

## **SPEAKER'S RULING**

### **QUESTION OF PRIVILEGE**

**September 17, 2009**

Honourable senators,

At this time, I will address the question of privilege raised by Senator Wallin on Tuesday, June 16.

Let me begin by acknowledging what we all know – that the Senate is a special place. It is unique. The Senate is the only second chamber of any legislature in this country. Only here do the three constituent parts of Parliament — the Crown, the Senate, and the House of Commons — actually come together. The Senate has a particular role in our bicameral Parliament. It plays an essential role in the legislative process in Parliament, and also provides a different perspective from the other place in the consideration of public policy. We are all charged with the privilege, and the responsibility, of fulfilling the Senate's important functions in a way that reflects its proper honour and dignity. It is with this reality in mind that I approached this question of privilege.

The matters raised by Senator Wallin largely focussed on events relating to meetings of the Standing Senate Committee on National Security and Defence, of which she is deputy chair, that were held on June 10 and 15. Before addressing the particular issues, it may be noted at this point that her concerns included: ignoring processes established by Standing Committee on Internal Economy, Budgets and Administration for contracting, interrupting a vote to change committee membership, changing decisions contrary to the Rules, summarily dismissing a point of order, refusing to allow a vote when a ruling was appealed, failing to guarantee a minority presence at meetings of the Subcommittee on Agenda and Procedure, and rescheduling activities without previous consultations.

Senator Wallin felt she had been prevented from performing her responsibilities as deputy chair, and that other senators had been unable to participate freely in deciding the committee's business. As a result, Senator Wallin feared that the National Security and Defence Committee was "being rendered dysfunctional and may be setting a dangerous precedent for the Senate as a whole."

The chair of the committee, Senator Kenny, disagreed. He noted that the National Security and Defence Committee, Internal Economy, and the Senate itself had all approved a budget application providing for the hiring of the contractors. He rejected the claim that the full committee can be excluded from involvement in its own contracting decisions, asserting that "When the full committee is seized with an issue, that decision takes precedence over the subcommittee," since committees are "their own masters." He acknowledged that the committee had voted on the issue of contracts more than once, but that this had been done for greater certainty. Senator Kenny noted that committees normally function less formally than the Senate. Consequently, they sometimes change or adjust previous decisions, and he considered that this is what happened in relation to the dates for travel and the size of the Subcommittee on Agenda and Procedure, usually called the steering committee.

A number of other senators also participated in discussion. Senator Moore asked whether the question of privilege had been raised at the earliest opportunity. Senator Tkachuk, for his part, echoed the worry expressed by Senator Wallin about the failure to follow contracting processes set by Internal Economy. He also emphasized the importance of collaboration, consultation, and cooperation in developing committee work plans. Senator St. Germain, in turn, called “on all honourable senators to work towards a resolution.”

Senator Fraser suggested that it would be more appropriate to approach Internal Economy about the disagreement involving processes it has established. She reminded senators that steering committees of five members are not unprecedented, a point later repeated by Senator Banks, who also spoke to the general work practices in the National Security and Defence Committee, presenting them in a positive light. He suggested that a committee is, at least when it comes to the parent committee’s right to act in the stead of one of its subcommittees, “master of its own procedures.”

In her assessment, Senator Carstairs took the view that the National Security and Defence Committee “is highly dysfunctional.” As a consequence, the senator suggested that, “Rather than a matter of privilege, ... this should be the purview of the leadership of both sides to sit down and find a way in which this committee be made functional.” The point of the committee being dysfunctional was taken up again by Senator Lang when he expressed his concerns about these events.

I would like to thank all honourable senators who contributed to the discussion on this question of privilege. This has been a difficult matter. Nonetheless, since it has been brought to the Senate as a question of privilege, I am obliged as Speaker to examine whether a prima facie case has been established. This, in fact, puts me in the position of reviewing the activities of a committee. My colleague in the other place, Speaker Milliken, faced a similar difficulty during the last Parliament. Asked to intervene to restore proper order in a committee, he noted that it is not really the role of the Speaker to act *in loco parentis*. I agree with his observation. Such a demand is awkward for the Speaker and is not particularly desirable for the Senate. I think all honourable senators understand this.

