SENATE SÉNAT

CANADA

RULINGS OF THE SPEAKER OF THE SENATE

40th Parliament

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Prepared by the Chamber Operations and Procedure Office

Introduction

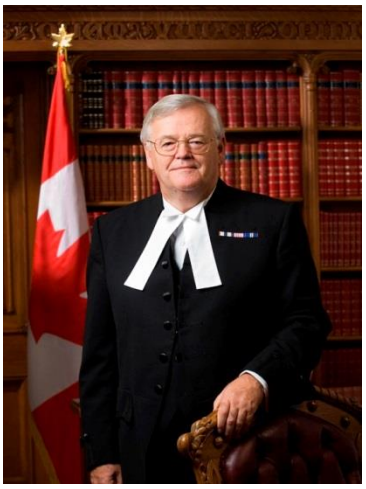
As the only Upper House in Canada, a primary role for the Senate has been to serve as a complementary legislative chamber providing sober second thought to measures adopted by the elected House of Commons. Senators are appointed and have stable, and relatively long, terms in office. As such, the atmosphere in the Senate differs significantly from that in the elected houses across the country. The Speaker of the Senate has an important role to play in maintaining this productive environment and assisting the Senate with the orderly conduct of its business. The Speaker is appointed by the Governor General on the Prime Minister's advice. The Honourable Noël A. Kinsella, P.C., served as Speaker during the 39th and 40th Parliaments, and for much of the 41st Parliament. This collection covers the decisions and statements made from the chair during the 40th Parliament.

The Speaker's duties are set out in rule 2-1(1), and include presiding over proceedings, ruling on certain procedural matters (points of order, the prima facie merits of questions of privilege and requests for emergency debates), and preserving order and decorum during the sitting. Almost all decisions of the Speaker are subject to appeal to the Senate, so the chamber retains direct control over its own proceedings. It is a testimony to his colleagues' esteem for Speaker Kinsella that only one of the more than one hundred decisions delivered during his years in office was appealed to the Senate. His rulings thus provide essential background to anyone wishing to understand how the Senate's Rules and practices interact and are applied on a day to day basis to balance the various principles underlying Canada's parliamentary democracy. This collection will thus serve as a useful tool for senators, their staff, the Senate administration and anyone who is interested in developing a better understanding of the Senate's work.

Charles Robert
Clerk of the Senate and Clerk of the Parliaments

TABLE OF CONTENTS

First Session, Fortieth Parliament
November 18, 2008 – December 4, 2008

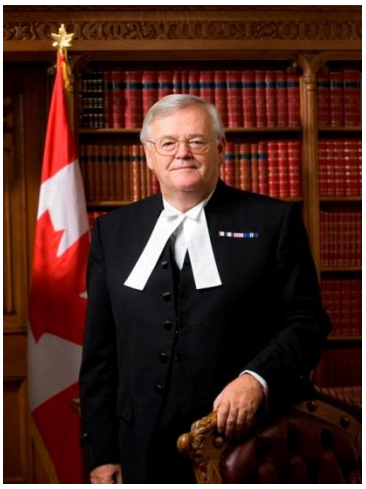


Speaker: The Honourable Noël A. Kinsella

Speaker *pro tempore*:
The Honourable Rose-Marie Losier-Cool

No Rulings were given during this session.

Second Session, Fortieth Parliament
January 26, 2009 – December 30, 2009



Speaker: The Honourable Noël A. Kinsella

Speaker *pro tempore*:
The Honourable Rose-Marie Losier-Cool

Referral of User Fee Proposal to Committee Before It Has Been Struck
January 28, 2009 *Journals*, p. 43

I thank the honourable senator for that point of order. The selection committee was only struck the day before yesterday and we have not had a report in from the selection committee yet. However, the *Rules of the Senate* provide for the Standing Senate Committee on Energy, the Environment and Natural Resources and so, operating pursuant to 28(3.1), this matter is referred to that committee. When the composition of that committee is approved by the chamber, then the days will start counting.

Bill — Requirement for Royal Recommendation
February 24, 2009 *Journals*, pp. 124-126

On February 3, after Senator Spivak had spoken to her motion for the second reading of Bill S-204, An Act to amend the National Capital Act (establishment and protection of Gatineau Park), Senator Nolin rose on a point of order. Referring to the *Constitution Act, 1867*, he asserted that the bill requires a Royal Recommendation. As a consequence, he maintained that the bill cannot continue before the Senate.

Senators Fraser and Spivak both urged that the bill does not require a Royal Recommendation. Senator Banks, for his part, referred to Senator Spivak's speech, and noted that the National Capital Commission already acquires and sells property, and this bill would simply set up the park. The commission could, he maintained, act without new appropriation.

This question is one that has come up in the Senate on a number of recent occasions. It may, therefore, be helpful to consider some of the fundamental points at issue. As noted in Marleau and Montpetit, at page 709, the financial prerogative of the Crown means that "Under the Canadian system of government, the Crown alone initiates all public expenditures and Parliament may only authorize spending which has been recommended by the Governor General." This principle is reflected in Senate rule 81, which states that "The Senate shall not proceed upon a bill appropriating public money that has not within the knowledge of the Senate been recommended by the Queen's representative." The rule itself embodies some of the obligations imposed by sections 53 and 54 of the *Constitution Act, 1867*.

The Royal Recommendation is the concrete expression of the financial initiative of the Crown and is signalled to the House of Commons. Since the 1970s, the Recommendation has followed a standard form: "Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled...," followed by the bill's title. In February 1990, the Standing Senate Committee on National Finance raised questions about this general wording, noting "that the form of the royal recommendation now used does not serve to make clear what, if any, appropriation(s) the ministers are seeking by bills to which royal recommendations are appended."

The procedural authorities, including Speaker's rulings, Marleau and Montpetit, Beauchesne, and Erskine May, indicate that a number of criteria must be considered when seeking to ascertain whether a bill requires a Royal Recommendation. First, a basic question is whether the bill contains a clause that directly appropriates money. Second, a provision allowing a novel expenditure not already authorized in law would typically require a Royal Recommendation. A third and similar criterion is that a bill to broaden the purpose of an expenditure already authorized will in most cases need a Royal Recommendation. Finally, a measure extending benefits or relaxing qualifying conditions to receive a benefit would usually bring the Royal Recommendation into play.

On the other hand, a bill simply structuring how a department or agency will perform functions already authorized under law, without adding new duties, would most likely not require a Recommendation. In the same way, a bill that would only impose minor administrative expenses on a department or agency would probably not trigger this requirement.

The list of factors enumerated here is not exhaustive, and each bill must be evaluated in light of these points and any others at play. It certainly is not the case that every bill having any monetary implication whatsoever automatically requires a Royal Recommendation. When dealing with such issues, the Speaker's role is to examine the text of the bill itself, sometimes within the context of its parent act. Of course, the Speaker, in making this assessment, seeks to avoid interpreting constitutional issues or questions of law.

The senator raising a point of order has a responsibility to present evidence and explain to the Senate why a Royal Recommendation is required, linking it to what the text before the Senate would actually require, not optional decisions that may or may not be made at some point after a bill is passed. Given the nature of the legislative process, senators may sometimes wish to delay raising a point of order until later stages, since committee hearings will often provide greater clarity on what a bill's provisions will entail and how they will have to operate.

In situations where the analysis is ambiguous, several Senate Speakers have expressed a preference for presuming a matter to be in order, unless and until the contrary position is established. This bias in favour of allowing debate, except where a matter is clearly out of order, is fundamental to maintaining the Senate's role as a chamber of discussion and reflection.

To be clear, however, a bill appropriating public money cannot be initiated in the Senate. To repeat, rule 81 establishes that "The Senate shall not proceed upon" such a bill. Thus, once it is determined that a Senate bill does infringe rule 81, it is not possible to make amendments that could correct the situation, since the bill cannot be dealt with further. The Royal Recommendation is, therefore, quite different from the Royal Consent, which relates to the requirement for the Governor General to signal agreement to Parliament considering a bill that would affect the prerogative powers of the Crown. As previous rulings have stated, in most instances the Royal Consent can be signalled up to the time a bill receives third reading.

To turn to the specific provisions of the bill before the Senate, the National Capital Commission already has considerable discretion when it comes to acquiring and selling land. As has been noted in some Senate committee hearings in recent years, the commission can buy and sell land in the National Capital Region largely at its own discretion. This power exists in the *National Capital Act*, specifically in subsection 10(2). That act also indicates that one of the commission's goals is to plan and assist in the development and conservation of the National Capital Region.

A reading of Bill S-204 shows that it would establish Gatineau Park and set its boundaries. The bill also allows for the expansion, but not the contraction, of the park. Of basic importance, the National Capital Commission would also have a right of first refusal on any land sold within the park, but is not compelled to purchase such land.

In relation to the management of the park, clause 4 of the bill states that the "Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Commission." Such legislative direction appears to be generally in keeping with the commission's existing goals.

Overall, the bill does not appear to involve any evident novel expenses. Instead, what it does do is establish Gatineau Park, direct priorities in its management, and allow, but not compel, the commission to purchase land if it comes up for sale, as it can already do. When viewed in the context of existing powers, none of these initiatives seem to involve new funding. Instead, Parliament would be guiding how the commission should exercise the discretionary authority it currently has. In particular, nothing in the bill indicates that the commission would be obliged to purchase land in the park. Its discretion in this regard would remain unfettered.

