding the maintenance of universal individual rights and freedoms. I will share an excerpt from their letter:

> As purely "public" entities are supplemented or replaced by private bodies, we must be vigilant to ensure that individuals' fundamental rights, those which protect them against excesses that may accompany the concentrated power typically wielded by government actors, remain meaningful when faced with corporate entities exercising coercive powers initially defined and delineated by the state. . . .
>
> The Alberta Court of Appeal has consistently held that the citizen's arrest power is a delegation of a government function and therefore subject to the *Charter*. The power to arrest — to physically detain another private individual contrary to his or her wishes — is an extraordinary coercive

> power that is overwhelmingly reserved for government actors. It is granted by the government in order to preserve public order of the "Queen's peace." Arrest powers are delegated to private individuals in a narrow set of circumstances. Police officers may exercise this power in a wider range of contexts. In both cases, however, the authority to restrict the freedom of another individual flows directly and solely from the state. The fact that the arrest may be initiated by a private individual as opposed to a state employee does not change the core governmental nature of this activity.

[*Translation*]

There is a serious deficiency in the legislation before us. Jurisprudence is not definitive on the issue of applying the Charter in the context of a citizen's arrest.

[*English*]

As Ms. Deshman argues, however, we must be very clear in stating that the Charter applies in all circumstances.

This legislation seeks to establish an appropriate legal context for the delegation of a state function to private citizens. There are significant legal and training deficiencies, however. This bill neglects to ensure at all times the maintenance of all citizens' Charter rights. More importantly, however, private citizens to whom the arrest power has been delegated in this bill likely do not possess the appropriate — may I have five more minutes, please?

Hon. Senators: Agreed.

Senator Jaffer: — appropriate policing and legal training to ensure that Charter rights are consistently respected and protected. As Ms. Deshman writes:

> *Charter* guarantees . . . should be considered in the context of any arrest, detention or search and seizure — regardless of whether the actor is a police officer, private security guard, or independent individual.

Honourable senators, I support the principle and overall intent of this legislation. I believe, however, that the following points should be kept in mind: that Parliament must ensure that legislation does not promote gender stereotyping; that existing sections of the Criminal Code, namely section 494, which specifies that the offence must be an indictable offence, require further clarification and practical consideration; that arrest power is fundamentally a government function that must only be delegated to citizens in extraordinary circumstances; and that individual rights as entrenched in the Charter must be protected in all circumstances.

[*Translation*]

Hon. Joan Fraser: Honourable senators, I would like to raise just two points in this debate. Before I begin, I would like to commend all those who spoke before me.

[*English*]

The quality of their interventions has been remarkable, and I think all three of them have made very important points.

I want to address two points. The first has to do with the citizen's arrest provisions of this bill. I believe that there is, in fact, less to the provisions of this bill than the public eye has seen in them.

It is widely believed that the case of Mr. David Chen, to which reference has been made, was the spur for this bill to come forward at this time. As Senator Baker noted in quoting from the judge's decision, that case became a matter of great public interest and, indeed, of public outrage. I would commend to all of you the decision of the judge in the *Chen* case. It is absolutely fascinating. It is completely free of legal gobbledygook. Anyone can read it, even me. It makes some very important points in connection with this bill.

There were essentially two big issues that the judge addressed, only one of which, in my view, is addressed by this bill. The first was the question to which Senator Baker referred of whether it was all right for Mr. Chen to apprehend the thief some time after the theft had been committed, when he had a chance, when he saw him again. The judge, as Senator Baker said, solved that particular problem by saying it was all part of the same offence. The bill has clarified that judges do not have to stretch that far and that you can make a citizen's arrest within a reasonable time after the actual offence has been committed, so that will now be clear.

The second great issue, though, was whether Mr. Chen was guilty of forcible confinement and other things that he was charged with — his conduct after he and his friends apprehended the person that they were arresting, as honest citizens of Canada. Senator Baker referred to it: tying the man up, throwing him in the back of the van and driving away, or starting to drive away.

• (1550)

The judge did not really address that. The judge said, in almost as many words, that the testimony before him had been so conflicting and so contradictory that he could not know exactly what had happened or why and that, therefore, nothing had been proven and, in this country, one is innocent until one has been proven guilty. He was thereupon required to find Mr. Chen not guilty.

However, he then went on to say that if he were in Scotland, he would be able to say "not proven." In Scotland they have this third possible verdict. One can be guilty, not guilty or not proven.

That was kind of interesting, and it left it all up in the air about the actual nature of Mr. Chen's conduct. As I read this bill, I did not think it did anything at all to address that issue, which was in fact the issue that had caused the public outrage: Why was Mr. Chen being arrested?

When Mr. Chen appeared before us, he came accompanied by his lawyer, and I asked her if she thought this bill would protect Mr. Chen's conduct, and her answer was no, she did not think so. I think she is right. I just wanted to make that point, in case any of honourable senators were talking with members of the public about the citizen's arrest portion of this bill.

The other element I would refer to is the self-defence provisions. I was particularly anxious to have clarity on the impact of the proposed new self-defence provisions on what are often known as battered women defences, basically concerning spousal assault and to some extent dating violence, but mostly spousal assault.

This is a serious problem in this country, honourable senators. In 2010, police reported approximately 48,700 victims of spousal violence in this country and, if you hear people talk about the battered women defence, it is not because men are immune from spousal violence. Some men do suffer violence at the hands of their spouses, but women aged 15 and older in 2010 accounted for 81 per cent of all those police-reported victims.

Now, in the *Lavallee* case, to which Senator Di Nino and I think others have made reference, back in 1990 the Supreme Court addressed many of the myths about spousal abuse, spousal violence and self-defence arguments that could be brought in those cases by the abused spouse. Ms. Lavallee was a woman who had been repeatedly and severely abused, and one night her partner told her that later that night he was going to kill her, and she believed him, so she shot him, dead. This case went all the way to the Supreme Court, and it was a landmark judgment instructing courts to take into account expert testimony about the effect of being an abused spouse, a feeling of having nowhere to go, nowhere to turn, no escape, and sometimes being driven to commit very serious violence in order, one believes, to defend oneself, even if that defence is not specifically necessary because one is not being abused at that precise moment.

I was quite concerned about the impact of two of the factors that judges are told to take into consideration, because I wondered if they might be contradictory, and Senator Jaffer referred to these. In proposed section 34(2)(*b*), the judges are asked to take into account if the circumstances are appropriate, the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force. That was clearly the one that made me wonder if we were weakening the grounds of defence for battered women.

I was only partly assuaged by the existence of proposed section 34(2)(*f*) which says the judge should take into account the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat.

Therefore, I asked about how these two possibly apparently contradictory elements might play out. I asked officials from the Justice Department when they appeared before us how we should understand the interplay between these two things, and I think the answer that was given is worth reading into the record. It comes from Ms. Joanne Klineberg, Senior Counsel, Criminal Law Policy Section, Department of Justice Canada, who said:

> Both of those factors are derived almost directly from the *Lavallee* case, which was the leading case from the Supreme Court.
>
> For the first time, the Supreme Court gave an interpretation to the existing self-defence laws such that the situation of the battered woman could be taken into account. Essentially the court said that where battered women's cases had previously not resulted in a successful self-defence plea was because the jury could not appreciate how a reasonable person in that woman's situation would not have left the relationship sooner, or how they might have perceived they were at risk. The most important thing the Supreme Court determined in that case was that whenever there is an aspect of reasonableness in the law of self-defence, it is important to consider the particular circumstances of an abused person — and the nature of their relationship — and attribute that to the reasonable person.
>
> That is essentially what 34(2)(*f*) is trying to get at; in determining what is reasonable you would have to consider the history of the relationship. Another thing the Supreme Court decided in that case was it had previously been assumed — although it was never in the wording of the Criminal Code — that the imminence of the assault was a necessary precondition for self-defence to be successful. The court in that case said that is an assumption; the paradigm self-defence case is one where it is eminent.

The transcript says "eminent" but the word was in fact "imminent." It continues:

> However, a battered spouse situation is exactly one where the assault might not be imminent, but nonetheless the person would not reasonably feel themselves taking into account the history to have any option but to do what they did.
>
> The factor that is enumerated as (*b*) was also specifically designed to reflect that aspect of the *Lavallee* case, by saying it is a factor to consider, the extent to which the attack was imminent, which in and of itself is meant to signal that imminence is not a requirement. If imminence were a requirement, it would be in 34(1) —

This is what Senator Di Nino referred to yesterday when he was setting out the act's absolute requirements for a self-defence.

> — but because it is in 34(2) as a factor to consider, as opposed to a requirement of self-defence, it signals that imminence is a factor to consider and the person's perceptions about other options they might have had is also a factor to consider. I think our view would be that both of those factors are entirely consistent with the reasons of the Supreme Court in *Lavallee*.

Honourable senators, given that, as Senator Baker has so regularly instructed us, we know reference is sometimes made to debates in this chamber when thorny issues of law are being considered, I did think that was worth putting into the formal record of the Senate.

Hon. Serge Joyal: If there is time left, I would like to put a question to the honourable senator. Would a question be accepted?

Senator Fraser: With some trepidation.

Senator Joyal: Unfortunately, I was not here last night when Senator Di Nino made his comments in support of the report of the committee. I attended many of the committee hearings, and

I think it would be proper to put on the record the conditions this bill will create for the security agencies that are multiplying exponentially these days and the particular conditions underwhich they operate and the context in which this bill can be called into action.

• (1600)

We all know that many of the large department stores and shopping centres have security agencies monitoring the premises on a television set from a remote area, watching where customers and visitors move around. Once the person who is responsible for monitoring activities sees someone shoplifting, that person would contact an agent on the floor and give a signal to that person. For example, if it was someone with a red baseball cap, blue jacket and a pair of jeans, that description would be provided if that person was shoplifting a book, for instance, or a CD, to put it into plain terms.