Let me now turn to the specific issues raised in this case in light of the requirements of our Rules. While committees often operate informally, they remain bound by the *Rules of the Senate*. Committees cannot follow any procedure whatsoever that they set for themselves. The phrase *mutatis mutandis*, in the context of our practices, means that the Rules apply in committee, unless they contain an exemption or there is a clear reason why they cannot. While committees are often said to be “masters of their own proceedings,” this is only true insofar as they comply with the *Rules of the Senate*.

The first concern that was raised had to do with events surrounding the contracting of committee staff. Senator Wallin made it clear that, as deputy chair, she had sought to establish a dialogue with the chair. She received no response. Instead, motions on the contracts were moved in the committee without prior warning. It was alleged that by adopting these motions the National Security and Defence Committee ignored a directive of Internal Economy.

It is true that on March 12, 2009, Internal Economy decided that its steering committee would be authorized to deal with impasses about contracts and invoices whenever the chair and the deputy chair of the originating committee cannot agree and their steering committee is unable to resolve the issue. However, this decision was not submitted to the Senate for its approval. And this point is significant.

According to the *Senate Administrative Rules*, Internal Economy cannot deal with legislative or procedural matters, nor can it direct the proceedings of another committee without the express approval of the Senate. Consequently, the directive of March 12, being largely administrative in nature, is outside the range of matters over which the Speaker has direct responsibility.

Rule 96(4), on the other hand, does state that a subcommittee “shall report back to the committee.” As such, a parent committee always retains control over its subcommittees. This appears to have happened in this instance when the National Security and Defence Committee approved the contracts. All the same, given the confusion of this issue in terms of the boundaries of responsibility, it may merit further examination by the appropriate bodies.

Another point of contention that was raised relates to a change of committee membership at the June 10 meeting, while a vote was already underway, but before the result was announced. Rule 85(4) deals with the process for membership changes, with rule 85(5) requiring that the form be signed by the appropriate leader or a designate. In this case, a photocopied form signed by the Opposition Whip, who has been designated by the Leader of the Opposition, appears to have been used. A key element here is that this change was made while the committee was in the process of voting. While the Rules are silent on this very specific point, rule 66(4) does require that a senator must be within the bar of the Senate when the question is put in order to vote.

Applied to committee, this could be interpreted as requiring that a senator both be in the room and be a member when the question is put. This is supported by citation 818(2) of the sixth edition of *Beauchesne*, which states that “The doors of the committee room are deemed to be locked while a division is being taken, and the vote of a member not in the room when the question is put will be disallowed.” The events of June 10 do not seem to be fully in keeping with usual process. It is also true, however, that in accordance with rule 65(2) “In the absence of a request for a standing vote, the decision of the Speaker is final.” In this case, it seems that the motion was declared carried, and there was no request for a roll call vote. To avoid any possible uncertainty, the question was raised again at the June 15 meeting of the committee, with the motion again being adopted, this time with a recorded vote.

A third issue has to do with the rescission of a motion already carried. To address this point, several of our rules need to be taken into account. Rule 65(5), which substantively repeats section 36 of the *Constitution Act, 1867*, provides that “Questions arising in the Senate shall be decided by a majority of voices,” with the Speaker always having a vote. However, rules 63(2) and 58(2) require a two-thirds majority. Rule 63(2) deals with rescission and states that “An order, resolution, or other decision of the Senate may be rescinded on five days’ notice if at least two-thirds of the Senators present vote in favour of

its rescission.” An exception to this is contained in rule 77, which allows the reconsideration of any clause of a bill prior to third reading.

Normally, this regime for voting, and the exceptions to it, would apply to committees. Yet there is a separate, very specific, provision in the Rules stating that decisions in committee are taken by majority vote. Rule 96(1) stipulates that “A question before a select committee shall be decided by majority vote including the vote of the chairman. When the votes are equal, the decision shall be deemed to be in the negative.”