While it is true that the bill does prohibit the sale of public lands within the park, this limitation is not an expenditure, and certainly not an appropriation.

This analysis of Bill S-204 suggests that it does not require expenditures, whether new or distinct, since the direction the bill would give the commission fits within its existing larger powers. Accordingly, the ruling is that this bill does not require a Royal Recommendation, and debate at second reading of this bill can continue.

Bill — Requirement for Royal Recommendation
February 24, 2009 *Journals*, pp. 126-128

On February 3, after Senator Grafstein had spoken to his motion for the second reading of Bill S-201, An Act to amend the Library and Archives of Canada Act (National Portrait Gallery), Senator Comeau rose on a point of order. While refraining from commenting on the merits of the bill, he suggested that it incurs increased government spending and should be ruled out of order since it lacks the Royal Recommendation. In making his argument, he referred to the *Constitution Act, 1867*, Bourinot, Erskine May, Senate rule 81, as well as a previous Speaker's ruling.

Senator Grafstein challenged this interpretation, as did Senators Tardif and Fraser. They noted the need for caution in rejecting any bill so early in the legislative process. Reference was also made to the February 20, 2007, ruling on Bill S-221 when asserting that the fact that a bill has some monetary implications does not automatically mean it needs a Royal Recommendation or that it must be introduced in the other place. Finally, Senator Nolin drew the Senate's attention to specific provisions of the bill, which he saw as requiring expenditures of public funds.

As was noted in the cited ruling on Bill S-221, a bill should be examined in terms of what it declares itself to be, that is to say in terms of its actual wording. The text of Bill S-201 appears quite limited: a property already owned by the government must be used by the Library and Archives of Canada to display portraits and other artistic works, and the public must have access to this exhibit. This display is to be called the "National Portrait Gallery." Nothing in the bill indicates how large this gallery is to be, or how many portraits are to be displayed. The text of the bill itself does not seem to require a large project of the type envisioned in previous iterations. A major undertaking would be an option, but is not mandated by this bill.

No part of Bill S-201 discusses an appropriation of the public revenue, or the levying of any tax or impost. Are expenditures involved in the actions required by the bill? Almost certainly. Whether these expenditures are new, however, is less clear. Under the *Library and Archives of Canada Act*, that organization can put on exhibitions that make known the documentary heritage of Canada. In doing this, it can access its rich art collection. The bill thus appears to guide or structure how part of an existing role of the Library and Archives of Canada is to be performed. Consequently, it is far from certain that this bill would incur novel expenditures, as opposed to possibly reallocating existing funds.

During his second reading speech, Senator Grafstein indicated that some expenditures had already been made for the portrait gallery project. To better understand this situation, estimates and supply bills for recent years were reviewed. This confirmed that money was in fact allocated for the purpose of developing a portrait gallery as a program activity of Library and Archives of Canada. Thus, it would seem, these funds were assigned under the ongoing authority of the current *Library and Archives of Canada Act*. The portrait gallery was encompassed in Library and Archives of Canada's existing mandate and objects, and has not been conceived of as a separate, stand-alone, public institution.

While one might suspect that there will be expenses as the bill is implemented, the bill itself does not require or authorize them. Whether they are incurred would depend on separate decisions as to how the measure is implemented. If new monies are deemed necessary as the project advances, they would be provided by the normal funding process.

Preferring to err on the side of allowing senators the opportunity to consider matters when they are not clearly out of order, the ruling is that this bill is in order, and debate at second reading can continue.

Bill — Requirement for Royal Recommendation
February 24, 2009 *Journals*, pp. 128-129

On February 4, during questions following Senator Grafstein's speech on his motion for the second reading of Bill S-203, An Act to amend the Business Development Bank of Canada Act (municipal infrastructure bonds) and to make consequential amendments to another Act, Senator Nolin rose on a point of order. He claimed that the bill appropriates funds from the Consolidated Revenue Fund and is therefore out of order because it does not have a Royal Recommendation.

A number of senators, including Senators Comeau, Tardif, and Fraser, spoke to the matter. It became apparent that two distinct issues could be involved. Senator Nolin's basic concern was that a tax exemption and consequent reduction in government revenue, which the bill provides for, is actually the equivalent of an appropriation of public funds. A second issue, to which mention was also made, although not extensively explored, was that the bill would appear to change the mandate of the Business Development Bank of Canada.

On the first point, as to whether a reduction in a tax is an appropriation, authorities and precedents are clear. Marleau and Montpetit states, at page 711, that "a royal recommendation is not required for an amendment whose effect is to reduce taxes otherwise payable." Beauchesne, at citation 603, also notes that tax measures do not require a Royal Recommendation. As the first quote makes clear, this includes reductions in the incidence of a tax. Likewise, Erskine May indicates that "Provisions for the alleviation of taxation are not subject to the rules of financial procedure," at page 901 of the 23rd edition.

In the Senate, the May 11, 2006, decision on Bill S-212, to which Senator Tardif referred, made clear that a measure to reduce taxes is in order. Although that particular bill was finally determined to be out of order, this was because of other provisions, not the proposal to reduce tax rates. It may also be noted that, since tax relief is clearly not a tax imposition, the issue of the bill having to originate in the House of Commons, under section 53 of the *Constitution Act, 1867*, does not arise.

From this, it is evident that the first concern in the point of order, that a measure to reduce taxes is an appropriation, is not valid.

The second concern relates to the fact that Bill S-203, in clause 2, expands the purposes of the Business Development Bank of Canada. Be that as it may, the bill does not contain any provisions appropriating

money; indeed it is not immediately evident how often the bank receives appropriations. Although the bill may impose some administrative burdens, arguments did not establish that the new responsibilities would automatically incur new public expenditures or could not be accommodated by reallocating existing resources.

On this point, it is helpful to refer to Erskine May and what it says about "Minor administrative expenses," which do not need a Royal Recommendation. This is at page 888 of the 23rd edition. As already noted, the actual text of Bill S-203 does not make clear that anything more would be required.

As has been noted in previous rulings by several Senate Speakers, matters should be presumed to be in order unless the opposite is established. In light of the available information, the ruling is that the point of order has not been established, and debate on the motion for second reading of Bill S-203 can continue.

Bill — Requirement for Royal Recommendation
February 24, 2009 *Journals*, pp. 129-130

On January 29, after Senator Carstairs had spoken to her motion for the second reading of Bill S-207, An Act to amend the Employment Insurance Act (foreign postings), Senator Comeau rose on a point of order. He argued that the bill needs a Royal Recommendation. While recognizing that the bill may have merits, he cited Beauchesne and rulings from the other place, stating that it could incur expenses not currently authorized by law. This issue arises because the bill would extend access to employment insurance to some individuals who do not now qualify. In keeping with rule 81, Senator Comeau asserted that the bill cannot be considered by the Senate.

By way of response, Senator Carstairs expressed concern that a restrictive approach could hamper senators' ability to introduce bills in the future. She also noted that the bill had been brought forward in several previous sessions without objection. Senator Fraser took up some of these points and suggested that, because this is not a supply bill, it should be given the benefit of the doubt. If amendments are required, she proposed that they could be made before the bill leaves the Senate. Senators Kenny and Tardif also spoke in favour of keeping the bill on the Order Paper. Finally, Senator Nolin drew the Senate's attention to sections 53 and 54 of the *Constitution Act, 1867*, arguing that the bill does not respect their provisions and is out of order.

Before addressing the merits of the specific case, the matter of when a point of order can be raised requires some clarification. A ruling of February 26, 2008, noted that "A point of order ... can be raised at any point during debate." Unlike a question of privilege under rule 43, timing is not always a critical issue. Although it is preferable that a point of order be brought to the Senate's attention as soon as a senator becomes aware of the issue, it is not an absolute requirement that the matter be raised at the first possible instance. This said, the matter must be raised before the question has passed to a stage at which the objection would be out of place —for a bill this would be before a decision at third reading. A point of order certainly can be raised on a bill reintroduced in a new session.

As to the concern that senators could be impeded in bringing in legislation, this must be balanced against the need for a scrupulous respect for the financial prerogative of the Crown, which is reflected in our own rules and cannot be ignored. As the recent rulings demonstrate, each time a point of order like this one is raised, the bill is examined in terms of its potential monetary implications. As senators know, such concerns do not always prove to be valid. The actual merit of a particular bill, however, is not the issue when faced with the possible need for a Royal Recommendation.

As was noted in the ruling a few moments ago on Bill S-204, measures to extend the purposes of payments already authorized by statute or to relax conditions to be met typically require the Royal Recommendation. Marleau and Montpetit, at page 711, states that "An amendment which either increases the amount of an appropriation, or extends its objects, purposes, conditions and qualifications is inadmissible on the grounds that it infringes on the Crown's financial initiative." A similar point is made at citation 596 of Beauchesne, to which Senator Comeau referred, and in the 23rd edition of Erskine May, at page 857. This obligation to respect the Royal Recommendation applies not just to amendments, but also to amending bills.

