SPEAKER'S RULING

QUESTION OF PRIVILEGE—
EVENTS BEFORE INTRODUCTION OF BILL S-7

Honourable Senators,

At the end of Orders of the Day on June 2, the Deputy Leader of the Opposition, Senator Tardif, rose on a question of privilege related to Bill S-7, *An Act to amend the Constitution Act, 1867 (Senate Term Limits).* She explained that on May 27, the Minister of State (Democratic Reform) issued a media advisory regarding the bill, which had not yet been introduced in the Senate. The next morning there was an announcement about the bill, and the Minister issued a release providing some information about its contents. All of this occurred before the bill was introduced in the Senate. According to Senator Tardif the media thus had access to details about the bill's provisions in advance of it coming before the Senate.

Senator Tardif explained that these events appeared to run counter to government policy as described in the *Guide to Making Federal Acts and Regulations*. As far as she knew, no briefing had been offered to senators, at least to those in the opposition, although the guide suggests that briefings should be available to both sides if one is provided to the media before introduction. As she saw it, a press conference had taken "precedence over our rights as parliamentarians to be the first to examine and learn of the details of legislation introduced into Parliament." She went on to argue that "If the contents of the bill were disclosed in private meetings to some of us but not to others before it was formally introduced into Parliament, the contempt against this chamber was compounded."

The Deputy Leader of the Government, Senator Comeau, was of a different opinion. He noted that Bill S-7 does not contain significant new proposals. In fact, the bill is similar to ones introduced in previous sessions. The government's policy of seeking to limit senators' terms has been common knowledge for some time, and the possibility of legislation formally restricting the terms of certain sitting senators has also been widely discussed.

Senator Fraser then noted two cases of possible relevance from the other place, both from 2001. In particular, the 14th report of the Procedure and House Affairs Committee, from March of that year, took the position that the House should have pre-eminence in legislative matters, with "the right … to be informed first." The report took the position that providing information to the media before introduction, but not to members, "impedes, obstructs, and disadvantages Members of Parliament in carrying out their parliamentary functions."

Honourable Senators, the Speaker's role at this preliminary stage is to examine whether there is a *prima facie* question of privilege. Rule 43(1) outlines certain tests that the Speaker is obliged to consider. The matter "must, *inter alia*,

(a) be raised at the earliest opportunity;
(b) be a matter directly concerning the privileges of the Senate, of any committee thereof, or any Senator;
(c) be raised to seek a genuine remedy, which is in the Senate's power to provide, and for which no other parliamentary process is reasonably available; and
(d) be raised to correct a grave and serious breach."

Senator Tardif obviously raised her concern at the earliest opportunity. Bill S-7 was only introduced in the Senate on May 28, and she had to verify to what extent the previously released material actually covered the contents of the bill. She has also indicated that she is prepared to move a motion, should a *prima facie* question of privilege be established, thereby satisfying the third criterion.

The second and the fourth criteria can perhaps be best considered together. The fundamental concern appears to be that the events preceding the introduction of Bill S-7 constituted a form of contempt, tending to undermine or weaken respect for the Senate as a legislative body. Marleau and Montpetit, at page 52, defines contempt as "Any conduct which offends the authority or dignity of the House, even though no breach of any specific privilege may have been committed … Contempt may be an act or an omission; it does not have to actually obstruct or impede the House or a [senator], it merely has to have the tendency to produce such results."

In this case, however, nothing actually obstructed the Senate in its work, nor did the actions preceding the bill's introduction tend to produce that result. The media advisory and the release did not impair or minimize the role of the Senate. To be clear, senators will be able to debate Bill S-7 fully. They will be able to study the bill extensively in committee. They will be able to propose and debate amendments. This Chamber will be able to accept or reject the bill. Nothing in the media advisory or press release in any way affected these basic rights and functions of the Senate. This House remains entirely unfettered when it comes to dealing with Bill S-7.

When considering this question of privilege, the distinction between the pre-parliamentary and the parliamentary stages of a bill must be taken into account. It is only after an individual senator actually introduces a bill, whether on behalf of the government or not, and it has been read a first time and ordered printed, that the Senate has formal knowledge of the proposal. Until introduction, the bill has no parliamentary existence; it belongs to the sponsor, whether the government or an individual senator, who can choose to do with it as he or she wishes.

An intention to introduce legislation can be indicated in different ways. The Speech from the Throne, for example, is used for this purpose. Both the government and individual parliamentarians frequently engage in widespread consultations before bringing bills to Parliament. This is sometimes preceded by news conferences or press releases. These practices are in keeping with the principles of openness and freedom of expression that are important to our society. This Chamber must be most prudent before seeking to curtail or impede this useful, indeed essential, range of pre-parliamentary activities.

It is true that the 14th report of the Procedure and House Affairs Committee, mentioned by Senator Fraser, notes that in the Commons an issue of contempt may sometimes arise if the content of a bill is revealed. But we must be clear that this possibility only arises after formal notice has been given to the Commons that the bill will be introduced. This notice marks the point at which the bill takes on a parliamentary existence. Prior to this notice, the report recognizes that there can be consultations and discussion on the possible bill's contents.

Honourable Senators, in the Senate, however, the point at which a bill begins its parliamentary existence is different. Unlike the Commons, we have no requirement for notice before first reading, so at no time do we have cognisance of a bill prior to first reading. Here, a bill is simply introduced at the appropriate time in routine proceedings, without notice. The Senate has not chosen to establish an intermediate phase during which we have been informed of the bill's existence but do not have access to its contents. An attempt by the Senate to control activities related to a possible bill, as yet unintroduced, would involve us trying to determine what can happen during the pre-parliamentary stages of a bill, claiming the power to determine who can talk to whom about what and in which circumstances.

It may be helpful, Honourable Senators, to consider the situation in some other jurisdictions when it comes to abusive contempts, that is to say words or actions disrespectful of a House of Parliament. The 1999 report of the Joint Committee on Parliamentary Privilege in the United Kingdom stated, at paragraph 269, that:

> In practice the Lords have long ceased to take any notice of an abusive contempt, and the Commons decision in 1978 to require evidence of substantial interference before treating a matter as a contempt has considerably reduced its scope. It may be noted that the Australian joint committee in 1984 considered claims of contempt in this area should be abandoned, and sections 4 and 6 of the Parliamentary Privileges Act 1987 (Australia) effectively abolished abusive contempt.

These jurisdictions are, therefore, not overly concerned about abusive contempt. For these Houses to take note of such complaints, some significant interference in parliamentary work must be demonstrated.

It is also interesting to note that in Australia the government may decide to publish a draft bill and explanatory memorandum prior to the introduction of legislation in Parliament.

Of course, none of the above affects the situation when it comes to committee reports. As entities created by the Senate, whose work is authorized by this body, committees can only report to the Senate itself. This is not the case where bills originating in the Senate, either from the government or individual senators, are concerned. To repeat, until a bill is introduced, the Senate has no cognisance of it. Once introduced here, the bill is public.

Some senators may have objected to the way in which information was revealed prior to the introduction of Bill S-7. It must also be recognized that these events do not appear to be in keeping with the government's own guidelines. Those are, however, the government's guidelines, not Parliament's. In my judgment, neither the second nor fourth criterion of rule 43(1) has been met. There was no substantial interference in the work of the Senate or with

its position as a House of Parliament. The ruling is, therefore, that a *prima facie* question of privilege has not been established.