Furthermore, actual rescission motions are infrequent, and it may also be helpful to consider when exactly they might be needed. *Odgers’ Australian Senate Practice*, at page 181 of the 12<sup>th</sup> edition, explains that

A rescission properly so called has the retrospective effect of annulling or quashing a decision from the time that decision was made as if it had never been made. Rescission motions are therefore rare: it is seldom the intention to achieve that effect.

Thus the issue of when rescission is necessary and how it is done, in the Chamber and in committee, are issues that could benefit from consideration by the Standing Committee on Rules, Procedures and the Rights of Parliament.

A fourth issue related to the process to be followed with respect to decisions of the chair in the committee. Rule 18(2) requires “reasons for the decision together with references to the rule or other written authority applicable to the case.” It is the primary function of a committee chair, like the Speaker here in the Senate, to maintain order and decorum. This is accomplished, in large part, through a neutral and unbiased application of the *Rules of the Senate*. Points of order should be treated seriously and not dismissed lightly. Like the Speaker, the chair of a committee should avoid any appearance or suggestion of arbitrary action. Instead, he or she is bound by the rules that the Senate has itself established, a requirement explicitly reinforced by rule 96(7).

On at least one occasion, on June 15, both the transcripts and the video record of the meeting show that a member sought to appeal a decision. This appeal was not allowed, although rule 18(4) provides that virtually all rulings are subject to immediate appeal. Even recognizing the somewhat confused nature of proceedings, with a number of senators seeking to speak, not accepting an appeal would be a departure from the customary way of proceeding.

Some other points raised related to the apparent failure to guarantee minority representation on the steering committee and the lack of substantive consultation before proposing that planned committee activities be rescheduled. When committees function normally, and matters are addressed through respectful and collaborative dialogue among

senators, these issues tend not to give rise to complaints. While the Rules limit a subcommittee to not more than half the membership of the main committee and set a quorum of three, they are silent on mandatory consultations and obligatory minority representation. That such basic issues have become concerns may be a reflection of the dysfunction mentioned by senators from both sides.

Honourable senators, the issues raised are serious, and I want to thank all again who participated in the debate.

Mindful of the mutual interests of all parties concerned, I took the initiative to meet with the Leaders and Deputy Leaders of both the Government and the Opposition, together with the respective whips, to explore what remedies might be available to reduce tensions and restore the cooperation that is essential to the proper operations of any committee. Given the status that the leaders have as *ex officio* members of committees, I believe that they are particularly well placed to help resolve the problems raised.

Honourable senators, this matter was specifically raised as a question of privilege. Accordingly, the Speaker must determine whether a *prima facie* case of privilege can be established based on the criteria stipulated in rule 43(1).

With respect to the first criterion, the earliest opportunity, the concerns relate to issues that have been developing for some time. However, it seems clear that the meeting of June 15 was an important trigger. From this perspective, I am satisfied that the question was raised at the earliest opportunity.

As to the second and fourth criteria, that the matter directly concern a privilege and that it be raised to correct a grave and serious breach, I believe the matters raised by Senator Wallin are in essence issues of order and administration, not privilege. At this stage, it is more appropriate to leave it to the committee itself to resolve these matters. Our tradition is that committees are masters of their own procedures, so long as they act within the bounds of the rules established by the Senate.

With respect to the third criterion, that the question of privilege “be raised to seek a genuine remedy ... for which no other parliamentary process is reasonably available,” it is true that Senator Wallin has stated her willingness to move an appropriate motion. There are, however, motions which might well have been proposed to address some of the serious issues that have been raised, including one to direct how the committee is to operate or one to guide the conduct of a particular member.

In light of all of the foregoing, it is my finding that a strict application of the criteria established in the *Rules of the Senate* to evaluate the possible *prima facie* merits of this question of privilege leads to the conclusion that none exists. However, there is evidence of a lack of order and decorum that is required by these same Rules. All appropriate means available to honourable senators themselves should be used to rectify this matter.