None of the arguments raised challenged the basic point that Bill S-207 would extend employment insurance benefits to some individuals who do not currently qualify for them. The bill would relax the conditions that must be met in order to receive employment insurance benefits for certain individuals who accompany their spouse or common law partner when posted abroad, by allowing them to extend their qualifying period up to a limit set in the bill. Such individuals cannot now have this period overseas discounted when determining whether they qualify for benefits. The proposal in Bill S-207 to extend access to a benefit enlarges the scheme of entitlements in the *Employment Insurance Act*, and, consequently, it requires a Royal Recommendation.

The ruling is, therefore, that this bill is out of order. Debate at second reading cannot continue, and the bill shall be withdrawn from the Order Paper.

(*Accordingly, the Order of the Day for the second reading of Bill S-207, An Act to amend the Employment Insurance Act (foreign postings), was discharged and, by order, the Bill withdrawn.*)

Senators' Statements and Question Period

March 11, 2009 *Journals*, p. 266

On February 12, after Question Period, Senator Cordy rose on a point of order to challenge the propriety of a remark made by another senator during the previous sitting while she was participating in Senators' Statements. Later, on February 26, Senator Fraser rose on a point of order respecting comments by the Leader of the Government in the Senate during Question Period that day. This Ruling addresses both points of order.

While the Speaker does have authority, under Rule 18(1), to intervene to keep order, the tradition here is that senators themselves are to a great extent responsible for maintaining order. In practice, the Senate is largely self- regulating, and Speakers have been careful not to be too heavy-handed.

I have reviewed both incidents as they appear in the Debates. The words appear to be within the bounds of the give and take that occurs in any parliamentary body.

While the comments in themselves were not out of order, I do invite all honourable senators to show care in how they frame interventions so as to avoid any unnecessary offence. We must always be wary of allowing any disorder to seep into our proceedings.

Presentation of Petitions
March 31, 2009 *Journals*, p. 415

Honourable senators, there is no point of order as such, but our rules do speak to a process for presenting petitions. The rules indicate that where our rules are light on procedure, we can look to the rules, procedures and practices in the other place. In the other place there is a fairly elaborate process.

However, the practical matter is that Senator Harb did make a presentation of petitions and it was done properly, the presentation of petitions being very much in order. That is the ruling of the chair on that matter.

Question of Privilege — Information on a government website
(Decision overturned by the Senate)
March 31, 2009 *Journals*, pp. 416-419

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.

Whereupon the Speaker's Ruling was appealed.

The question being put on whether the Speaker's Ruling shall be sustained, it was negatived …

Question of Privilege — National Security and Defence Committee
April 21, 2009 *Journals*, pp. 448-449

On April 1, Senator Wallin rose on a question of privilege, pursuant to rule 59(10). Her complaint focused on the fact that the Standing Senate Committee on National Security and Defence, of which she is deputy chair, had been unable to establish a Subcommittee on Veterans Affairs. This, in her view, was an obstruction, preventing the committee from dealing with a critically important topic. As became apparent during the course of discussion, the committee had met in camera earlier that day to consider whether to establish a subcommittee. At that meeting, a senator had moved a motion that would have resulted in the Senate being asked to establish a separate standing committee on veterans affairs. An amendment was then moved that, until such a standing committee is established, the topic be dealt with in a subcommittee. This amendment was debated but no decision was reached before the meeting was adjourned due to the sitting of the Senate.

Senator Kenny, the chair of the committee, questioned the assertion and that there was an attempt to block a decision on the issue of veterans affairs. Instead, there was a disagreement as to the best way to deal with this subject, whether in a subcommittee or in a stand-alone committee. Senator Tkachuk then explained his preference to send a letter raising the idea of a separate committee to the Rules Committee, which is reviewing the committee structure. Senators Moore and Manning also spoke on the matter before Senator Fraser concluded discussion. She saw this as the kind of debate that sometimes occurs when there is disagreement on how to proceed. She felt that the matter was, if anything, a question of order rather than a question of privilege.

When faced with a claimed question of privilege the Speaker's role is to determine whether it has any prima facie merit, referring, *inter alia*, to the criteria set out in rule 43(1). These criteria require that the matter be raised at the earliest opportunity; that it directly concern the privileges of the Senate, a committee, or a senator; that a genuine remedy be sought, for which no other parliamentary process is reasonably available; and that the question of privilege seek to correct a grave or serious breach.

Honourable senators, these criteria sometimes require that the Speaker engage in an in-depth analysis of the purported question of privilege. In other cases, however, such extensive analysis is unnecessary.

Though it is clear that Senator Wallin, availing herself of rule 59(10), raised the matter at the earlier opportunity, does this case, in fact, involve privilege? This is the second criteria. There appears to be disagreement as to how the topic of veterans affairs, which all interveners recognized as important, should be dealt with at the committee level. One proposal was made, an amendment was suggested, and the time for that particular meeting ran out before a decision was reached. There is nothing out of the ordinary in this. Senators often have disagreements about how to deal with issues, either in the chamber or in committee, and the requirement of automatic adjournment in this particular situation was a function of the rules. This case was a result of senators exercising their right to speak.

If there is an issue here, and this is not certain, it might be one of order. It would therefore be more appropriate to raise it in committee, as committees are normally masters of their own proceedings.

Since based on the information provided, nothing seems to have occurred in committee that violated privilege, it is not necessary to evaluate the final two criteria and the ruling is that there is no prima facie case for a question of privilege.

Question of Privilege — Remarks during debate

April 21, 2009 *Journals*, pp. 450-451

On April 1, Senator Harb rose on a question of privilege to complain of words spoken the previous day in debate, while he was speaking to an inquiry on the cessation of the commercial seal hunt. These remarks are to be found at page 560 of the *Debates of the Senate* of March 31. They were made following Senator Harb's confirmation that the International Fund for Animal Welfare had taken him to view the seal hunt. An unidentified senator had called out "bought and sold." Senator Manning also made some comments. Senator Harb felt that these interventions amounted to an inappropriate attempt to silence him. He indicated that in accepting the opportunity to observe the seal hunt he had followed relevant rules and made the proper declarations. A press release had even been issued. On this basis, Senator Harb asserted that he had acted correctly, and had in no way sought to hide his actions.

Senator Harb referred to rule 43(1), explaining how he felt he had met the criteria for establishing a prima facie question of privilege. He also referred to rule 51, which prohibits "personal, sharp or taxing speeches," and rule 52, which allows "A Senator considering himself or herself offended or injured in the

Senate, in a committee room, or in any of the rooms belonging to the Senate [to] appeal to the Senate for redress." Finally, he mentioned rule 53, which deals with exceptional words and their retraction.

Senator Stratton then rose to argue that Senator Harb should have fulfilled the written and oral notice requirements of rule 43, since the complaint involved remarks made the previous day. As such, he saw a difference between Senator Harb's alleged question of privilege and the one raised by Senator Wallin earlier that day. Senator Harb could have given notice, Senator Wallin could not have done so.

Senator Manning then spoke. While recognizing that the exchange on March 31 had been heated, he denied having said that Senator Harb had been "bought and sold." After this, Senator Fraser intervened, emphasising the need for moderation when senators engage in heckling, but also challenging Senator Stratton's assertion that Senator Harb should have complied with rule 43, since rule 59(10) allows a question of privilege to be raised without notice, without restriction. Finally, Senator Milne confirmed that she was the one who had uttered the words "bought and sold," and then retracted them for the record.

Honourable Senators, before dealing with the particular matter of this question of privilege, the Chair would again urge all colleagues to use temperate language to help maintain order and decorum. Senators should avoid unnecessarily impugning the motives of colleagues. With respect to the issue of receiving support from outside bodies, processes exist to address any concerns that may arise, and they should be followed, if required and if appropriate.

Turning now to the specifics of this case, there is the initial and critical issue of whether Senator Harb should have provided notice under rule 43. In the two recent instances when rule 59(10) was invoked — the March 26 case raised by the Leader of the Opposition and the April 1 case raised by Senator Wallin — there was a justification provided as to why notice under rule 43 was not given. Having given this explanation, the usual process for establishing whether there was a prima facie question of privilege was followed. With respect to Senator Harb's question of privilege, however, there was no stated reason why rule 59(10) was used, instead of giving notice under rule 43. Since the matter involved an incident that had occurred the previous day, Senator Harb should have availed himself of rule 43.

Honourable Senators, rule 43 details a process for written and oral notice to properly raise a question of privilege. All of these are imperative, and are meant to be used. Unless the Senate makes a deliberate decision to change rule 43, rule 59(10) will only remain available for questions of privilege that arise out of circumstances that prevent a senator from providing the notices required under rule 43. To do otherwise would render the rule meaningless. Such a reversal of the clear obligations contained in the rules requires a deliberate and positive decision of the Senate.

With respect to the substantive matter of the question of privilege, the Speaker's role is to review the case and determine whether there is a prima facie case for a question of privilege, guided, *inter alia*, by the four criteria identified in rule 43(1). The first criterion is that the matter must be raised at the earliest opportunity. On this point, it may be reasonable to assume that Senator Harb wished to consult the Debates to ensure that he had indeed heard the remarks in question.

On the second criterion, that the matter must directly concern privilege, Senator Harb felt that the remarks affected him personally, seeing them as an attempt to silence him. In point of fact, however, nothing actually prevented the Senator from continuing to speak in debate. If there was any problem with the remarks, it was more as to whether they were "personal, sharp or taxing," to use the language of rule 51. As such, the issue may have been one of order, but was certainly not one of privilege.

