

## **SPEAKER'S RULING**

### **POINT OF ORDER ON FIRST REPORT OF STANDING COMMITTEE ON RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT**

Honourable Senators, on March 27, 2012, the Senate resumed debate on the motion for the adoption of the First Report of the Standing Committee on Rules, Procedures and the Rights of Parliament, presented to the Senate on November 16, 2011. That report recommended that the *Rules of the Senate* be replaced with revised rules. The Honourable Senator Cools raised a point of order and Senators Carignan and Fraser provided further comments for the consideration of the chair.

The Honourable Senator Cools reminds us that the recommended rule changes “are the single largest, in quantum and volume, amount of rule changes ever put before this house.” Given this fact, I am grateful that the honourable senator has taken the time to study the procedural admissibility of the report. If it is procedurally defective, we should know now; if the objections fail, we will know that the report is procedurally solid.

In the judgment of Senator Cools, “These proposed rule changes are simply too numerous, too comprehensive and too complex for consideration in one proceeding, in one shot.” This is a normative comment on the senator’s part; the question for the chair is whether the point of order raised has identified a procedural objection to prevent consideration of the report. Three objections were offered.

The first objection is that the committee has exceeded its mandate as provided for in the Rules. The second objection is that the committee’s report imposes closure on Senate debate by ordering a date for the coming into force of the rules. The third and last objection is that the recommended rule changes are not in the report itself but in an appendix, which the senator characterizes as a separate document alien to the report.

I will deal with these three objections in their reverse order.

Senator Cool’s characterizes the third objection as “the most important, profound and far-reaching breach.” In the words of the senator:

“Simply put, we cannot debate the proposed rule changes because they are not part of or included in the report that the motion asks us to adopt.” [Debates, p. 1495]

“This report, by its form of proceeding, has placed the substantive matter, the

actual proposed rule changes, beyond the procedural ability of senators to consider, debate, amend and vote on the actual words, paragraph by paragraph, of the rule changes. It is therefore out of order.” [Debates, p. 1495]

“The appendix, by its nature, is not part of the report.” [Debates, p. 1501]

It is the chair’s opinion that if there is an objection to using appendices to reports in order to amend our internal governance documents, the committee could be forgiven for not being aware.

On March 31, 2004, the Standing Committee on Internal Economy, Budgets and Administration tabled its Sixth Report on the *Senate Administrative Rules*. Appendix “A” to the document set out a draft amendment to the *Rules of the Senate*, the adoption of which would be consequential to the adoption of the *Senate Administrative Rules*. The report was adopted on May 6, 2004 and the amendment to the *Rules of the Senate* was implemented.

Just recently, on March 29, 2012, the Standing Committee of Conflict of Interest for Senators presented its Third Report recommending amendments to the Conflict of Interest Code for Senators. That report attached a revised copy of the Code as an appendix to the report and recommended that the revised Code come into force on October 1, 2012.

Of course, the recent use of appendices is not conclusive as to whether the practice is procedurally acceptable. To put this in familiar terms, just because it has happened doesn’t mean it is right.

It seems to the chair that the relationship of an appendix to a main text is not fixed, but is a question of substance and of intention. Context and purpose inform the reader as to whether appendices are integral to a report or alien to it.

As Senator Cools pointed out to us, when members’ observations are appended to a committee report below the chair’s signature, the text is not considered to form part of the report in a procedural sense. On the other hand, presenting rule changes in the context in which they will serve, that is to say, inserted into the full body of rules, can assist the reader in appreciating their import. This is particularly so when the revised rules are presented with a table of concordance as is the case here. In the end, how best to present rule changes depends upon their nature and the circumstances and is a matter of judgment best exercised by the reporting body.

Finally, does the presence of the proposed rule changes in the appendix prevent debate on them or prevent motions to amend them? In debate on this point of order, an issue arose as to whether the appendix to the committee’s report was even properly

placed before the Senate for its consideration. The *Journals of the Senate* are the official record of the House. At page 407 of the Journals for November 16, 2011, it is recorded that the report of the committee presented to the Senate is printed as an appendix to the Journals at pages 412-615. Those pages include both the text of the report over the signature of the chair and the appendix containing the revised rules. The chair is therefore satisfied that the proposed revised rules are on the table, known to senators and available for debate and amendment.

The senator's second objection is that the committee, by recommending September 1, 2012, as the coming into force date for the new *Rules of the Senate*, has as a practical matter imposed closure on debate in the chamber. The logic of the argument is that if the new Rules are to come into force by September 1, they surely must be adopted before then. The chair does not agree. As a matter of procedure, debate on the motion to adopt the committee's report can proceed until it is adopted, until the motion falls off the Order Paper for lack of debate or until the end of the session. If debate continues past September 1, the Senate will then consider the impact on the motion of that change in circumstance, and what needs to be done about it. An amendment to the report could certainly be moved.