The agent on the floor who did not witness that person shoplifting, but based his or her intervention on the description of the person as seen on a television set quite remote from the area, would try to intercept that person somewhere, either at the exit or by rushing the counter where the situation happened. In so doing, that agent would not give the person a warning.

Section 10(1) of the Charter prescribes any agent or person making an arrest, such as Senator Dagenais' or Senator White's people, must immediately inform a person of the reason why they are being arrested. This is a compulsory Charter obligation. If that warning is not given, the charge is dropped. I am sure Senator Dagenais could certainly tell us about many situations that have happened that way.

In the shopping centre scenario, we have an agent who does not inform the person immediately why they are being arrested. That information would be provided once a police officer is called to the premises; the police officer would then inform the person.

The reason that section of the Charter is so important is because it protects people from self-incrimination. A person not knowing why he or she is being arrested can incriminate themselves, thus of course not using the defence that is within his or her rights as provided for in the Charter.

In my opinion, this is a very important issue that we were informed of during the committee hearings. My colleague Senator Di Nino was there when we raised that issue.

I know that Senator Fraser's time has lapsed. Perhaps she could ask for five more minutes and she would be able to comment.

Senator Fraser: May I have five minutes, honourable senators?

Hon. Senators: Agreed.

Senator Joyal: I will conclude, honourable senators. Thank you for your leniency.

Could Senator Fraser determine how that concern of the members of the committee could be addressed and how it could find itself in the courts certainly sometime soon? This situation is now so common everywhere that sooner or later it will find its way to the courts, in my opinion.

Could the remarks made by the experts we heard from, especially the police officers, be shared with the chamber?

Senator Fraser: Indeed. As Senator Di Nino indicated yesterday, we did hear from one witness that there are now attempts under way for the federal and provincial attorneys general to figure out systems of regulation that would cover, among other things, this precise point. However, that only came from one witness. The same witness said that, in Ontario, it is already automatic for agents to read rights as soon as an arrest is committed.

Other witnesses, however, with experience in other provinces, were much less definite on this matter and did raise concerns. I think Senator Jaffer also alluded to these concerns in her remarks.

I think there was a sense among members of the committee, having heard the testimony, that it would be appropriate — and Senator Di Nino did allude to this yesterday — for the federal and provincial authorities to see if they could come together and agree upon standards that would ensure that everywhere in Canada private security companies and their agents are instructed in and required to respect the Charter.

One of the things that struck me was that although serious security companies do give some training to their employees, it did not sound to me as if it was very much. Sometimes it is one day; sometimes it is maybe a little more. However, it was nothing compared to the degree of instruction, for example, that police officers must undergo.

I do not think I am misstating the sense in the committee that there was some view that this was probably worth at least some federal-provincial exploration. I do not want to go any further than that because not all members of the committee wanted it to go further than that; some did. To the extent I have tried to indicate, there was a sense that this was at least a potential problem. If it exists, it is a serious problem. Clearly, Charter rights are among the most serious things that the country and Parliament could ever address.

Some Hon. Senators: Question.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

(Motion agreed to and bill read third time and passed.)

POOLED REGISTERED PENSION PLANS BILL

FIRST READING

The Hon. the Speaker informed the Senate that a message had been received from the House of Commons with Bill C-25, An Act relating to pooled registered pension plans and making related amendments to other Acts.

(Bill read first time.)

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

(On motion of Senator Stratton, bill placed on the Orders of the Day for second reading two days hence.)

RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT

FIRST REPORT OF COMMITTEE— CONSIDERATION IN COMMITTEE OF THE WHOLE

On the Order:

> The Senate in Committee of the Whole on the consideration of the first report of the Standing Committee on Rules, Procedures and the Rights of Parliament (*Revised* Rules of the Senate), presented in the Senate on November 16, 2011.

(The Senate was accordingly adjourned during pleasure and put into Committee of the Whole, the Honourable Fernand Robichaud in the chair.)

• (1610)

[*Translation*]

The Chair: Honourable senators, the Senate is now in Committee of the Whole on the first report of the Standing Committee on Rules, Procedure and the Rights of Parliament, pursuant to order of the Senate of May 17.

The pages can provide you with copies of the *Journals of the Senate* containing the report.

[*English*]

The Committee of the Whole shall be conducted according to the following schedule today: For the first portion of this meeting, the committee shall consider Chapters Thirteen and Fourteen of the First Appendix of the report for a maximum of one hour. The committee shall then consider Chapters Fifteen and Sixteen and the appendices during the second portion of this meeting, for a maximum of one additional hour.

[*Translation*]

Lastly, during the third portion of this meeting, the committee shall consider its recommendation to the Senate as to whether or not the report should be adopted, for a maximum of 30 minutes.

Honourable senators, rule 83 states that:

> When the Senate is put into Committee of the Whole every Senator shall sit in the place assigned to that Senator. A Senator who desires to speak shall rise and address the Chair.

Is it agreed, honourable senators, that rule 83 be waived?

Hon. Senators: Agreed.

[*English*]

The Chair: As was the case last week, I would ask senators who intend to propose amendments to Chapters Thirteen or Fourteen to do so now. The final consideration of the amendments will be suspended until we are disposing of the appropriate chapter. This will ensure that the committee is seized of the amendments should we run out of time.

[*Translation*]

After receiving the amendments, we will debate the chapters. After debating the chapters, we will proceed with the motions required to dispose of them.

Honourable senators, are there any amendments?

[*English*]

Senator Tardif: Honourable senators, as we begin our third and last session in Committee of the Whole to review the report of our Rules Committee, there is one final matter I wish to draw to the chamber's attention, and that concerns how we deal with questions of privilege. There is an amendment I wish to propose to Chapter Thirteen, and I would ask the pages, please, to circulate the amendment.

As we are all aware, parliamentary privilege is part of the general public law of Canada and is recognized in the Constitution itself. It deals with the procedure, customs, practices and powers of each house and of its members. As described in Erskine May, "Parliamentary privilege is the sum of the peculiar rights enjoyed by each house collectively as a constituent part of the High Court of Parliament and by members of each house individually, without which they could not discharge their functions . . ." It is this "individual" aspect that I would like to focus on.

Under our current rules, if a senator wishes to raise a question of privilege, she or he would normally give written and oral notice as required by rule 43, and the matter would then be formally raised and discussed at the end of Orders of the Day. If there were no opportunity to give the written notice three hours in advance, as required by rule 43, questions of privilege have still been raised under the authority of 59(10). This was done most recently by Senator Ringuette only last week. That is the current situation.

The new proposed rules would make a substantive change to the current situation by requiring all questions of privilege, even those raised at the last minute, to be considered only after the Senate has concluded virtually all its other business or at 8 p.m., whatever comes first. In situations where something of significance arose at the last minute, the issue could only be discussed at the end of the day, no matter how important.

In my opinion, what is being proposed does not give questions of privilege that arise at the last minute the priority they deserve and which they now have. Consequently, I am proposing that the

report of our Rules Committee be modified so that all of us retain the right to raise questions of privilege that we become aware of too late to give the three hours' written notice.

I am proposing that a senator be able to raise such a question of privilege at any time except during Routine Proceedings, during Question Period, or during the taking of a vote, but at any other time one could rise to draw the attention of the Senate to a question of privilege that has just arisen. My proposal will also allow the question of privilege to be considered and debated at the time it is raised.

As is now the case, the Speaker would have the authority to at some point say that he has heard enough to consider making a ruling. The Speaker would also be able to defer further consideration of a question of privilege raised in this way, raised without notice, to later in the day, when questions of privilege are normally dealt with.

In seeking an amendment that would preserve the ability of all honourable senators to raise important questions of privilege at the last minute, I was also considerate of the need for us, as a chamber, to fulfill our legislative responsibilities. I believe the proposal I have had distributed and will now formally move strikes that balance. Therefore I move:

> That chapter thirteen of the First Appendix of the report be not now adopted but that it be amended:
>
> (*a*) by replacing paragraph (a) of rule 13-5, at page 117 of the Appendix (page 533 of the *Journals of the Senate*), with the following:
>
> "(a) raise it during the sitting without notice at any time, except during Routine Proceedings, Question Period, or a vote, but otherwise generally following the provisions of this chapter; or";
>
> (*b*) by replacing rule 13-6(1), at page 118 of the Appendix (page 534 of the *Journals of the Senate*), with the following:
>
> **"**Consideration of question of privilege
>
> **13-6.** (1) Except as otherwise provided, or unless the Senate adjourns earlier, questions of privilege of which written and oral notice was given shall be considered as soon as the Senate has completed Orders of the Day, but no later than either 8 p.m. the same day or noon on a Friday.
>
> *EXCEPTIONS*
>
> *Rule 8-4(1): Adjournment motion for emergency debate*
>
> *Rule 13-5(a): Question of privilege without notice*
>
> *Rule 13-6(2): When question of privilege without notice considered*
>
> *Rule 13-7(2): Debate on motion on case of privilege";*
>
> (*c*) by adding the following new rule 13-6(2), at page 118 of the Appendix (page 534 of the *Journals of the Senate*):
>
> "When question of privilege without notice considered
>
> **13-6.** (2) A question of privilege raised without notice shall be considered at the time it is raised, unless the Speaker at any time directs that further consideration be delayed until the time for considering questions of privilege of which written and oral notice was received. In this case, the delayed consideration shall be taken up before any questions of privilege of which notice was given.";
>
> (*d*) by renumbering current rules 13-6(2) to 13-6(4) as 13-6(3) to 13-6(5); and
>
> (*e*) by updating any other cross-references in the report and its appendices, including the lists of exceptions, accordingly.