Since this issue did not involve privilege, it is unnecessary to review the third or fourth criteria, and the ruling is that no prima facie case for a question of privilege has been established.

Question Period — Matters Before a Commission
May 5, 2009 *Journals*, p. 560

At the beginning of Orders of the Day on April 23, Senator Mercer rose on a point of order relating to the conduct of Question Period held earlier that day and the application of rule 24(1)(a). This provides that an oral question may be addressed to:

> (a) The Leader of the Government in the Senate, if it is a question relating to public affairs.

As has been noted in a number of rulings, there is considerable latitude during Question Period in terms of what constitutes "public affairs." In the present case, the matter referred to the commission of inquiry being conducted by Mr. Justice Oliphant. The general practice in Parliament has been to avoid discussing matters or proceedings currently before the courts or quasi-judicial inquiries. This is referred to as the *sub judice* convention.

While the convention has not been codified, procedural literature indicates that, although not binding, parliamentarians should be cautious about making reference to the proceedings, evidence, or findings of a commission before it reports.

Applied to Question Period, parliamentarians should exercise due restraint in terms of the questions they ask and the answers they provide.

Bill — Requirement for Royal Recommendation
May 5, 2009 *Journals*, pp. 562-563

On April 1, when the order was called for resuming debate on the second reading of Bill S-219, An Act to amend the Bankruptcy and Insolvency Act (student loans), the Deputy Leader of the Government, Senator Comeau, rose on a point of order. He argued that the bill requires a Royal Recommendation, and therefore cannot continue before the Senate. Senator Comeau referred to the *Constitution Act, 1867*, Senate rule 81, and authorities such as Bourinot and Erskine May in explaining how, in his view, the bill violates the financial initiative of the Crown.

Senator Comeau's concern was that the amendments to the *Bankruptcy and Insolvency Act* proposed in Bill S-219 could possibly increase the government's liabilities under the *Canada Student Loans Act*. Fundamentally, Bill S-219 seeks to implement two changes. First, a person declaring bankruptcy could seek relief from student loan debts at the end of five years, instead of waiting seven, as is now the case. Second, the bill would allow any former student to apply for changes to the terms of repayment, without having to wait five years as they must currently.

Since the government is the guarantor for loans made under the *Canada Student Loans Act*, it is liable to the lender if former students are discharged from debts or obligations with respect to such loans. The changes that Bill S-219 proposes would thus have the effect of increasing the contingent liabilities of the government, possibly resulting in additional charges on the Consolidated Revenue Fund.

The sponsor of the bill, Senator Goldstein, challenged the idea that the bill requires a Royal Recommendation. He noted it does not specifically appropriate public money, from which he concluded that rule 81 does not apply. He also mentioned that the bill had been before the Senate in previous sessions, and had been referred to committee, without this issue being raised.

At the outset, it should be noted that a point of order on such issues can be raised at any time while a bill is before the Senate. A point of order in a new session is certainly acceptable, and has occurred on a number of recent occasions.

The question of the relationship between the Crown's liabilities and the Royal Recommendation does not arise often in the Senate. There have, however, been some cases of relevance. On October 23, 1991, Bill S-5 was ruled out of order, since it would have imposed new liabilities on the Crown. In that case reference was made to the 20th edition of Erskine May, which states that both liabilities and contingent liabilities require the Royal Recommendation. Eafrlier, on February 20, 1990, the same text had been cited, among others, when some amendments proposed to a bill in a committee report were ruled out of order.

From the most recent edition of Erskine May, the 23rd edition, it is evident that a Royal Recommendation is still required for proposals that would incur a liability or a contingent liability. Page 884 specifically indicates that this includes charges that "might arise from a Treasury guarantee." While page 888 does state that the Royal Recommendation may not be required if the "liability arises as an incidental consequence of a proposal to apply or modify the general law," this does not save Bill S-219, since the changes proposed to the student loans regime are not merely incidental to the bill, but its primary purpose.

While there is a general preference in the Senate to favour debate in uncertain situations, this must be balanced against the need for a scrupulous respect for the financial initiative of the Crown, a basic principle of our parliamentary system. The passage of Bill S-219 would expand the range of conditions under which the government would have to make good its guarantee of loans under the *Canada Student Loans Act*. This would change the existing scheme, since payments from the Consolidated Revenue Fund might increase due to the change in possible obligations. As such, the bill should have a Royal Recommendation, and would have to originate in the other place.

The ruling is, therefore, that this bill is out of order. Debate at second reading cannot continue, and the bill shall be withdrawn from the Order Paper.

(*Accordingly, the Order of the Day for the second reading of Bill S-219, An Act to amend the Bankruptcy and Insolvency Act (student loans), was discharged and, by order, the Bill withdrawn*.)

Bill — Requirement for Royal Recommendation

May 5, 2009 *Journals*, p. 564

On March 31, after Senator Grafstein had spoken to his motion for the second reading of Bill S-230, An Act to amend the Bank of Canada Act (credit rating agency), Senator Nolin rose on a point of order. He noted that, under clause 2, the bill cannot be brought into force before funds have been appropriated, based on a Royal Recommendation, for the purpose of the bill. On this basis, he was of the view that the Senate cannot proceed with the study of the bill.

The effect of the type of clause challenged by Senator Nolin was addressed in some detail in a ruling given on May 27, 2008, concerning Bill S-234, introduced by our retired colleague Senator Gill. That bill contained a virtually identical provision. The ruling is published at pages 1086 to 1088 of the *Journals of the Senate*, and is directly applicable to the current point of order. The final paragraph, which summarized the effect of this type of clause, applies equally to Bill S-230. It suggests that the bill has no real effect without a separate appropriation of the necessary funds. As stated in the ruling of May 27, 2008:

> [T]here is no obligation to appropriate new money imposed upon Her Majesty. Nothing can happen if funds are not properly appropriated following a Royal Recommendation. Preferring to err on the side of allowing Senators the largest opportunity possible to consider proposals, debate on this item can proceed.

The ruling on Bill S-230 is the same. The bill does not require a Royal Recommendation, since nothing can happen following its adoption until and unless funds have been appropriated. Debate can therefore continue.

Senators' Statements
May 12, 2009 *Journals*, pp. 660-661

On May 6, at the end of Question Period, Senator Poulin rose on a point of order respecting a senator's statement made earlier in the sitting. She felt that it had been excessively partisan. While recognizing that senators have party affiliations, Senator Poulin referred to rule 22(4) in urging that Senators' Statements be used to raise issues of general public interest, including outstanding accomplishments by Canadians.

In response, Senator Comeau suggested that the statement had been broadly in line with others made recently, reflecting the undeniable fact that the Senate is a political forum. Several other senators then spoke on both sides of the matter before the Chair took the issue under advisement.

Honourable senators, the conduct and the substance of Senators' Statements have been explored in several recent rulings. The issue of order and decorum during Question Period, which is also relevant to this subject, has also been addressed on a number of occasions.

Under rule 22(4) senators can, "without notice, raise matters they consider need to be brought to the urgent attention of the Senate ... which are of public consequence and for which the rules and practices of the Senate provide no immediate means of bringing ... to the attention of the Senate." The rule makes clear that, in making a statement, "a Senator shall not anticipate consideration of any Order of the Day and shall be bound by the usual rules governing the propriety of debate. Matters raised during this period shall not be subject to debate."

Since Senators' Statements is a time-limited portion of the sitting, practice has been to avoid points of order at this stage. Therefore, as noted in a ruling of May 7, 2008, "Senators must, usually, rely on their own understanding of the appropriate matters for statements. This is evident from the rule itself, which states that Senators may raise matters that 'they consider' to be urgent."

While honourable senators have considerable freedom in framing their statements, they should always be guided by the customs and the practices that we value and that contribute to the distinctive atmosphere of this house. The tradition here is that senators themselves are to a great extent responsible for maintaining order. In practice, the Senate is largely self-regulating, and Speakers have been careful not to be too interventionist.

Precisely because the Senate operates in this way, it functions best when business proceeds in a courteous and dignified manner appropriate to the chamber of sober second thought. I again emphasize this point, and again urge all honourable senators to reflect on the manner in which we conduct ourselves. Let us preserve the useful exchange of ideas that has been the tradition and indeed distinguishing feature of this institution. We can contribute to this goal by avoiding deliberatively provocative remarks, thus better serving all honourables senators.

Question of Privilege — Events Before Introduction of Bill S-7
June 17, 2009 *Journals*, pp. 1134-1137

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.

Senators' Statements

June 18, 2009 *Journals*, pp. 1152-1153

Honourable senators, I concur with the point of order raised by the Honourable Senator Carstairs. I listened carefully because I attended the Committee of the Whole. I wish to sustain the view that the Speaker *pro tempore*, in my judgment, conducted the Committee of the Whole in a proper manner; and I support the way in which she dealt with the matter.

Honourable senators, we have been asked, in this chair, to comment on the purpose of Senators' Statements and how senators make their statements. I simply wish to repeat all that I have said, as your Speaker, about Senators' Statements up to this point in this Parliament and what we had to say in the last Parliament.

