SPEAKER'S RULING
QUESTION OF PRIVILEGE
March 31, 2009

Honourable senators,

On Thursday, March 26, before Orders of the Day, the Leader of the Opposition in the Senate, Senator Cowan, rose, exceptionally invoking rule 59(10) to bring a possible question of privilege to the Senate's attention. At the end of his remarks he asked the Speaker to determine whether there was a prima facie question of privilege, indicating that he was prepared to move that the matter be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament.

Senator Cowan's complaint related to a government website, entitled "Canada's Economic Action Plan," at www.actionplan.gc.ca. Under the heading "The Rollout," there was the following statement, referring to Bill C-10, the Budget Implementation Act:

> While the House of Commons has passed this legislation, the Senate must still approve the Act for it to become law. Senators must do their part and ensure quick passage of this vital legislation.

As honourable senators know, the bill had actually passed the Senate and received Royal Assent on March 12, two weeks before Senator Cowan raised his question of privilege. As the record will show, all honourable senators present facilitated passage, granting leave for third reading to take place on the same day the committee reported that bill.

The Leader of the Opposition argued that, because of the lengthy time this inaccurate information had remained on the website, it amounted to "erroneous and incorrect statements," which the senator characterized as "purposely untrue and improper." He referred to a ruling from 1980 in the other place and suggested that this could amount to deceit, conveying a false message about the Senate and its work. He argued that this misrepresentation impaired all senators' ability to perform their duties on behalf of Canadians.

Senator Cowan indicated that he was using rule 59(10), which allows a question of privilege to be raised without notice, rather than the normal process under rule 43, because of exceptional circumstances, particular to this case. The content of the website had only come to his attention the previous evening, when it was mentioned in the news. As he and Senator Tardif explained, if the matter had been corrected before the sitting, the question of privilege might not have been raised at all. An argument was made that the notice requirements under rule 43 could not, therefore, be met, since it was not clear the question of privilege would actually be pursued.

The Deputy Leader of the Government in the Senate, Senator Comeau, then spoke. He noted that this question of privilege had not been preceded by the normal written notice, as stipulated in rule 43. He also suggested that there would be a willingness to correct any erroneous information on the website.

A number of other senators also participated. Senators Banks, Grafstein, and Tardif remarked that this was the first opportunity the matter could have been raised, since they had

been unaware of it previously. Senator Carstairs repeated the point made by Senator Cowan that the failure to correct the website, once it was mentioned on the news, made the alleged breach of privilege more egregious.

At the end of these exchanges, the Speaker confirmed that, as of 2:43 p.m., the website did have the wording quoted earlier, and urged that it be corrected. Honourable senators will be interested to know that the website was indeed changed over the course of the night, so that by Friday morning it stated as follows: "Now that Canada's Economic Action Plan has passed parliament it is vital that all parties continue to work together to see it succeed."

The complaint raised by Senator Cowan is, in essence, a matter of possible contempt, that is to say "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." This definition is taken from page 52 of Marleau and Montpetit. The October 29, 1980 ruling from the other place, cited by Senator Cowan, suggested that "To be false in the context of contempt, an interpretation of our proceedings must be an obviously, purposely distorted one." A contempt can, thus, involve either an act or an omission, but an element of purpose, of deliberate intent, should also normally be present.

The basic issue is whether the lengthy delay in updating the website was a purposeful attempt to distort and misrepresent the Senate's work. Since no evidence was presented to the contrary, one must assume that the statement reflected the facts when it was initially posted. As was noted, a correction made before the sitting could have largely resolved the issue. The fact that the website was corrected a few hours after the question of privilege was raised suggests that the presence of the text in question was probably due to a lack of diligence in updating information. The element of purpose, or deliberate intent, which should be present to establish a case of contempt, was not evident, as far as can be determined from the available information.

Although the statements on the website may not constitute a contempt of the Senate, the complaint raised by Senator Cowan is a serious one. While the government does have a legitimate interest in keeping Canadians informed about important developments, it also has a duty to ensure accuracy. This is especially so when the information concerns developments in Parliament.

In this case, the government was strongly urging senators to "do their part" and pass Bill C-10 quickly. In fact, the Senate did exactly that, even though the decision, as Senator Cowan explained, was difficult for many senators. Once the Senate had passed Bill C-10, the government had a responsibility to rapidly update all relevant information.

Accuracy in the information government provides about Parliament's work is a problem that arises from time to time, and departments must be vigilant to this. A ruling in the Senate from February 24, 1998, provides a convenient summary of the situation: "While … prepared to accept that no contempt appears to have been committed, … the actions of the department [are] inexcusable."

On balance, therefore, it does not appear that a contempt was intended towards the Senate, and its privileges were not violated. All departments must, however, ensure that any information relating to Parliament is appropriate, accurate, and updated in a timely fashion. On this basis, a prima facie question of privilege has not been established.

Before concluding, there is a second issue that must be addressed, having to do with the process whereby the question of privilege came to the Senate's attention. Such matters are normally raised after notice given under rule 43. As far as is known, this was only the second incident attempting to use rule 59(10), which states that no notice is required for a question of privilege, since the rule revisions of 1991.

Rule 43 sets out various criteria an alleged question of privilege must meet to have priority over other matters. A written notice is required several hours before the sitting and an oral notice must be given during Senators' Statements. The putative question of privilege is then considered at an appropriate time during the sitting, and the Speaker determines whether a prima facie case of privilege has been established. Rule 43, and the related provisions of rule 44, date from 1991, and replaced an old rule, 33, which had allowed a motion on a question of privilege to be moved without notice, debated, and indeed adjourned.

The issue of the appropriate use of rule 59(10) was addressed in a ruling of October 26, 2006. As explained at that time, when the 1991 changes were made, the rules were "not properly adjusted, either to delete [rule 59(10)] entirely or to modify it to explain under what conditions a question of privilege could be raised without notice." When old rule 33 existed, rule 59(10) was part of a coherent whole. Since the changes of 1991, it is no longer evident how a matter raised under rule 59(10) should be pursued.

In this case, Senator Cowan specifically asked the Speaker to consider whether there was a prima facie question of privilege. It must, however, be recognized that it is problematic to use rule 59(10) to effectively bypass the written and oral notice requirements clearly stipulated in rule 43. As such, this case should not be relied upon as a precedent.

This case demonstrates that the Senate would still benefit from work by the Standing Committee on Rules, Procedures and the Rights of Parliament looking at rule 59(10) and proposing how it can be reconciled with rule 43.