The chair will now address the senator's first, and what would appear to be the most important, objection, which is that the Rules, Procedures and the Rights of Parliament Committee has exceeded its mandate. The relevant portion of that mandate is set out in rule 86(1)(d)(i) of the Senate Rules, in their latest version as posted on our web site. It provides that the committee is empowered, on its own initiative, to propose from time to time amendments to the Rules for consideration by the Senate. As the senator notes, rule 86 is delegated authority and the committee, in carrying out its functions, must not exceed the authority delegated to it.

The senator seems to allow that a single report may recommend more than one rule change, but argues that a total repeal is not an amendment and that no amendment can negate the whole of that which it amends.

There is no question that this report touches on the core of the Senate's privileges. The right to organize its own internal affairs is a fundamental privilege. The *Rules of the Senate* have a history of precedents based on practice and rulings that enrich them with a considered understanding. Moreover, many of these rules are an historical legacy passed on to the Senate in various forms from the pre-Confederation Legislative Councils of Lower Canada and the Province of Canada. They are part of our parliamentary history and legislative patrimony handed down to us through generations of past members of our chamber.

The question to be resolved is whether or not the delegated authority under Rule 86 is sufficient to cover the enormity of what is proposed. Other reports from the Rules

Committee have altered multiple rules or added new ones. However, never before has the Senate been asked to contemplate a report that recommends the entire repeal of our existing Rules in order to substitute new rules as a package. Indeed, in the words of the First Report, the Rules Committee recommends, in part that “[T]he existing *Rules of the Senate* be replaced...”

It may be useful to review what the intentions of the committee were in presenting its First Report. The committee states “The major objective of the revision was to clarify the Rules, while avoiding significant changes in content. In a few cases changes were required in the interest of clarity or to reflect current practice.”

The committee also notes that “A new feature of the revised Rules is the use of constitutional and statutory references as well as lists of exceptions to any particular rule. For example, the deliberative vote of the Speaker is sanctioned by section 36 of the *Constitution Act, 1867* and this is referenced immediately after the rule. The general rule with respect to speaking times, proposed rule 6-3(1), is followed by a list of rules that stipulate any exceptions.”

The report before us then is quite sweeping in both content and in form. The committee maintains there is no significant change to the substance of the rules but that may only be determined through the course of time. There are as well new practices being codified, such as the time limit for the various bells which summon senators to recorded votes. There is a complete reordering and renumbering of the rules. Many explanatory notes have been added. There is also a new appendix regarding parliamentary terminology, including terms and definitions not previously sanctioned by the Senate. Many senators may be surprised by the extent of these proposed changes and what impact there may be on the procedural case law which has been established over many years from our existing rules. They may wonder if the report is much more than a house-keeping re-write of the Rules and whether it is too far-reaching and has exceeded the committee’s authority.

Honourable senators, one is mindful of the rights of senators to organize the business of the Senate, as well as the importance of not limiting the authority delegated to our committees under the Rules. By delegating to the Rules Committee a degree of autonomy to propose amendments to the Rules, we are, in effect, entrusting to them a custodial management function to ensure specific issues are clarified for the benefit of their colleagues. The chair is also mindful of the rights of senators to have a say in more comprehensive changes to how Senate business is conducted. While there is no question that senators are being asked to approve these proposed rules before they can come into force, it may well be that, for some, this is a step too late in the process.

In the case before us, a motion requesting a mandate to repeal the *Rules of the Senate* and replace them would have avoided placing senators in an awkward situation.

They are faced with a profound change to the way in which they are to codify how they govern the business of the Senate. On the other hand, there is the consideration of their Senate colleagues and the Senate staff, whose hard work and personal commitment to undertaking this review must also be recognized. Such a motion would also have been consistent with the interpretation of the authority delegated to the committee as being a custodial responsibility. In this instance, where the *Rules of the Senate* are not being amended but repealed and replaced with new language and new elements, such as 30 minute bells for non-debatable motions, the chair is concerned that the Rules Committee may have exceeded the mandate provided under Rule 86.

The finding is that there could be a procedural issue involved here. The chair is reluctant, however, to set aside the excellent work of the Rules Committee based on an arguable procedural point. The suggestion is that the matter could be resolved by having the First Report of the Rules Committee referred to a Committee of the Whole. The consideration of matters in Committee of the Whole is more flexible and appropriate to fully explore and debate these proposals that are before us than the restrictive nature of the formal debate in the Senate itself. This suggestion would serve the dual purpose of providing all honourable senators with an opportunity to clarify the purposes and principles behind the work of the report and express themselves on it before being asked to decide on the work itself. At the same time, it would prevent us from losing the significant body of work performed by our colleagues on the Rules Committee.

So, to be clear, the chair is making a strong recommendation that the matter be referred to a Committee of the Whole. If this recommendation is not acted upon, the matter remains on the Order Paper.