It is important for us all to dig a little deeper and understand, as has been recognized by honourable senators themselves, that we address ourselves as honourable senators because we are honourable senators. It is also important, in my judgment, that we be circumspect. Sometimes it is even a virtue to have custody of the tongue. I would invite honourable senators to be mindful of that and to keep Senators' Statements for the intent and the purpose for which it is really designed.

Many honourable senators who have long experience in this house have had the opportunity to share their experience with those of us when we arrived. I do recall, on one occasion in my first few months in the Senate, leaving the chamber at the end and our very distinguished former colleague, Heath Macquarrie, came up to me. That day I had had the audacity to make a statement and I think also to ask a question. He said to me, "Now, young man, once a day is quite sufficient."

Honourable senators, I think it is important that we learn from each other. What I would like us always to remember is that this is the Senate. It is the upper house. It is a place where the throne is found. The quality of our debate, the quality of our statements is at a different plateau, both in form and substance — and I underscore both form and substance.

I think Senator Carstairs has made a good point of order. I concur in it, and I would invite all honourable senators to be as prudent and as perspective as we can be.

Question of Privilege — Meetings of National Security and Defence Committee
September 16, 2009 *Journals*, pp. 1232-1237

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 12th 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.

Senators' Statements
September 29, 2009 *Journals*, pp. 1249-1250

On September 15, Senator Tardif raised a point of order respecting a senator's statement earlier in the sitting. The statement referred to a variety of government bills, including some that have already passed and at least one that is currently in the Senate. Senator Tardif suggested that the statement had not respected the criteria of rule 22(4). A number of honourable senators participated in debate. Senator Stratton offered a suggestion that the issue of the appropriate topics for statements might be addressed through the caucuses, to ensure that there is a clear and general understanding of the subjects that can be raised and those that should be avoided.

The Speaker has addressed the issue of the appropriate use of Senators' Statements in a number of recent rulings, at least four in the past two years. Honourable senators have been urged to use statements for the intent and purpose for which they were designed and to make them in a manner that respects the dignity of this honourable house. Senator Stratton's suggestion is a good one, and I hope that it will be acted upon. If it does not resolve this persistent problem, the Speaker will be obliged to intervene, using the power granted under rule 18(1) to maintain order, to cut off the statement and to recognize another honourable senator.

Senators' Statements
September 30, 2009 *Journals*, pp. 1263-1265

Honourable senators, let me thank Senator Comeau for raising this matter. I find it very helpful that we have this dialogue around this particular topic and that we have the various views brought to bear on it.

As we know, this honourable house traces part of its ancestry to the House of Lords and, up until recently, there was no Speaker in the House of Lords. There is now. There is a Lord Speaker in the House of Lords and prior thereto it was the Lord Chancellor who sat on the Woolsack. As we all know, it was not the role of the Lord Chancellor or the noble lord sitting on the Woolsack to decide points of order, a tradition we should reflect upon to see whether we should go back there. This honourable senator would be happy to go back that way.

The house is the house of all honourable senators. That is why, when rising, we address each other as honourable senators. I know that many make reference to the Speaker, but the tradition is to address honourable senators. The house is run by all honourable senators, and the Speaker does not occupy the position of *primus inter pares*. I have a seat in the chamber and at any time I am able to leave the chair and go to my place and participate in debate. That helps to underscore the fact that each of us in this chamber has a responsibility for the good operation and the maintenance of order and the dignity of this house.

Now, with reference to the particular case of Senators' Statements, I think we are making a little bit of progress on keeping them well within the parameters of the rule, but all rules are written in language, and language is written by humans, and humans are not infallible with most of the things that we do, including writing rules.

We interpret them as best we can. I welcome Senator Comeau's suggestion that perhaps I express my views as to how I understand this rule. I attempted to do it yesterday and on four prior occasions.

However, it does say here under rule 22(4):

> When "Senators' Statements" has been called, Senators may, without notice, raise matters they consider need to be brought to the urgent attention of the Senate.

This is the point that Senator Comeau was underscoring for us — that it is the judgment of the honourable senator who rises to make his or her statement. They may consider it, but if it is outside the rules, then the rules trump the individual senator's consideration or prudential judgment.

Certainly, whoever sits in the Speaker's chair — and any honourable senator at any moment in time could be sitting in the Speaker's chair — would not want to be in the position of always trying to make a judgment upon what the judgment is of the honourable senators who rose and participated in Senators' Statements on the basis of what he or she may consider to be a matter that fits within the rule 22(4).

However, as I sat here and heard the honourable senator's initiated statement — maybe I misunderstood it and if I did I apologize for that — I understood the statement in the vein of the Notice of Inquiry which is recorded in the Hansard English and French version at page 1395. As I recall yesterday, it was in French when Senator Comeau said:

> **Hon. Gerald J. Comeau (Deputy Leader of the Government):** Honourable senators, I give notice that, two days hence, on behalf of the government:
>
> I will call the attention of the Senate to *Canada's Economic Action Plan — A Third Report to Canadians*, tabled in the House of Commons on September 28, 2009, by the Minister of Transport, Infrastructure and Communities, the Honourable John Baird, P.C., M.P., and in the Senate on September 29, 2009.

I did say, as I looked at the Order Paper today, the government's inquiry is not on it, but notice had been given. I was not sure whether technically there is a distinction, but I think it better to err on the side of prudence. Honourable senators, it is my belief that we exercise prudential judgment.

It is a political body that we are part of, and, under our Westminster system, political bodies are a good thing. It is the engine room of our Westminster system. None of us is offended by observations and interventions that are political as such. This is a political body, and political parties in our system of governance are a good thing.

Having said that, if I was in error, I apologize for any error that I made. Once again, I wish to thank honourable senators for having been observant at the time of Senators' Statements to make a declaration well within the terms of reference of rule 22.

Question of Privilege — Departure of Committee Witnesses and Press Conference
October 28, 2009 *Journals*, pp. 1384-1386

On October 6, Senator Fraser raised a question of privilege under rule 43. Her concern related to a meeting of the Standing Senate Committee on Legal and Constitutional Affairs, of which she is chair, held on October 1. To summarize, the committee delayed the planned date for clause-by-clause study of Bill C-25, An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody), in order to hear from the Alberta and Manitoba Ministers of Justice and Attorneys General. At the meeting of October 1, just before noon, one of the ministers indicated that they both had to leave to catch planes. This prevented some senators from completing their discussion with the ministers, although they did agree to provide written responses to questions. Senator Fraser explained that, instead of heading directly to the airport, the ministers actually attended a previously scheduled press conference with the federal Minister of Justice and Attorney General. At this conference the federal minister urged the Senate to pass Bill C-25 without delay and without amendment.

Senator Fraser had three concerns about these events. First, she suggested that the committee had been deliberately misled about why the provincial ministers had to leave. Second, she argued that the committee's work had been impeded, since the meeting with the ministers had been cut off earlier than strictly necessary. Finally, she suggested that some statements at the press conference had impugned the committee's work. She expressed concern about the contempt she felt had been shown to the committee and asserted that these events had breached its privileges.

Senator Wallace took a different view. He underscored the serious nature of the allegations, particularly when directed against ministers of the Crown. He noted that the provincial ministers had stayed beyond what they had understood to be the duration of their appearance and had accepted a number of questions for written follow-up. From this, Senator Wallace concluded that the ministers had sought to cooperate with the committee. While they did have planes to catch, they did not mention specific times, and no questions were asked on that point. Senator Wallace did not see these events either as contempt or as an attempt to mislead the committee. He rejected the idea that the ministers had to justify the use of their time after their appearance. The senator also rejected the idea that the federal minister had attempted to interfere with or manipulate the committee's work. Finally, Senator Wallace questioned the process of raising a matter of privilege from a committee. It was his understanding that it can only be done by a committee report, and he made references to Erskine May, Beauchesne, and Marleau and Montpetit justifying this position.

Senator Tardif, when she spoke, expressed the opinion that the ministers had used the excuse of a flight to get to a press conference. In her view this was both disrespectful to the committee and had impaired its ability to properly fulfil its duty to examine and report on Bill C-25. Senator Cools then reviewed a number of extracts from the committee transcripts. She suggested that the committee had acted in good faith, and she detected a sense of disappointment in the way events had unfolded. Senator Brown, for his part, emphasized that the ministers had understood they would appear for an hour, and had structured their time in consequence.

Before considering the substantive points at the heart of this question of privilege, it is appropriate to address the procedural issue raised by Senator Wallace about how a matter of privilege from a committee can be brought before the Senate. Many parliamentary authorities do indeed state that such a matter should only be considered, except in rare instances, upon a report of the committee in question. However, the *Rules of the Senate* provide, at rule 43(1)(b), that a question of privilege can be raised under the special process for such issues if the "privileges of the Senate, of any committee thereof, or any Senator" are at issue. Accordingly, rule 43 can be used to raise questions of privilege arising from committee work, although a report of the committee is another vehicle available, as the authorities suggest.

To now turn to the substantive matter, this purported question of privilege involved two broad fundamental issues. One relates to the provincial ministers leaving the committee meeting. The other relates to the comments made at the subsequent press conference and the fundamental issue of the independence of the Senate as a house of Parliament.