The Chair: Honourable senators, it has been moved by the Honourable Senator Tardif, seconded by the Honourable Senator Fraser, that Chapter Thirteen of the First Appendix of the report be not now adopted but that it be amended. Shall I dispense?

• (1620)

An Hon. Senator: Dispense.

The Chair: Are there any other amendments to be considered?

Senator Cools: Yes, Mr. Chairman. I would like to move an amendment to rule 13-1, the old rule 43. Perhaps I can move it and then explain it:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, Chapter Thirteen,
>
> (*a*) on page 115, by replacing section 13-1 with the following:
>
> "13-1. The preservation of the privileges of the Senate is the duty of every Senator. A violation of the privileges of any one Senator affects those of all Senators and the ability of the Senate to carry out its functions outlined in the *Constitution Act, 1867*. Action to ensure protection of the privileges of the Senate takes priority over every other matter before the Senate."; and
>
> (*b*) on page 121, by deleting subsection 13-7.(11).

Mr. Chairman, my amendment is highly nuanced. If we look at proposed rule 13-1, it reverses the order of the two statements to the original as it was in rule 43(1), if we happen to have a copy of that before us. My concerns arise out of the fact that every time we have rule changes or amendments, the system seems to be that they become increasingly restrictive, reducing every time the powers and privileges of the senators. I thought that proposed rule 13-1 is the flagship statement, which should lead on setting the stage for the consideration of privileges.

If honourable senators look at it carefully, they will see that I am applying to rule 13-1 the notion that Senate privileges have their origins in the Constitution Act, 1867. I am putting that back in. I really do not understand why the proposed changes took it out at all. That is number one.

Number two, if honourable senators look at the proposed rule 13-1, they will also see it says:

> The preservation of the privileges of the Senate is the duty of every senator and has priority over every other matter before the Senate.

My amendment will clarify that the priority is the action. Originally, the statement was action to ensure protection of the privileges of the Senate takes priority. I hope I can make it clear. I am reading directly from the old rule 43:

> Action to ensure such protection takes priority over every other matter before the Senate.

That is quite different from the report's 13-1 saying that:

> The preservation of the privileges has priority over every other matter before the Senate.

Action can only be taken directly by particular ways in the Senate, for example, by distinct motions. The two proposals sound the same and they sound very similar, but they are really quite different and remarkable.

The third very nuanced difference that would escape most eyes is, again, the statement of violation of the privileges of any senator. Proposed rule 13-1 says "affects all senators." That is incorrect. It does not matter if it affects a senator. It affects the privileges of the Senate. Honourable senators must understand that. My amendment will say "a violation of the privileges of any one Senator affects those of all Senators." It does not affect those senators; it affects those privileges of all the senators. These are three profound differences in these two drafts. I would ask senators to give mine careful consideration.

Mr. Chairman, I come back again to the example of the day of the Throne Speech, when we all watched with some consternation the events that were unfolding. I want to make the point again that this is the High Court of Parliament. The issue at the end of the day is the ability of the High Court of Parliament to defend itself or to defend any of its members. Really, it is all about the independence of the Senate.

We must understand that a movement into questions of privilege engages the plenitude of the full penal and judicial powers of the Senate. This power to defend itself is a contempt power held by every high court and it should never be weakened as it has consistently been weakened here.

The priority, honourable senators, is the key issue. Beauchesne and many others have said that it seems that the first duty of Parliament is to keep its privileges and no rule or standing order should restrain its conduct when it must vindicate its authority, especially in suddenly or recently arisen circumstances.

Mr. Chairman, I would like to put some authority for priority on the record. I would like to begin with some of our books of authorities. All our books of authorities have always informed that urgent, recently or suddenly arising questions of privilege may be moved — that is by motion, honourable senators — in both houses by motions with no notice and take precedence over all business.

John George Bourinot, in his 1916 fourth edition, *Parliamentary Procedure and Practice in the Dominion of Canada*, at page 292 said:

> Notice of the motion is required, except upon questions of privilege. . . .

At page 302 he said:

> Questions of privilege may always be considered in either house without the notice necessary in the case of motions generally."

Like words are found again in Arthur Beauchesne's *Rules and Forms of the House of Commons in Canada*, 1927, at page 117:

> As a general rule every motion proposed in the House requires notice unless it is of a formal or uncontentious character, or raises a question of privilege.

Mr. Chairman, this assertion in rule 13-1 is critical and urgent, especially when one considers that last week this Senate agreed — and it will come before us for a vote later on today — that rule 59(10) be withdrawn and repealed because that was the classical motion that was used at all times. As a matter of fact, I shall argue later on today that its repeal was an enormous mistake. The real point is that priority means exactly that: urgently and suddenly.

My final authority in that region, two of them, Erskine May, in his *A Treatise on the Law, Privileges, Proceedings and Uses of Parliament*, in 1883, ninth edition, page 291, said:

> It has been said that a question of privilege is, properly, one not admitting of notice: but where the circumstances have been such as to enable the member to give notice, and the matter was, nevertheless, *bonâ fide* a question of privilege, precedence has still been conceded to it.

Another one from Bourinot again, but a different book, Bourinot's work, *A Canadian Manual on the Procedure at Meetings of Municipal Councils, Shareholders and Directors of Companies, Synods, Conventions, Societies and Public Bodies Generally,* states at page 40:

> A motion directly concerning the privileges of the house, which calls for its present interposition on a matter which has recently arisen, takes immediate precedence of all other business before the house, and is moved without notice.

Mr. Chairman, there is a second part to my amendment but I thought it was better to explain the first part first.

Part (b) of my amendment states:

> (*b*) on page 121, by deleting subsection 13-7.(11).

Mr. Chairman, this will delete the section that denies a question of privilege priority. Rule 13-1 declares that the preservation of privileges has priority over every other matter of the Senate. Immediately we find in 13-7(11) that the priority is altered. It states:

> If the Senate has to deal with an emergency debate or a question of privilege . . . it shall deal first with the emergency debate. . . .

Suddenly, the rule asserts that questions of privilege have no priority.

• (1630)

The Chair: You have used up your 10 minutes.

Senator Cools: That is fine, but proposed rule 13-7(11) essentially voids and disables the priority.

The Chair: Senator Cools, thank you.

We have a second amendment before us. It was moved by the Honourable Senator Cools, seconded by the Honourable Senator Moore:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13 —

Shall I dispense? I think senators have before them a copy of the amendment.

Are there further amendments to Chapters Thirteen and Fourteen?

Senator Cools: Mr. Chairman, I have another one.

The Chair: I remind honourable senators that we have one hour for Chapters Thirteen and Fourteen, and each senator is allowed a period of 10 minutes.

Senator Cools: Mr. Chairman, I move:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13, on page 121, by adding, after section 13-7, the following:
>
> "**13-8.** The Senate has no power, by any vote or declaration, to create new privileges that are not warranted under the *Constitution Act, 1867* and the known laws and customs of Parliament.".

Mr. Chairman, my amendment will add a new rule to state the well-established law that we cannot create any new privileges and that our Senate rules cannot amend the British North America Act, 1867, by any enlargement or diminution of our privileges.

Mr. Chairman, no Senate rule can increase or decrease the Senate's or any senator's privileges as these proposed Senate rules do. My amendment addresses the unwarranted expansion of the privileges and powers of the Senate Speaker not granted or contemplated by the BNA Act, which granted no overlordship of one senator over another and no privileges or powers to the Senate Speaker to determine another senator's privileges or their exercise. All senators are equal and share equal privileges. No senator has any more or less or different privileges from any other senator. The Rules Committee's explanatory statement boasts of this enlargement in the Senate Speaker's role. The proposed rules to revise the *Rules of Senate* in the explanatory statement tell us this:

> 2-1(1): The Speaker shall
>
> preside over the proceedings of the Senate;

That is new. I repeat that the committee tells us that this rule is new and acknowledges the primary function of the Speaker in guiding proceedings. The existing rules do not specify this fundamental rule.

Mr. Chairman, I ask honourable senators to consider the proposition — the fact — that the reason the current rules and no rules have ever specified this primacy is perhaps because there is no such primacy and because the BNA Act and the ancient *lex et consuetudo parliamenti* provide no power for Senate rules to do so. The Senate rules cannot exceed the BNA Act.

Mr. Chairman, I ask us to consider that what we are doing might be an exercise in Senate rules, doing forays into governance and rule making beyond the law. I caution senators that these excursions will lead to challenges in inferior courts, like the Supreme Court.

I would like to give very quickly some authority. Erskine May tells us in his 1893, 10th edition, at page 61, that:

> . . . although either house may expound the law of Parliament, and vindicate its own privileges, it is agreed that no new privilege can be created. In 1704, the Lords communicated a resolution to the Commons at a conference, "That neither house of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of Parliament;" which was assented to by the Commons.

I would like to put another authority on the record — the BNA Act. Last week, Senator Fraser noted that:

> The law clerk was involved when we were considering matters of actual law. . . . However, the *Rules of the Senate* are the *Rules of the Senate*. They are not statute law.

I disagree with that, and I will state why. The fact is that section 5 of the Parliament of Canada Act states very clearly the following:

> 5. The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

About all of this, Joseph Maingot, in his book *Parliamentary Privilege in Canada*, second edition, writes under the heading, "No new privilege may be created by either House," at page 20:

> Privileges are beyond the control of either the Crown or any single power other than the Parliament of Canada. Thus, no new privilege may be created by the House of Commons, by the Senate, or by the Crown, because a new "privilege" would be part of the general and public law of Canada, and only Parliament may enact such laws. Similarly, a privilege may not be diminished, prejudicially affected, or repealed save by express statutory enactment to that effect.

Mr. Chairman, the contemporary lawyer's position is articulated by Mr. Maingot:

> It will be seen that parliamentary privilege is part of the general and public law of Canada, and that the courts may judicially take notice of and interpret it as they would any other branch of the law.

Mr. Chairman, the purpose of my amendment is to enshrine this fact in our rules so as to keep top of mind that the limit of our privileges is exactly that, the Imperial statute, the BNA Act.

One of my concerns, as well, has been the upgrading of the privileges of the Senate Speaker in respect of ruling on questions of privilege. Under rule 43(1) and previously, the increase in the Speaker's duties was not any increase in his privileges or any decrease in the privileges of a senator. That proposed change was by virtue of section 18 of our current rules, order and decorum, and that was an increase granted by virtue of an increase in his natural duties, shared equally by every single senator, shared with all of us, owed to the maintenance of order and decorum in the house. It was not intended to be an increase in privileges because there is no privilege that permits or allows any senator to engage in disorder or indecorum. If we look at rule 18, we will see all the issues about the Speaker are recorded there. These new proposed rules have galloped into an uncharted area, by actually giving the Speaker greater privileges than other senators, and I would submit that that is the first time ever. We should look at that with some care.

Mr. Chairman, I will close with that. There is much more to say. These issues are very difficult and very complex. I am open to argument.

The Chair: We have another amendment to Chapter Thirteen. It was moved by Senator Cools, seconded by Senator Moore:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended in Appendix I —

Shall I dispense?

Some Hon. Senators: Dispense.

The Chair: I will dispense.

Are there other amendments to Chapters Thirteen or Fourteen?

• (1640)

Senator Cools: Mr. Chairman, I move:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13, on page 121, by adding, after section 13-7, the following:
>
> "**13-8.** In accordance with the duty of every Senator to preserve the privileges of the Senate and those of any one Senator, and notwithstanding anything in these Rules, every Senator, as of right and privilege, may move a motion for a question of privilege with no notice.".

I hope that was clear. I am trying to speak quickly. My natural tone does not lend itself to that.

Mr. Chairman, the Rules Committee claims that their new Chapter Thirteen on questions of privilege will integrate current rules 43 and 59(10). This is akin to breeding a horse and a donkey. The progeny is a parliamentary mule, a genetic non-starter. I shall show that the new Chapter Thirteen will be inoperable and unworkable without my amendment, which allows for a motion to be moved with no notice and is needed to move a motion if the Speaker finds, prima facie, under the new rule 13-7(1), the old rule 44(1) and (2).

Mr. Chairman, by necessity rule 59(10) has stood for well over 100 years as a considered judgment for use at times when a matter of privilege directly concerning the Senate has suddenly or recently arisen and requires urgent Senate action.

I will add some very quick history. A table officer appeared before the Rules Committee on March 20, 2007. He opined that there was conflict between the notice time in rules 43 and 59(10) because 43 required written notice and oral notice to raise a question of privilege and 59(10) required no notice. He opined that rule 59(10) reflected the pre-1991 rule 33, which rule 43 replaced, saying —

The Chair: If I may, please slow down a little bit for the benefit of the translators and reporters.

Senator Cools: I thank the Chair for that. It is difficult.

The table officer said:

> In that context, the Senate's current rule 59(10), which was then rule 46(10), was coherent with the other rules. However, changes to 59(10) that were required by the addition of the process under rule 43 were not made. Since the amendments to the rules in 1991 were quite wide-ranging, this was not the only case of an oversight.

Claiming that the 1991 rule changes neglected to delete the now rule 59(10), he said:

> In fact, it has no real force, no real substance behind it. It is an enumerated item that was overlooked in an editing process. . . .
>
> You do not need rule 59(10). . . .; y omitting it, you lose nothing.

A concerned Senator Andreychuk said:

> I do not know where you are drawing your authority from.

Offering her none, he simply repeated:

> There is no loss.

Mr. Chairman, I submit to you that the 1991 rule changes were no oversight or negligence, and no one on that committee was negligent or demonstrating oversight.

I thought this Rules Committee's claim of senators' oversight and negligence is bad parliamentary form and bad parliamentary manners. It is a reflection on the good senators who led the 1991 rule changes, especially Senators Robertson and Murray, and our own esteemed and dear Senator Kinsella, who moved rule 59(10) in Senator Robertson's committee, and older Progressive Conservative senators like Orville Phillips. I think we can change rules without unseemly reflections on senators' pasts. I will show that rule 59(10) was no oversight and was a deliberate decision.

I note that the committee and the table officer did not consider rule 44 at all. This is telling because the two rules 43 and 44 were spliced out of the one rule 33, which the witness noted was coherent with rule 59(10). I shall trace rule 33's pedigree and destiny to show that in 1991, rule 59(10) was upheld because of its necessity to rule 44. Let us go to rule 44. To use the witness's words, rule 59(10) would be "coherent with" rule 44.

I will read the old rule 33 and compare it to the new 43 and 44. Old rule 33 said:

> When a matter or question directly concerning the privileges of the Senate, of any committee thereof, or of any senator, has arisen, a motion calling upon the Senate to take action thereon may be moved without notice and, until decided, shall, unless the debate be adjourned, suspend the consideration of other motions and of the Orders of the Day.

All of those words, Mr. Chairman, were lifted right into the new rule 43 and new 44. This is an extremely important matter, and I have a whole list here of each set of words as they move from 33 into 43 and 44. The Rules Committee did not consider rule 44 at all.

If we go to rule 44, this is very important because the motion in rule 33 to be moved without notice shows up in rule 44. It is clear. Rule 44 follows a prima facie finding by our Speaker. Rule 44(2) says:

> Such a motion can be moved only immediately following the Speaker's decision . . .

Mr. Chairman, a motion moved immediately is a motion moved without notice — no notice — which is rule 59(10).

Mr. Chairman, I am saying very clearly that all of rule 33 became 43 and 44. Rule 44(2)'s "no notice" motion was supported by rule 59(10). Remember, in the pre-system, rules 33 and 59(10) existed together. Rule 59(10) represented an enumeration and classification, because in 1906, every single motion in the Senate was divided into three groups: those with no notice, those with two days' notice, and those with one day's notice. Rule 59(10) was in the no notice motions group.

Mr. Chairman, what we have been doing here is repealing 59(10), which is the power for that rule 44(2) motion, whereby a senator immediately following the Speaker's ruling, prima facie, may move a motion for a question of privilege.

Mr. Chairman, we have to understand that this took a high degree of ingenuity on the parts of Senator Robertson and others, and much thought. I used to discuss this a lot with Senator Phillips. The fact is that when they created that new prima facie process, they wanted to be sure that they were not encroaching on senators' privileges — that particular privilege of being able to move a motion directly. Therefore, they enlarged the power of the Speaker in respect of order and decorum, but not the power of individual senators, so that when the Speaker ruled on prima facie, that senator could then move his motion without notice.

There is great confusion and misunderstanding or whatever in this place about a question of privilege. I want to impress upon honourable senators that this is so important. Some months back, we left our Speaker exposed to many different kinds of liabilities because most of us no longer understand that each and every one of us had a duty at that moment to spring to our feet and move a motion because something was happening here and some sort of action was required.

Remember, speakers here and in the House of Commons can only act on orders of the house. The result was that we left our Speaker, a wonderful, exceptional human being, exposed to we do not know how many kinds of liabilities.

Mr. Chairman, I am trying to help honourable senators understand that Senator Brenda Robertson and some of those senators understood what was happening. Rule 59(10) has stayed intact as it is because if 59(10) did not stay in the rules, they would have had to attribute that grant of power to move that motion immediately after the prima facie finding to the permission of the Speaker. Therefore, by having rule 59(10) there, the power remains the privilege of the senator and not from the Speaker.

Right now, this chamber, either in this go-around or in some future court case, must wrestle with that fact.

• (1650)

I have shortened all my comments. I had this written out clearly. I have been condensing because the point is larger than myself, larger than me personally. This concerns all of us. I want you to know that I used to discuss this a lot with Senator Phillips because he served in this place when the old committee of privileges was the committee of the whole Senate.

Yes, those rules carried in 1991, but there were many knowledgeable Conservative senators at the time keeping some eagle eyes on this.

I am pleading with senators.

The Chair: Senator, your time has expired.

Senator Cools: I am sorry, senators, but I cannot be that articulate under these kinds of rushed conditions. These are important matters, and we are rushing these large matters.

The Chair: Is there further debate on Chapters Thirteen and Fourteen?

It was moved by Senator Cools, seconded by Senator Moore that:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13, on page 121 —

Shall I dispense?

Some Hon. Senators: Dispense.

The Chair: I dispense.

Senator Tardif: Honourable senators, I wanted to point out that in the amendment that I put forward I have taken into consideration the last amendment that Senator Cools presented to us regarding the rights of senators. The amendment that I proposed and that has been duly presented does indicate and preserve the rights of senators to raise questions of privilege without notice. That is already in the amendment that you have received before you under 13-6(2) as well as new 13-5(a).

I wanted as well to make a few points regarding Senator Cools' statements. I always appreciate what she says, particularly in regard to questions of privilege. However, in regard to her comment that it appears we are giving the Speaker greater privileges and a greater role, I have had the opportunity to look at the *Debates of the Senate* relating to the amendment that we have moved on questions of privilege.

A careful examination of the Senate Debates, even prior to 1991, shows that senators had a general expectation that the Speaker would have an important role to play when serious questions of privilege were raised. That was even the case under the old rule. I believe it was the old rule 33 and the old rule 46 which indicated an expectation that the Speaker would rule and establish a prima facie case of privilege.