To deal with the first of these issues, the problem that arose in the committee meeting on October 1 can be viewed as a misunderstanding about time, albeit a misunderstanding that had vexatious consequences. The witnesses had not been compelled to attend and ordered to remain until dismissed. They came voluntarily, and seem to have arranged their day based on the understanding they would appear for a limited period of time. Once this premise is accepted, the subsequent events do not appear unreasonable.

The second issue in this question of privilege touches on fundamental issues about our structure of governance. Ours is a parliamentary system operating under written and unwritten rules and long-standing traditions. This country enjoys its great measure of freedom and rights in no small part due to an understanding of, and respect for, basic principles and a recognition of the different roles of the executive and of Parliament.

Parliament has three components — the Queen, the Senate, and the House of Commons. Each is distinct and autonomous, although they must all act together to ensure the passage of legislation. To focus on the two houses, communications are properly through the exchange of messages, reflecting decisions taken. Neither house is formally aware of the details of how business is conducted in the other. A respect for the independence of each house by the other is essential. As stated in the fourth report of the Rules Committee, adopted by the Senate on June 23, attempts to place undue pressure on the Senate to act quickly are "at odds with the autonomy and independence of the Senate." The report went on to note that "The Senate cannot be coerced to adopt a legislative proposal or to adopt it in a given timeframe." This underscores the point that it is not the role of the executive branch to dictate to Parliament, or its component parts, how they are to act.

At the same time, it must be recognized that members of both houses — whether they are ministers or not — have a great interest in monitoring and encouraging legislative proposals that they sponsor. Parliamentarians do not simply introduce bills and then let them take care of themselves. They monitor developments, urge action, discuss, negotiate, and seek to arrive at satisfactory outcomes. This process is perhaps most visible in committees. If problems are identified with a bill, the sponsoring parliamentarian must often work assiduously to arrive at a successful resolution.

The comments at the press conference of October 1 can be seen as part of this process of trying to move a bill forward. The minister was urging rapid action by the Senate. Of course, the remarks in no way compelled action by the committee. It was free to deal with Bill C-25, within the bounds of our rules and practices. As it happened, the committee did recommend amendments, but the Senate did not accept them and passed the bill without changes. What is important, honourable senators, is that the Senate retained full freedom to accept or reject the bill, with or without amendment. Nothing said at the press conference affected these basic rights and functions of the Senate.

With this understanding of the events of October 1, it is now possible to consider the question of privilege in light of the criteria of rule 43(1). Senator Fraser explained why she could not have raised the matter earlier, thereby satisfying the first criterion. She also indicated that she is ready to move that the matter be referred to the Rules Committee so that the issues can be studied in detail, thereby satisfying the third criterion. With respect to the second criterion — that the matter directly concern privilege — and the fourth — that it seek to correct a grave and serious breach — the points outlined earlier suggest, upon reflection, that the criteria have not been met. The provincial ministers can be seen as having acted

reasonably based on their understanding of how their appearance would be managed. Even if the remarks at the press conference caused offence to some senators, they in no way affected how the Senate could deal with Bill C-25 or limited the role of this house in the parliamentary process.

As such, the ruling is that the criteria of rule 43(1) have not been satisfied, and accordingly a prima facie question of privilege is not established.

Question of Privilege — Certain Statements About Senate Work
October 28, 2009 *Journals*, pp. 1386-1387

On October 20, Senator Comeau, the Deputy Leader of the Government in the Senate, raised a question of privilege challenging the accuracy of a press release from and interviews by Senator Cowan, the Leader of the Opposition in the Senate, as well as statements contained in a blog kept by Senator Mitchell. These materials addressed the Senate's handling of Bill C-25 and Senate procedures. Senator Comeau considered that they had misrepresented decisions taken by the Senate and distorted his own role and position. The result, he argued, was that they constituted a contempt.

The statements challenged by Senator Comeau included one that government senators refused a proposal to consider and vote on the bill itself on October 8. Senator Comeau argued that the record actually indicates that no such proposal was made. He also objected to claims that the government had prevented the Senate from meeting on October 9. The government, he said, does not control the Senate's schedule and that any senator could have denied leave, forcing a Friday sitting. Senator Comeau felt that such statements had resulted in erroneous articles appearing in the press, misrepresenting senators' work and their position, including his own.

Senator Cowan rejected Senator Comeau's interpretation of the events of October 8. He reviewed the press release in detail. The senator insisted that it accurately reflected events and did not affect any senators' rights or privileges. Senator Mitchell, for his part, denied that postings on his blog constituted an impediment to any senator. He characterized them, instead, as a part of a broad public debate not an infringement of privilege. Senator Cools also questioned the idea that there was a prima facie question of privilege, being unable to identify any specific privilege that had been breached.

I wish to thank all honourable senators who contributed to the discussion of the question of privilege for their input. The Speaker's role is now to evaluate the purported question of privilege in terms of the criteria set out in rule 43(1). Before doing so, however, it should be noted that Senator Comeau's complaint broadly respected the requirement of rule 45, that when a senator complains of a statement in "any form of public news media, as a breach of privilege," specifics must be provided as to "the matter complained of, the source thereof and the nature of the breach of privilege."

The first criterion under rule 43(1) is that a purported question of privilege must "be raised at the earliest opportunity." Since Senator Comeau raised this issue at the first sitting after the events at issue occurred, he clearly met this criterion. Similarly, in relation to the third criterion, that the matter "be raised to seek a genuine remedy," Senator Comeau has indicated his readiness to move a motion to refer the matter to the Rules Committee.

The second and fourth criteria can be considered together. They require that the complaint "be raised to correct a grave and serious breach" that "directly concern[s] the privileges of the Senate, of any committee thereof, or any Senator." In this case a significant difference of opinion as to the course of events on October 8 obviously exists. Some honourable senators understood what happened in one way, others interpreted the situation quite differently.

Paragraph 62 of Beauchesne's sixth edition offers some guidance, which honourable senators should bear in mind. It reads: "...in the context of contempt, it seems to me that to amount to contempt, representations or statements about our proceedings or of the participation of members should not only be erroneous or incorrect, but, rather, should be purposely untrue and improper and import a ring of deceit."

Do differences in how events are interpreted in the present case actually constitute a "grave and serious breach" of privilege? Was the Senate prevented from dealing with Bill C-25 as it wished? Do senators still exercise their rights and responsibilities unimpeded?

Senator Comeau certainly felt aggrieved by what was said, and not without reason. However, on balance, it does not appear that the tests of the second and fourth criteria have been satisfied. The ruling is therefore that a prima facie question of privilege has not been made out.

Speaker's Statement — Question Period
November 19, 2009 *Journals*, pp. 1471-1472

Honourable senators, it is the responsibility of the chair to maintain order and ensure that the proceedings of the house remain faithful to the rules and to the guidance we get from procedural literature. The use of supplementary questions during Question Period has come to my attention.

All honourable senators have the right to raise questions. The time by our rules is limited. The chair feels uncomfortable knowing that a number of senators who have indicated they would like to ask questions are being trumped by many supplementary questions. In fairness to all honourable senators who have the right to ask questions, it is important that we review the ground upon which supplementary questions are in order.

Page 354 of the 23rd edition of Erskine May states:

> A supplementary question may refer only to the answer out of which it immediately arises, must not be read or be too long, must not refer to an earlier answer or be addressed to another...

The point is that bona fide supplementary questions must really be targeted and focused on information that has been apprehended as a result of the response by either a chair of a committee or the minister in the house. I simply draw this to the attention of honourable senators.

Bill — Requirement for Royal Recommendation
December 1, 2009 *Journals*, pp. 1516-1517

On November 17, Senator Oliver rose on a point of order challenging proceedings on Bill S-241, An Act to amend the Office of the Superintendent of Financial Institutions Act (credit and debit cards). He argued that the bill should be accompanied by a Royal Recommendation and should therefore not have originated in the Senate.

Senator Oliver's contention was that Bill S-241 would add an additional purpose to the *Office of the Superintendent of Financial Institutions Act*, creating a new oversight body and inevitably requiring additional resources and staff. He stated that such an expansion of purpose would have to be accompanied

by a Royal Recommendation. Senator Oliver referred to a number of rulings from the other place, and his concerns were supported by Senator Comeau.

Senators Fraser and Tardif questioned this position. Senator Fraser noted the importance of relying on Senate precedents, suggesting that they have established that merely ancillary expenses do not prevent a bill from originating in this house. Senator Tardif, in turn, noted the importance of only addressing what is required or authorized by the specific bill under consideration. She also referred to various rulings given in the Senate.

Senators Banks and Cools also questioned whether there was a valid point of order. Senator Banks did not see how Bill S-241 mandates the creation of any new body. Instead, the new purpose would be assigned to an existing entity. Senator Cools then explained that the bill does not appropriate monies or impose taxation. As such, she did not accept that it violates the limits on bills originating in the Senate. She later identified relevant provisions of the Constitution and citations from Beauchesne.

For her part, the sponsor of the bill, Senator Ringuette, clarified that Bill S-241 would not create any new body. Instead, the additional purpose is to be assigned to an existing agency, the Office of the Superintendent of Financial Institutions. In her defence of the bill she also referred to a past ruling given in the Senate and to Erskine May.

I wish to thank all honourable senators for their assistance with this point of order. The fundamental issue in this case has to do with the financial prerogative of the Crown. As noted at page 831 of the second edition of *House of Commons Procedure and Practice*, this means that "Under the Canadian system of government, the Crown alone initiates all public expenditure and Parliament may only authorize spending which has been recommended by the Governor General." This principle is reflected in Senate rule 81, which states that "The Senate shall not proceed upon a bill appropriating public money that has not within the knowledge of the Senate been recommended by the Queen's representative." The rule itself embodies some of the provisions contained in sections 53 and 54 of the *Constitution Act, 1867*.

The existing *Office of the Superintendent of Financial Institutions Act* has as its purpose "to ensure that financial institutions and pension plans are regulated ... so as to contribute to public confidence in the Canadian financial system." Bill S-241 would add an additional purpose, relating to the use of credit and debit cards. This can be seen as directly relating to the act's existing purpose, since credit and debit cards are essential, indeed integral, parts of a modern financial system and the operations of financial institutions.

Bill S-241 does not contain provisions appropriating any part of the public revenue. The Superintendent of Financial Institutions already exists, supported by an office. The office is funded both by a standing appropriation and by assessments on regulated bodies. It is to this office that the new purpose would relate. It is the superintendent who would be mandated to consult with other already existing bodies.

To be clear, Bill S-241 does not mandate new hiring or other expenditures. Although the changes it proposes may impose some administrative adjustments, arguments did not establish how the new responsibility would automatically incur new public expenditures, as opposed to being accommodated within existing funding, or how any expenditures would be "new and distinct." The purpose to be added by Bill S-241 fits within the existing general roles and functions of the Office of the Superintendent of Financial Institutions. In light of the available information, the ruling is, therefore, that the point of order has not been established, and debate on the motion for second reading can continue.

Speaker's Statement — Assault on the Parliament Buildings
December 8, 2009 *Journals*, p. 1549

As you are aware, an incident occurred yesterday when 19 persons climbed onto the porch over the Senate entrance as well as the roof of the West Block.

A number of senators, their staff, and members of the Administration had their access to Parliament impeded. What is more, emergency responders were inconvenienced by unnecessarily having to respond, and other difficulties were caused by this assault.

These individuals may have sought to convey a message to the government, yet the real target of their action ended up being Parliament itself.

Honourable senators, we will all agree that this was a deplorable assault. This incident was a direct attack against the dignity of Parliament.

The Senate is offended by such a reprehensible display of disregard for the position of this body and all of Parliament, the very institution that represents and safeguards the rights and liberties of all Canadians.

It is my hope and, I believe, that of all senators that this act will be recognized not just as an affront to Parliament, but to all the people we represent.

Receivability of Committee Amendments
December 9, 2009 *Journals*, pp. 1588-1589

On December 8, Senator Comeau rose on a point of order respecting the twelfth report of the Standing Senate Committee on National Finance, which proposes amendments to Bill C-51, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and to implement other measures. The report had been presented earlier in the day and ordered placed on the Orders of the Day for consideration at the next sitting.

Senator Comeau's concern was, in essence, that the amendments contained in the report were not relevant to Bill C-51. He referred to the second edition of *House of Commons Procedure and Practice*, which, at pages 766-767, notes that "an amendment is inadmissible if it proposes to amend a statute that is not before the committee or a section of the parent Act, unless the latter is specifically amended by a clause of the bill." Similar limitations are to be found at citation 698(8) of Beauchesne, which states:

> (*a*) An amendment may not amend a statute which is not before the committee
> (*b*) An amendment may not amend sections from the original Act unless they are specifically being amended in a clause of the bill before the committee.

Senator Comeau explained that the report's amendments deal with the *Bankruptcy and Insolvency Act*. Although Bill C-51 does propose amendments to that Act, the sections that it would amend are different from those in the report. As such, he argued that the amendments in the report are out of order.

A number of other senators participated in debate. Some suggested that, since Bill C-51 opens the *Bankruptcy and Insolvency Act*, any sections of that Act can be amended. Other senators, on the other hand, emphasized the importance for committees not to exceed their mandates. There were also some concerns expressed about the wide- ranging nature of some recent Budget Implementation Acts. Finally, Senator Ringuette, who had moved the amendments in committee, spoke to defend them.

As honourable senators know, an amendment moved in committee must respect the principle and scope of the bill, and must be relevant to it. It may generally be helpful to view the principle as the intention underlying a bill. The scope of the bill would then be related to the parameters the bill sets in reaching any goals or objectives that it contains, or the general mechanisms it envisions to fulfil its intentions. Finally, relevancy takes into account how an amendment relates to the scope or principle of the bill under examination. An amendment must respect the principle of the bill it seeks to amend, must be within its scope, and must be relevant to it.

As Senator Comeau noted, normal practice is that an amendment should not be moved that would amend an existing Act, unless the bill under consideration proposes that the Act be amended. What is more, in general, only those aspects of the original Act that are already to be amended by the bill are subject to further amendment. In the Commons, this appears to have been interpreted in a very rigid manner, that is to say that amendments that fail to respect these criteria, even if they are directly relevant or perhaps seek to correct something overlooked in error, are not acceptable.

As is often the case, and reflecting its unique approach, the Senate has not been so rigid on this point. Although the issue only comes up very rarely, practice here has tended to be that a proposed amendment to a bill amending an existing Act may deal with sections of the original Act that are not amended by the bill, provided that there is a strong and direct link between an existing clause of the bill and the change to the original Act that the proposed amendment seeks to affect.

This said, the summary of Bill C-51 indicates that the amendments it proposes to the *Bankruptcy and Insolvency Act* are "to correct unintended consequences resulting from the inaccurate coordination of two amendment Acts." The amendments proposed by the twelfth report, on the other hand, deal with unfunded pensions of retirees and employees when a corporation files for bankruptcy, placing them on the same level as creditors. Without in any way speaking to the desirability of the changes proposed by the report, they exceed the quite limited nature of the amendments the bill proposes.

The ruling is that the point of order is established, and the amendments that the report proposes are out of order.

Since the report only contained amendments that have been determined to be out of order, the content of the report is evacuated. In consequence, the report proposes no amendments to Bill C-51 and, under rule 97(4), therefore stands adopted. The next question that must be put to the Senate is therefore the procedural one of "When shall this bill be read a third time?". To be clear, this is for third reading of the bill without amendment.

Question of Privilege — Comments in a Press Release

December 14, 2009 *Journals*, pp. 1654-1657

Our houses of Parliament, both the Senate and the House of Commons, equally possess certain rights and immunities to protect their proceedings and members from any undue interference. Such immunities and rights constitute "parliamentary privilege," and they are an important part of the law of Parliament.

The fundamental importance of privilege is acknowledged in rule 43(1), which states that:

> 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 ...

Through privilege, the Senate has the capacity to, among other things, summon witnesses, discipline its members, and punish as contempt any action or conduct that it feels offends the authority and dignity of this house, even when it does not breach a specific parliamentary privilege.

Erskine May's Parliamentary Practice has long provided the standard statement respecting the character and purpose of privilege. In the 23rd edition, at page 74, it states that:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively ..., and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

This definition makes clear that an essential element of privilege is the need for these rights and immunities so that the houses and parliamentarians can fulfill their duties.

On December 3, 2009, the Honourable Senator Cools rose on a question of privilege after having given the necessary written and oral notices. In speaking to the question of privilege, the senator identified a press release issued on December 2, 2009, by Benjamin Perrin, Assistant Professor of Law at the University of British Columbia. The release dealt with Bill C-268, An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years). It included a statement asserting that the senator had stalled the bill in the Senate by unilaterally adjourning debate. It also claimed that "As a result of her inaction, alleged child traffickers in a Calgary case announced today will benefit from lax sentences that the current law permits. The Senate must take action."

Senator Cools explained that the release demonstrated a lack of understanding about parliamentary practice, and Senate procedure more particularly. Items are adjourned by decision of the Senate, as she noted, not by the unilateral action of a single senator. The senator also noted that, far from blocking progress on the bill, she had gladly yielded to Senator Dyck to speak. The period the bill has since stood in Senator Cools' name is nothing out of the ordinary.

Going beyond these points, Senator Cools claimed that the release constituted an act of intimidation directed at her, and, more generally, an attempt to force adoption of the bill in a precipitous manner. In Senator Cools' view the statements were untrue and incited scorn and contempt towards her.

Senators Harb, Carstairs, Dyck, Fraser, and Cowan generally expressed sympathy with Senator Cools' concerns. Through their remarks they underscored the lack of understanding about Senate procedure that the release demonstrated, and the offensive nature of its contents. The history of Bill C-268, both in the Senate and the House of Commons, was also analyzed in detail. Senator Carstairs made several references to Beauchesne and to the importance of freedom of speech, the most fundamental right of parliamentarians.

Senator Comeau, on the other hand, did not see a question of privilege. He spoke to the right of all Canadians to express their views. Nothing in the release, according to the senator, constituted a real threat or intimidation. Senators Di Nino and Martin made similar points. While sympathizing with Senator Cools, Senator Di Nino pointed out that the matter at hand was not the bill and how long it had been before Parliament, but whether privilege was infringed by a Canadian citizen expressing his views in a critical way.