Of course that came forward in the debates, particularly in the debates on the GST in 1990. On September 25, 1990, Deputy Government Leader Senator Bill Doody raised a question of privilege concerning what had occurred during a meeting of the Banking, Trade and Commerce Committee, which was examining the bill to introduce the GST. He did not move a motion but at the end of his remarks said:

> Honourable senators, I wish to say that, in the event that a prima facie case is made on a breach of privilege of honourable senators, I will be prepared to bring forward the appropriate motion at the appropriate time.

That can be found at page 2230 of the Senate Debates for that day.

Then Senator Royce Frith, the Deputy Leader of the Opposition, responded immediately, giving the reasons:

> . . . that clearly justify Your Honour in finding that there is no prima facie case of privilege here in the chamber on proceedings that took place in the committee.

That can be found on page 2231 of the Senate Debates of that day.

As debate dragged on, Senator Frith said, at page 2239:

> . . . Your Honour has a duty to decide when you have heard enough on this point of privilege to make up your mind as to whether a prima facie case is made.

Finally, at page 2246, Senator Allan J. MacEachen, the Leader of the Opposition, referred to procedure in both the House of Commons and the Senate and said:

> Usually the Speaker adjudicates as to whether there is a prima facie case. If it is found it that there is a prima facie case, it is open to the individual member or senator to put a motion. Ultimately the Senate or the House of Commons must decide whether, in fact, a breach of privilege has occurred. That is the procedure.

Not having the experience of Senator MacEachen, I am not prepared to question his assertion that "That is the procedure." However, in view of what was said by these distinguished parliamentarians more than 20 years ago, I think we can see that there was an expectation with regard to how questions of privilege have traditionally been dealt with in the Senate, particularly the view that the Speaker does have a role to play in a decision about whether a prima facie case has been made.

I would leave it at that and say that there has always been an expectation that the Speaker has a role to play. Even under our 59(10), there has always been the expectation that the Speaker would rule.

The Chair: I will recognize the following senators in this order: Honourable Senator Fraser, Honourable Senator Stratton and Honourable Senator Cools.

I remind you that at 5:11 p.m. I will put all the questions that are before us to dispose of Chapters Thirteen and Fourteen.

Senator Fraser: To take some of these matters in order, I seconded Senator Tardif's proposed amendment and I support it. I think that does restore, as many senators I believe wished, in very clear language, the right of the senator to raise a question of privilege without notice at any time after delayed answers and to have it considered at that time.

Senator Cools' first amendment on subsection (a) which refers to section 13-1 and discussion of the privileges of the Senate, I would submit that the existing proposal, section 13-1 in the proposed new version of the rules, covers all of the necessary elements. Her subsection (b) in that amendment, which would delete the last paragraph of Chapter Thirteen, has to do with the order in which matters are taken up. Our existing rules create potential collisions in that they say that various matters shall be

taken up at eight o'clock or at the end of Orders of the Day. They do not explicitly state which should come first, if there are occasions arising when more than one of these sorts of elements should be considered.

If you tease out the rules and the precedents and whatnot, you can come to the following conclusion, which is what the subcommittee and the committee did: First priority should go to a case of privilege. A case of privilege is what arises when the Speaker has found that there is a prima facie case.

Next, once you have disposed of the case of privilege, is an emergency debate because that is a reflection of a decision of the Senate taken that day, and, finally, a question of privilege, which is very important but is at that point still only the allegation of one senator. It is a very serious and important allegation, but it is neither a reflection of a decision of the Senate nor yet at the stage of being an established case of privilege.

I think it is unnecessary to say that the Senate has no power to create new privileges. I would draw to your attention the section of the Constitution Act that, according to the note I have here, says:

> The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada . . .

The Senate cannot alone pass an act of the Parliament of Canada, so I would submit that this proposed amendment adding a new section 13-8 is unnecessary.

Finally, the matter of moving a motion for a question of privilege with no notice is indeed a reference to very old practice, both in Westminster and here, where one would raise a question of privilege simultaneously with a motion. That has not been the practice here or in Westminster for many years. It is clearly established, and Canadian practice followed the shift in Westminster, that one can raise a question of privilege, but the Speaker must rule on it before it can go any further.

• (1700)

Erskine May Parliamentary Practice, Twenty-third edition, states in Chapter 10 at page 167:

> . . . a Member who wishes to raise a privilege complaint is required to give written notice to the Speaker as soon as reasonably practicable after the Member has notice of the alleged contempt or breach of privilege. The Speaker has discretion to decide whether or not the matter should have the precedence accorded to matters of privilege . . .

That is to say, whether there is a prima facie case.

Erskine May in Chapter 12 at page 221 states:

> The Speaker also decides whether a Member who has informed him of a matter of privilege should be allowed to table a motion which would take precedence over the orders of the day.

In other words, the Speaker has to decide the prima facie merits before a motion can take place.

Similarly, Maingot's *Parliamentary Privilege in Canada*, Second Edition, at page 220, states:

> In the U.K. Commons, the Speaker will not entertain a debate on the matter raised as a "question of privilege" unless and until he finds a prima facie case of privilege granting precedence in debate.

Finally, I would refer honourable senators to Beauchesne's *Parliamentary Rules & Forms*. Citation 117 at page 29 of the sixth edition states:

> (1) Once the claim of a breach of privilege has been made, it is the duty of the Speaker to decide if a *prima facie* case can be established.

I would submit that what we are proposing, in particular what Senator Tardif's motion proposes, is not as restrictive as the practice in Westminster but is a faithful reflection of long-established practice in this place. It was the mandate of the Rules Committee to try to do just that.

Senator Stratton: Two of Senator Cools' three amendments start with the preservation of the privileges of the Senate: "It is the duty of every senator . . ." I do not think there is anyone in this chamber who would disagree with that statement.

When we were looking at this, we tried to give it logical order. In other words, if we were going to deal with a case of privilege or a question of privilege, then it had to be dealt with in a logical order. We tried to preserve and give that logical order so that the question of privilege oral and the question of privilege written could be presented in the Order Paper so that we could deal with it without confusion. The current rules, as they are written, had that confusion. We wanted to clarify it and not demean or diminish the rights of any senator on a question of privilege. That was not the intent whatsoever and I do not think it is here at all.

Therefore, I argue that the amendments proposed by Senator Tardif are exactly as we originally intended when we looked at this and that we should pass these amendments from Senator Tardif.

Senator Cools: Mr. Chairman, most of the practice that Senator Fraser described is House of Commons' practice. The Senate, until 1991, remained a largely 19th century institution. I lived through those GST debates 24 hours a day, month after month, and a bitterness I hope never to encounter in my life again.

In respect of the then Senate Speaker about whom Senator Tardif is speaking, Liberals moved a motion of censure against that very same Speaker. Let us understand what we are talking about. The particular debate that she was speaking about, Liberals objected to very strongly. Had I thought that a Liberal Senate leader was going to raise that, I would have cited some of the debates. I have copious copies of debates, too, with Senator Frith and Senator Molgat heaping scorn and abuse on that whole situation.

Let us understand the process that Senator Fraser has described. Yes, it is highly restricted, but in the House of Commons they have the same rule such that a matter of privilege may be taken under consideration immediately. That rule has been in place in the House of Commons since pre-Confederation; but it has become highly restrictive and is something that we should not imitate.

The Senate never went down that road. During the GST debate, there was shouting and screaming; it was a terrible event. I have never felt in my life such fear as I did that night that people would hurt each other physically. That anger persisted for quite some time, even when Senator Robertson's rules were brought into this place. Liberals made a terrible mistake when they boycotted the Rules Committee on those rules.

I have a vivid memory of those events, which were aggravated after that big GST fight, when the then Liberal Prime Minister turned around and said that he would keep the GST and would not repeal it, as he said he would do.

Let us understand the very important point that if any senator moves a motion, then it should be under the power of that senator's privileges, and that is the point. The proposed rules reveal a terrible conundrum. The current rules say that once the Speaker has made a prima facie finding under rule 44(2), the senator raising the question of privilege may move a motion immediately. The new rules are classified as no notice, one day's notice and two days' notice; and that rule 44(2) motion is not reflected — that is the point I am trying to make, honourable senators. That is why rule 59(10) was upheld.

Every single motion has to be reflected in one of those three categories. When I examined those categories, I could not find that rule 44(2) motion in the new no notice motion group. One has to look through all of those rules. Is it then in a two-day notice or is it in a one-day notice? The motions group rule that could apply is the one day's notice group under any other substantive motion.

Any senator who employs that rule when a Speaker finds prima facie will find themselves challenged as to the authority by which they are moving that motion. It is unfair to put any Speaker in that position.

Mr. Chairman, that is what Senator Robertson did. She and her committee were very skilled. Remember, honourable senators, that I voted against some of those rules. In the context of a Senate Speaker's prima facie finding under rule 44, the committee was attentive that no one should ever accuse the Speaker of the Senate of granting permission to a senator for such a motion on questions of privilege. This is because no senator, no Speaker has any power over any other senator to grant permission to move this motion or any other motion. In that respect, we are all equal. The Senate rules have never provided for any superiority of privilege of one senator over another. Until now, the *Rules of the Senate* have given the Speaker additional duties; that is quite true. However, until now the Senate rules have never officially declared that the Senate Speaker has an overlordship over other senators.

• (1710)

I would like to remind honourable senators of a few facts of life. We have had in this place, for the last many years, a most judicious, most fair-minded, most unusual and most well-esteemed human being in the occupancy of that chair, but we need not think that that will be a perpetual and permanent condition. Rules should look to the future, when individuals in that position may not be as decent and as honourable as the current Speaker. Rules should always be looking to the future for the mischief.

The Robertson people spliced these two rules 43 and 44 out of rule 33. However, the power of senators to act with or without the Speaker is our privilege. What happens if the Speaker is hurt by some terrible event here? We could not ask prima facie of him. We would have to act on the power of our own privileges to take action.

What I am trying to say is that we have a duty to protect our Speaker.

The Chair: I have to make everyone aware that we have used up the first hour of the debate.

[*Translation*]

We have arrived at the time provided in the Order of the Senate to examine Chapters Thirteen and Fourteen. Consequently, I must interrupt the proceedings to put all questions necessary to dispose of these chapters successively, without further debate.

I will put the questions in the order that these amendments apply to the rules before us.

[*English*]

Honourable senators, we are now disposing of Chapter Thirteen. The Honourable Senator Cools has moved, seconded by the Honourable Senator Moore:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted but that it be amended, in Appendix I, chapter 13,
>
> (*a*) on page 115, by replacing section 13-1 with the following:
>
> "**13-1.** The preservation of the privileges of the Senate is the duty of every Senator. A violation of the privileges of any one Senator affects those of all Senators and the ability of the Senate to carry out its functions outlined in the *Constitution Act, 1867*. Action to ensure protection of the privileges of the Senate takes priority over every other matter before the Senate.;" and
>
> (*b*) on page 121, by deleting subsection 13-7(11).

Is it your pleasure, honourable senators, to adopt this amendment?

Some Hon. Senators: No.

Senator Cools: Yes.

The Chair: The amendment is negatived.

The second amendment that I bring to your attention is that it was moved by Senator Tardif, seconded by Senator Fraser:

> That chapter thirteen of the First Appendix of the report be not now adopted but that it be amended:

— by replacing paragraph (a) of 13-5, at page 117 of the Appendix (page 533 of the *Journals of the Senate*), with the following:

> "(a) raise it during the sitting without notice at any time, except during Routine Proceedings, Question Period or a vote, but otherwise generally following the provisions of this chapter; or";

[*Translation*]

(*b*) by replacing rule 13-6(1), at page 118 of the Appendix (page 534 of the *Journals of the Senate*), with the following:

"Consideration of question of privilege

13-6. (1) Except as otherwise provided, or unless the Senate adjourns earlier, questions of privilege of which written and oral notice was given shall be considered as soon as the Senate has completed Orders of the Day, but no later than either 8 p.m. the same day or noon on a Friday.

[*English*]

EXCEPTIONS

Rule 8-4(1): Adjournment motion for emergency debate

Rule 13-5(a): Question of privilege without notice

Rule 13-6(2): When question of privilege without notice considered

Rule 13-7(2): Debate on motion on case of privilege";

(*c*) by adding the following new rule 13-6(2), at page 118 of the Appendix (page 534 of the *Journals of the Senate*):

"When question of privilege without notice considered

13-6. (2) A question of privilege raised without notice shall be considered at the time it is raised, unless the Speaker at any time directs that further consideration be delayed until the time for considering questions of privilege of which written and oral notice was received. In this case, the delayed consideration shall be taken up before any questions of privilege of which notice was given."

(*d*) by renumbering current rules 13-6(2) to 13-6(4) as 13-6(3) to 13-6(5); and

(*e*) by updating any other cross-references in the report and its appendices, including the lists of exceptions, accordingly.

Is it your pleasure, honourable senators, to adopt this amendment?

Some Hon. Senators: Yes.

Senator Cools: I abstain.

The Chair: The amendment is carried, with one abstention.

The next amendment before us is that it was moved by Senator Cools, seconded by Senator Moore:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13, on page 121, by adding, after section 13-7, the following:
>
> "**13-8.** The Senate has no power, by any vote or declaration, to create new privileges that are not warranted under the *Constitution Act, 1867* and the known laws and customs of Parliament."

Honourable senators, is it your pleasure to adopt this amendment?

Some Hon. Senators: No.

Senator Cools: Yes.

The Chair: The amendment is negatived.

Honourable senators, the next amendment before us is moved by Senator Cools, seconded by Senator Moore:

> That the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament be not now adopted, but that it be amended, in Appendix I, chapter 13, on page 121, by adding, after section 13-7, the following:
>
> "**13-8.** In accordance with the duty of every Senator to preserve the privileges of the Senate and those of any one Senator, and notwithstanding anything in these Rules, every Senator, as of right and privilege, may move a motion for a question of privilege with no notice."

Honourable senators, is it your pleasure to adopt this amendment?

Some Hon. Senators: No.

Senator Cools: Yes.

The Chair: The amendment is negatived.

Honourable senators, shall Chapter Thirteen, as amended, carry?

Hon. Senators: Agreed.

Senator Cools: No.

The Chair: Carried.

Senator Cools: On division.

• (1720)

The Chair: On division.

Honourable senators, shall Chapter Fourteen carry?

Hon. Senators: Agreed.

The Chair: Carried.

[*Translation*]

Honourable senators, we will now begin the second portion of our meeting in order to consider Chapters Fifteen and Sixteen and the appendices.

I would ask senators who intend to propose amendments to any of these chapters or appendices to do so now, if they wish.

The final consideration of the recommendations will be suspended until we are disposing of the appropriate chapter.

[*English*]

After receiving the amendments, we will then proceed to debate the chapters and appendices. After having debated the chapters and appendices, we will deal with the motions necessary to dispose of them.

Honourable senators, are there any amendments to Chapters Fifteen and Sixteen?

Senator Stratton: These amendments are to bring current or up to date rules that were changed by the Rules Committee some time ago but unfortunately were not able to be incorporated into the rules revisions that had been made. This is more a housekeeping item because these amended rules were adopted by the Senate some time ago.

I will read through the amendments that are proposed and have been approved by this house. I think the point has to be made that these amendments had been approved by this house, but to incorporate them into the current rules and revisions. Once having done that and I have read the amendments, I will go through an explanation for each.

That chapter fifteen of the First Appendix of the report be not now adopted but that it be amended by:

(*a*) by adding the following new rule 15-3(4), at page 130 (page 546 of the *Journals of the Senate*):

"Suspension of Allowances

15-3. (4) Where a finding of guilt is made against a Senator who has been charged with a criminal offence that was prosecuted by indictment, the Standing Committee on Internal Economy, Budgets and Administration may order the withholding of the payable portion of the sessional allowance of the Senator in accordance with rule 15-3(1)(a) as if the Senator were suspended.";

(*b*) by replacing rule 15-4(1), at page 130 (page 546 of the *Journals of the Senate*), with the following:

"Notice of charge

15-4. (1) At the first opportunity after a Senator is charged with a criminal offence for which the Senator may be prosecuted by indictment, either:

(a) the Senator shall notify the Senate by a signed written notice that is delivered to the Clerk of the Senate, who shall table it; or

(b) the Speaker shall table such proof of the charge as the court may provide.";

(*c*) by replacing rule 15-4(2), at page 130 (page 546 of the *Journals of the Senate*), with the following:

"Leave of absence for accused Senator

15-4. (2) When notice is given under subsection (1), the Senator charged is granted a leave of absence from the time the notice is tabled and is considered to be on public business during this leave of absence.";

(*d*) by adding the following new rule 15-4(6), at page 131 (page 547 of the *Journals of the Senate*):

"Senate resources in case of leave of absence

15-4. (6) If a Senator is granted a leave of absence under subsection (2), the Standing Committee on Internal Economy, Budgets and Administration may, as it considers appropriate in the circumstances, suspend that Senator's right to the use of some or all of the Senate resources otherwise made available for the carrying out of the Senator's parliamentary functions, including funds, goods, services, premises, moving, transportation, travel and telecommunications expenses."; and

(*e*) by updating any cross-references in the report and its appendices, including the lists of exceptions, accordingly.

To refresh your memories, if I may, the Rules Committee struck a subcommittee, of which I was a member, to look at these changes as a result of a court case that took place with respect to a senator. It always seems to come down to, really, that what we are dealing with is abuse. The real reason for most of these rules is for that reason.

You will notice when I read 15-3(4), when a finding of guilt is made against a senator, that the Board of Internal Economy may order the withholding of the payable portion of the session allowance. That is a big word, "may," so I think that leaves it in the hands of the Internal Economy Committee, of which there are 15 members, to determine whether that is brought into effect or not.

The second is the 15-4(1): At the first opportunity after a senator is charged with a criminal offence for which the senator may be prosecuted, the senator shall notify the Senate by a signed written notice that is delivered to the Clerk of the Senate, who shall table it, or the Speaker shall table such proof of the charge as the court may provide.

That is an amendment that includes section (b) here that the Speaker shall table such proof of the charge should the senator not be able to do so for whatever reason.

The 15-4(2): When notice is given under subsection (1), the senator charged is granted a leave of absence from the time the notice is tabled and is considered to be on public business during this leave of absence. In other words, he or she cannot or does not attend the Senate sessions except for . . . and there are rules to that effect.

Last, 15-4(6): If a senator is granted a leave of absence under subsection (2), the Standing Committee on Internal Economy, Budgets and Administration may — and again, it is a big word, "may" — as it considers appropriate in the circumstances, suspend that senator's right to the use of some or all of the Senate resources. Again, there are reasons for that that are historic, and I think it depends on the situation. In both cases, with suspension of any of these allowances, it will lie with the Committee on Internal Economy to determine whether or not that occurs.

That is essentially the summary, as best as I can recall, of the history of these amendments.

The Chair: Honourable senators, it was moved by the Honourable Senator Stratton, seconded by the Honourable Senator Nolin, that Chapter Fifteen of the First Appendix of the report be not now adopted but that it be amended by — shall I dispense?

Hon. Senators: Dispense.

The Chair: All senators have a copy of the amendment, I take it.

Senator Cools: Honourable senators, if I have been following this correctly, the subject matter that has just been put before us is entirely new subject matter. My understanding is that we are operating under a particular order of reference. It is not clear from the order of reference what it was to study, but we are looking at the report of the Rules Committee. I would like to raise two questions.

• (1730)

My understanding is that we can only consider and study that which was referred to us in that order of reference. It is my clear understanding from what I am hearing and seeing that this proposal is outside and beyond our order of reference. It may be happy and nice that some people want to use this opportunity, but when I review the proposed Senate rules, all 174 pages of them — and a huge job it was — I could find no mention of this particular set. I just do not understand how a totally new set of unrelated amendments can be put before us whose subject matter we were not able to study within the order of reference and in advance of these meetings.

I think something is very wrong here. The subject matter before this Committee of the Whole, the order of reference, is the second report of the Rules Committee and we cannot stray beyond that order of reference. If Senator Stratton wanted such a reference, he could have moved a motion when the report was outside of Committee of the Whole and before the Senate to ask for the extension. He cannot spring new subjects and new matters before this body.

This is what I mean, honourable senators, when I say that we are in the business of creating certain privileges for certain senators and not for others. I think the time is coming soon when we will have to deal with this and have some reckoning.

I would also like to inquire and include in my point of order that I have never in my life encountered a situation where the chair of a committee has been disinclined to sponsor and squire his own report through this house. My understanding is so different. I am trying to figure out why, for example, Senator Smith is not bringing forward these proposals rather than Senator Stratton. This is improper.

My understanding, honourable senators, is that this is not a subcommittee's question; this is a committee question. My understanding is that when a chair abandons his report, it used to be called a disavowal. When a minister abandons his bill, it is a signal to the whole house to ignore it, and they call that disavowal or disownership.

I do not understand what is going on here, and we need some clarification. From where I sit, what is happening before us right now is quite out of order. It is not proper, and we should all take a moment to look at this within the body of the report that some of us spent months studying. It is pretty complicated and I do not mean to lay a burden on honourable senators, but this, to me, is out of order.

The Chair: Further comment on the point of order?

Senator Fraser: Just to confirm what Senator Stratton said in his explanatory remarks, this motion in amendment sets out rules that have in fact already been adopted by the Senate. I do not have the precise date in front of me; I think it was last fall. I am sure the table can provide the date if any senator wishes to have it.

In other words, what honourable senators see before them are rules that are now part of our existing rules. Clearly, the subcommittee was aware — because the original proposal came from the Rules Committee — that these rules were under consideration, but at the time that we did our draft report and when the Rules Committee was considering it, those rules had not yet been adopted by the Senate. Therefore, it was our view that it would be appropriate to wait until these rules about suspension had actually been adopted by the Senate before we put them into the draft report for a rewritten version of the rules.

I hope this is even partly clear. The main point is that they have in fact already been considered by and adopted by the Senate. Therefore, to put this amendment in force into the report now before us would simply be to complete, if you will, the original mandate of the subcommittee, which was vetted by the Rules Committee, that the proposed new version of the rules reflect the existing rules.

If we did not make this amendment, then the proposed new version of the rules would not in fact reflect all of the existing rules.

Senator Di Nino: Honourable senators, I think Senator Fraser has pretty well expressed what I was going to say. If I understood Senator Stratton correctly, I think the key words are that these are already part of the existing rules. We are not changing the rules; we are including them in the package that we are approving today.

We are not talking about changing the rules. They exist, but they exist, in effect, without having been incorporated in the rule book, if you wish. It makes sense that, as we are redoing the rules, these rules that have been approved by the Senate and exist as Senate rules be incorporated in the package called "the Rules of the Senate." I think that the point of order is not valid.

[*Translation*]

Senator Nolin: Mr. Chair, if you refer to the actual text of the order of reference, it concerns the existing *Rules of the Senate*. The existing Rules definitely include the consolidation of the *Rules of the Senate*, but also all Rules that are currently in effect. Therefore, the Rules currently in effect include the texts that were proposed through Senator Stratton's amendment. Accordingly, this is part of the existing *Rules of the Senate*.

[*English*]

Senator Cools: Mr. Chairman, I would like to take issue with the representations of the last speakers. If we were to abide by what they have said, any issue, any question, any matter to do with the rules that had already been adopted by the Senate, or any other matter as well — there is a word that means "on the bandwagon" here — could easily be brought here.

My understanding is that the only question, the matter before us, is our reference, which came here under the signature of the Chair, Senator David Smith, in particular this report, and the authors of the order of reference chose to include and referred the appendix.

Unless these matters are a part of those documents — and some of them are totally new rules — they are out of order. This Committee of the Whole is not a place for a convenient sort of one-stop shop for everything. If that were possible, every senator here could bring their little bundles as well. There is an order of reference before us and I think we have a duty to be loyal to it. I just do not like this kind of piggyback action.

One of the last interveners spoke about including this bundle in the package, so they admit that there is a different package from what we are considering here. They also spoke about including its inclusion. These are afterthoughts, and this is not in order.

In this place, some senators have better privileges and more privileges than others, and I am placing my objection strongly on the record, because this entire proceeding has been conducted as though it is a government issue, with everyone lined up between the two leaders. That is how it has been conducted, and I have problems with that. I think it is unhealthy for this system, and it is unhealthy for the Senate.

• (1740)

I would also tell you it is not senatorial because the characteristics of the Senate and senators are supposed to include a high level of intellectual activity and a high level of political and personal —

An Hon. Senator: Oh, oh!

Senator Cools: I did not insult you. You insulted this place. You brought this on yourself.

An Hon. Senator: Oh, oh!

Senator Cools: Exactly. He is the one who does it; he always begins things that he cannot end. We can talk about it. I was a deputy chair with him and I know.

I am saying to the chair that it is out of order and all of their arguments point to the same thing: It is for their convenience that they want this, but this matter was not put before us in the order of reference and that is my reference point.

Senator Stratton: I want to bring to your attention that this report on the revisions, the rewriting of the rules, was tabled in the chamber on November 16, 2011, nearly seven months ago — seven months ago. You have to realize that between November 16 and the time that we are talking about now, the amendments we are talking about regarding those that I have just put forward were passed in the interim by the Rules Subcommittee, by the Rules Committee and by this chamber. We are simply incorporating those subsequent rule changes into this document — straight and simple.

The Chair: Honourable senators, when I look at the document that is before us, rule 15-2 in the document before us deals with leaves of absence and suspensions. Chapter Fifteen then deals with sessional allowance, and then it deals with the time that a leave of absence should remain in force.

In my view, this is not a completely new matter that is brought before the Senate. This amendment applies to Chapter Fifteen and I would rule that this amendment is in order.

Are there further amendments? Is there further debate?

Some Hon. Senators: Question.

The Chair: Before I put this motion, are there other amendments? Seeing none, I will put the question. It was moved by the Honourable Senator Stratton, seconded by the Honourable Senator Nolin:

> That chapter fifteen of the First Appendix of the report be not now adopted but that it be amended by —

Shall I dispense?

Some Hon. Senators: Dispense.

The Chair: Is it your pleasure, honourable senators, to adopt this amendment?

Some Hon. Senators: Agreed.

Senator Cools: Abstention.

The Chair: Carried, with one abstention.

In this hour, we have before us Chapters Fifteen and Sixteen and the four appendices. I want everyone to be clear on that.

Is there any debate on the subject matter that is now before us? If not, I will call the question on all of these chapters and the appendices.

Some Hon. Senators: Question.

The Chair: Seeing no senators rising to debate, shall Chapter Fifteen, as amended, carry?

Some Hon. Senators: Agreed.

Senator Cools: Abstention.

The Chair: Adopted.

Shall Chapter Sixteen carry?

Some Hon. Senators: Agreed.

The Chair: Carried.

Honourable senators, we are now disposing of the appendices. Shall Appendix I of the First Appendix of the report carry?

Some Hon. Senators: Agreed.

Senator Cools: No.

The Chair: Shall Appendix II of the First Appendix of the report carry?

Some Hon. Senators: Agreed.

The Chair: Carried.

Shall Appendix III of the First Appendix of the report carry?

Some Hon. Senators: Agreed.

The Chair: Carried.

[*Translation*]

The Chair: Shall Appendix IV of the First Appendix carry?

Hon. Senators: Agreed.

The Chair: Carried.

[*English*]

Honourable senators, we are now starting the final portion of the meeting to consider the committee's recommendations.

[*Translation*]

I was going a little too fast, honourable senators. It has been brought to my attention that I should have presented the motion.

[*English*]

Honourable senators, we have completed our review of the First Appendix of the report. Is it agreed that the First Appendix, as amended, carry?

Some Hon. Senators: Agreed.

Senator Cools: On division.

Senator Joyal: I have in my notes that Appendix IV has not been put to a vote. It is entitled "Procedure for Dealing with Unauthorized Disclosure of Confidential Committee Reports and Other Documents or Proceedings." It has not been put to a vote by the chair. Has it been included in other appendices? I do not see that as part of a report.

[*Translation*]

The Chair: Senator Joyal, I am told that it is Appendix IV.

Senator Joyal: It became Appendix IV, I see.

The Chair: Senator Fraser?

Senator Fraser: That was it.

The Chair: With your permission, we will simply ensure that we are on the right track.

Honourable senators, the experts are telling me that we can now move on.

[*English*]

Honourable senators, we have completed our review of the First Appendix of the report. Is it agreed that the First Appendix, as amended, carry?

Some Hon. Senators: Agreed.

Senator Cools: On division.

The Chair: Carried, on division.

[*Translation*]

I will now get back to where I was earlier. Honourable senators, we are now starting the final portion of the meeting to consider the committee's recommendations to the Senate on whether the first report of the Standing Committee on Rules, Procedures and the Rights of Parliament should be adopted or not with amendment.

Are there amendments to parts of the report that the committee has not already discussed?

• (1750)

As this has been our practice, we can receive them and then have a general debate before the questions are put to a vote.

[*English*]

Senator Stratton: I will simply read the amendment, and then I have an explanation:

> That the report be not now adopted but that it be amended by replacing its first recommendation, at page 412 of the *Journals of the Senate,* with the following:
>
> "1. That the existing *Rules of the Senate* be replaced by the revised *Rules of the Senate* contained in the First Appendix to this report, including the associated appendices to the Rules, effective from September 17, 2012;".

That is an update from September 1. I think it is simply an administrative procedure to allow them a little more time to adapt to the revised rules.

[*Translation*]

The Chair: Copies of this amendment have now been distributed.

It was moved by Senator Stratton, seconded by Senator Nolin:

> That the report be not now adopted, but that it be amended by replacing the first recommendation, on page 412 of the *Journals of the Senate,* with the following:
>
> "1. That the existing *Rules of the Senate* be replaced by the revised *Rules of the Senate* contained in the First Appendix to this report, including the associated appendices to the Rules, effective from September 17, 2012;".

[*English*]

Senator Di Nino: If I understand this correctly, we are really saying that the implementation date of these new rules, if this amendment is approved, will now be September 17 instead of September 1, to allow administration some further time to be able to achieve that. Is that correct, Senator Stratton?

Senator Stratton: Yes; that is correct. Going back to when the report was first filed on Wednesday, November 16, 2011, we thought at that time September 1 was a decent deadline, not realizing that it would take seven months to get to this stage.

Senator D. Smith: I simply was waving earlier to second the motion from Senator Stratton.

Senator Cools: My reading of this is that it is not simply asking for the extension of the date of the implementation of the rules. This is a lot more than was in the original recommendation.

Perhaps, Mr. Chairman, we could have the original recommendation from the committee, because I am not sure that it is in order that the recommendation be altered here in this body. It is in order for any committee or for any body to ask for an extension, but I have never seen it done by virtue of amending a recommendation in the report.

It seems to me that this is a decision that belongs to the whole Senate with an independent motion explaining the circumstances, which are very fair and valid. One cannot go around amending the major recommendations of the committee report like that. Perhaps, Mr. Chairman, you could read to us what the original recommendation said. My understanding of the original recommendation is that it was far more limited than that. I have no objection in principle that staff and whoever being given the time to do their work, but this amendment is really outside the mandate. It is outside the mandate of this Committee of the Whole. It seems to me that, again, this is another case of another piggyback.

I would like to know what the original rules report recommendation was because some are asking this Committee of the Whole to amend their original Rules Committee recommendation, whose recommendation was not made here, but was made to the house. An alteration of that recommendation is a matter between the Rules Committee and the whole Senate, not a committee of the Senate. There is something very wrong in all of this. In other words, the report of the Rules Committee was a report to the house. Our mandate extends only to what we were asked to do. Any questions like these should come from the chair of the committee to the house — not the Committee of the Whole, but to the Senate. One cannot shortcut through this Committee of the Whole. They are doing the one-stop shopping deal. It is not right, Mr. Chairman; it is very wrong.

I would like to know what the original recommendation said.

Senator Brown: We have had a couple of hard-working people, one from the Conservative side and one from the Liberal side, who I think have laboured on this thing for all the years that I have been here, which is about five and a half years now. We trusted them to do what they did, and I think that is why most of us are going to agree with what they have done and be thankful for the efforts that they made.

The Chair: Pardon me, Senator Di Nino. My apologies; the eyes in the back of my head did not recognize you, Senator Brown. Please, if you have any interventions by motion, let the people at the table know.

Senator Di Nino: Senator Robichaud, those of us who have seen you operate in the Senate for as long as we have know that you have many talents, including seeing from behind. We appreciate your comment.

I do not think there is a point of order here. Again, I stand to be corrected, but to me this is a very simple extension of a date that had been suggested for implementation, and because of the length of time it took for the report to be completed — and I would certainly agree with Senator Brown that it is an excellent report done in a very effective manner by a hard-working committee — the change from September 1 to September 17 is a simple change. However, in the final analysis, this is a committee of the chamber. This will go before the chamber for ratification. Therefore, the chamber will have its say at a later date. I do not believe there is a point of order.

Senator Cools: Mr. Chairman, I have been able to put my hands on a copy of the original recommendation of the first report of the Rules Committee. It is remarkably different. The first report's recommendation articulated "That the existing *Rules of the Senate* be replaced by the revised *Rules of the Senate* contained in the First Appendix to this report, including the associated appendices to the Rules, effective from September 1, 2012.

• (1800)

There is nothing at all wrong with the Rules Committee seeking to extend the time. The "wrong" is in taking this route.

This Committee of the Whole, like the Rules Committee, reports to the house. This committee is about to make its report, and that Rules Committee, if it wants changes in its own report, particularly in its recommendations which were signed by its Chair David Smith, has to put that request to the Senate, not in this Committee of the Whole, but in the Senate in its full body of powers.

Honourable senators, we have a lot of "if certain people propose it, it is fine and dandy" and "if certain people do it, it flies." I have no interest in any of this, but I do have an interest in this institution. I think we have a duty to proceed according to established forms of proceeding and established custom.

The custom is that when a committee wants an extension of time for any one of its projects, it comes to the Senate. It does not go to another Senate committee. Therefore, just as the chair who signed the report would not go to the Social Affairs Committee or any other Senate committee it should not come to this Senate Committee of the Whole. The request for this extension should be properly placed by the chair to the Senate.

This is just a shortcut; the whole thing has been a series of shortcuts — 173 pages of rules.

I hear people complaining about seven months being a long time. Let me tell honourable senators that it is nothing. One can go back into the record and see rule changes taking place over years, for anyone who cares to read those records. Seven months is nothing in terms of a measure that touches as many issues as this and that is as comprehensive and as large as this.

The proper thing to be done is for Senator Smith, whose report it is — who signed it under his signature — to go to the house and ask the house to extend the date from September 1. That is the proper way to do it. If not, why cannot anyone else come in here and ask for shortcuts? Well, only some can. This is what one would call one-stop shopping — everything in one motion. It is unfair, improper and it is not worthy of us.

Senator Fraser: Mr. Chair, I do not believe this is a valid point of order. By my count, we have already amended the appendix to this report, which is part of the report, at least four times. For greater certainty, I would read into the record subparagraph (*g*) of the order of reference referring this report to this Committee of the Whole.

Subparagraph (*g*) states:

> after completing its consideration of the First Appendix of the report at the end of the third meeting —

— that is, today's meeting —

> — the committee shall consider its recommendation to the Senate as to whether or not the report should be adopted, with amendments if appropriate . . .

That is precisely what we are considering now. We have been authorized to consider amendments to the report. I think this is a reasonable amendment that the staff will probably need quite desperately.

[*Translation*]

Senator Nolin: Senator Fraser just brought up what I believe is the most important argument. I do not believe this is a valid point of order because there is an amendment before this committee related to a fundamental aspect of the report, namely, the implementation date of the Rules.

The Chair: Seeing no one else who wishes to speak, this amendment is properly before us, simply because the report in question states:

[*English*]

> 1. That the existing *Rules of the Senate* be replaced by the revised *Rules of the Senate* contained in the First Appendix to this report, including the associated appendices to the Rules, effective from September 1, 2012;

[*Translation*]

The only thing that the amendment before us states is that the Rules will be effective from September 17, 2012.

If there is no further debate, is it your pleasure, honourable senators, to accept the motion in amendment currently before us?

Hon. Senators: Agreed.

The Chair: Carried.

[*English*]

Senator Cools: On division.

The Chair: On division.

The Chair: Honourable senators, we are now proceeding to the last part of this whole exercise.

Is it agreed that the report be amended by updating any cross-references, including the list of exceptions, according to adopted amendments?

Hon. Senators: Agreed.

The Chair: Carried.

Senator Cools: On division.

The Chair: On division.

[*Translation*]

Honourable senators, in addition to the amendments passed today, I would like to remind you that we have already passed some amendments to the First Appendix to this report, which contains the revised Rules. The committee will not pass them again, but for the sake of clarity, I will remind you that the amendments passed during the past two committee meetings are as follows:

[*English*]

Changes were made to rule 2-5(3) respecting the length of bills for appealing a Speaker's ruling; second, the specific wording of the motion for strangers to withdraw in rule 2-13(1) was restored to its current form; third, rule 4-13(3), dealing with the reorganizing of government business, was modified; fourth, rule 9-6(2) was eliminated and rule 9-6(1) accordingly became rule 9-6.

[*Translation*]

Rule 12-4 was amended to clarify the role of the Selection Committee.

Permission was also granted to update the references and the list of exceptions accordingly.

[*English*]

We will proceed to the final question now. Shall the report, as amended, carry?

Some Hon. Senators: Agreed.

The Chair: Carried.

Senator Cools: On division.

The Chair: On division.

Honourable senators, pursuant to the order adopted on May 17, 2012, the result of the committee's work shall be reported to the Senate with the recommendation to adopt the first report of the Standing Committee on Rules, Procedures and the Rights of Parliament, along with the proposed amendments, as soon as convenient.

Senator Di Nino: Bravo.

Some Hon. Senators: Hear, hear.

[*Translation*]

The Hon. the Speaker: Honourable senators, the sitting of the Senate is resumed.

BUSINESS OF THE SENATE

ADJOURNMENT

Hon. Claude Carignan (Deputy Leader of the Government): Honourable senators, with leave of the Senate, I move the immediate adjournment of the Senate.

(The Senate adjourned until Wednesday, June 13, 2012, at 1:30 p.m.)

CONTENTS

Tuesday, June 12, 2012

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