I again wish to thank all honourable senators for the input they provided on this question of privilege. As I have already noted, the privileges we enjoy, both collectively and individually, are essential for us to perform our functions. The thoughtful and considered comments by senators showed how well this is understood.

The Speaker's role at this point is to address the narrow issue of whether there is a prima facie question of privilege, using the four criteria set out in rule 43(1). This inevitably requires that consideration be given to a broader range of issues. The standard definition of privilege, from Erskine May, was quoted earlier. This is a foundation upon which to base how we deal with such questions. It is, however, also important to remember that privilege has changed over time. Matters considered breaches of privilege or contempt in a less democratic era, are no longer treated as such. At one time, for example, those reporting words spoken in Parliament risked imprisonment. Today we encourage the media to report on our proceedings.

As the English philosopher John Stuart Mill pointed out in *On Liberty*, more than 150 years ago, it is not our role as parliamentarians to suppress the liberty of the citizen, particularly in the exercise of free speech.

We now understand that public engagement in national affairs is to be fostered and nurtured. It is part of the vibrant democracy we enjoy in Canada. Good debate inside Parliament, and therefore good legislation and policy, is helped by informed criticism from keen observers and the general public.

With useful criticism, however, we must all too often be willing to accept ill-informed, indeed harsh and offensive, comments. We need not like it at all, but no one occupying a position in Parliament, at the heart of public life, can claim exemption from being exposed to sometimes unmerited or ignorant criticism.

In the specific case before us, we must draw a distinction between the question of privilege and Bill C-268 itself. Disagreeable or offensive words are not in themselves sufficient to violate privilege. Instead, it must be shown how these words can be reasonably seen as impairing a specific privilege. Issues of contempt must also be approached with caution. Citation 62 of Beauchesne notes that a statement must be "purposely untrue and improper and import a ring of deceit" to possibly constitute contempt.

In the case at issue, it is certainly true that the press release contained inaccuracies. For example, Senator Cools did not unilaterally adjourn debate on Bill C-268. Proper processes under the Rules were followed, resulting in the item currently standing in her name. This kind of misunderstanding is not uncommon, and for this reason we have sought to foster a better understanding of how the Senate works.

While the senator can speak if she wishes, nothing prevents other senators from speaking to the bill, as has been made clear in past rulings, so Senator Cools cannot be said to have "stalled" the bill. Indeed, nothing prevents the Senate from making a decision on the motion for second reading, should this chamber so determine, at any time the order for resuming debate is called.

What is more, some of the language in the release was exaggerated, to say the least. To suggest that one senator is at fault for how accused criminals are treated under the law is fallacious. To then imply some link between the senator and slavery is offensive. Such *ad hominem* attacks serve little purpose, and could even harm the cause they seek to advance.

This said, we must ask in what way Senator Cools' privileges were affected, especially her freedom of speech? In what way were the Senate's privileges infringed? Citation 69 of Beauchesne states that "It is very important ... to indicate that something can be inflammatory, can be disagreeable, can even be offensive, but it may not be a question of privilege unless the comment actually impinges upon the ability

of [parliamentarians] to do their job properly." Similarly, in a report of the Rules Committee from the third session of the 34th Parliament, adopted by the Senate on June 10, 1993, stated that:

> An adverse reflection upon a Senator or the Senate can constitute breach of privilege, but only if it impedes the Senator or the Senate from performing parliamentary functions. As such, it has a very narrow application, and is to be distinguished from actions for defamation, which are available to all citizens and are pursued through the civil courts. It is extremely difficult to bring oneself within the protection offered by this aspect of parliamentary privilege.

Nothing in the release has forced any change as to how the Senate will deal with Bill C-268, nor could it. Senator Cools can speak freely to the bill, subject to our Rules and practices. Other senators can do the same. Neither her right to speak, nor that of any other honourable senator, has been infringed. Eventually, at a time determined by the Senate, it will make a decision on second reading of Bill C-268.

As to the issue of contempt, mere ignorance of Senate Rules does not constitute purposeful untruth or deceit. We have no basis to see more in the current case. It may also be of interest to note here that, when Beauchesne refers to threats attempting to influence members, it appears to envision more than merely uninformed or disagreeable commentary. Citation 99 explains that normal practice is now to turn investigation over "to the ordinary forces of the law." This suggests an entirely different type of matter from mere words in a press release. It implies direct threat and menace, even physical intimidation.

To turn to the criteria identified in rule 43(1) for determining if there is a prima facie question of privilege, it is clear that the matter was raised at the earliest opportunity. It is not, however, clear how this matter directly concerns privilege. While the language in the press release was exaggerated, and Senator Cools can quite rightly be offended by it, nothing in it affected the Senate's right to deal with Bill C-268 as it sees fit. All senators can still speak freely. A few lines in a press release are not enough to cause honourable senators, let alone the whole chamber, to change their minds or course of action. The ruling is therefore that a prima facie case of privilege has not been established.

Speaking a Second Time in Debate
December 14, 2009 *Journals*, pp. 1666-1667

On December 10, Senator Cools raised a point of order during debate on the series of amendments to the motion for third reading of Bill C-6, An Act respecting the safety of consumer products. The senator questioned Senator Comeau's participation in debate for what appeared to be a second time.

A brief chronology of events may help us understand what exactly happened. When the sitting resumed at 8 p.m., there was some initial business, after which Senator Comeau moved the adjournment of debate without actually participating in it. After an hour bell, the motion was rejected. Senator Dallaire then spoke briefly on the amendments. Senator Comeau then moved the adjournment of the Senate. That motion was also rejected after another hour bell, and Senator Comeau subsequently rose to speak, after which he moved the adjournment of debate.

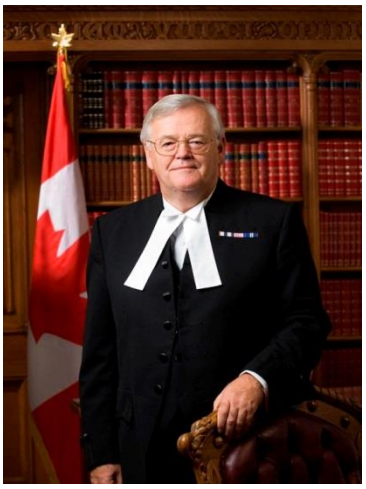
Senator Cools questioned whether Senator Comeau should have been speaking at this point. Several other senators expressed a range of views on the point of order.

Parliamentary authorities provide some assistance on this issue. Page 601 of the second edition of *House of Commons Procedure and Practice*, states that "If a Member moves a motion during his or her speech (e.g., an amendment or a motion to adjourn debate), the act of moving the motion will terminate the

Member's speech." Page 346 of the fourth edition of Bourinot notes that "If a member should move the adjournment of debate, and the house should negative that motion, he will have exhausted his right of speaking on the main question."

As is often the case, the Senate is flexible in its practices, not always applying these provisions rigidly. Since the matter has been raised, however, it is clear from the authorities that, with the rejection of his motion, Senator Comeau had exhausted his time in speaking to the amendments on Bill C-6 and cannot speak again to them.

Third Session, Fortieth Parliament
March 3, 2010 – March 26, 2011



Speaker: The Honourable Noël A. Kinsella

Speaker *pro tempore*:
The Honourable Donald H. Oliver

Strangers Present in the Senate
March 11, 2010 *Journals*, pp. 67-68

Honourable senators, Senator Wallace has drawn our attention to rule 136(5) quite accurately, but I also would like to draw the attention of honourable senators to rule 20(1) which reads as follows:

> If at any sitting of the Senate, or in Committee of the Whole, a Senator shall take notice that strangers are present, the Speaker or the Chairman (as the case may be) shall forthwith put the question "That strangers be ordered to withdraw", without permitting any debate or amendment.

A senator who, pursuant to the rules — as pointed out by Senator Wallace — is on a leave of absence or suspended under rule 141, is in a very real sense, a stranger.

The point I am making is that, as your chair, I did not observe Senator Lavigne in this place, nor was it drawn to the chair's attention. Senator Wallace has drawn it to our attention, and it is a fact that in the record his name appears as being present. We could refer to guidance from Beauchesne's, the sixth edition at page 97, which points out, in paragraph 321:

> A point of order against procedure must be raised promptly and before the question has passed to a stage at which the objection would be out of place.

The fact is that Senator Lavigne, apparently, took his place in the Senate although improperly, as has been pointed out by Senator Wallace. This discussion is now all on the record and, unless honourable senators feel that we have to expunge the name from those present yesterday, I suggest that the record now makes the matter clear.

Question of Privilege — Presence of a Senator on Leave of Absence
March 25, 2010 *Journals*, pp. 165-167

On March 17, 2010, Senator Wallace rose on a question of privilege under rule 59(10) respecting Senator Lavigne's attendance earlier that day. Senator Wallace explained that Senator Lavigne is currently on leave of absence and, having already attended the Senate once this session, rule 136(5) prohibits him from attending again. Senator Wallace referred to Maingot to argue that disobedience to the Rules constitutes contempt. He also indicated that he was ready to move that the matter be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament should the Speaker find a prima facie question of privilege.

Senator Cools then questioned the process being followed. She argued that when invoking rule 59(10) Senator Wallace should have moved a motion, not asked the Speaker to determine whether there was a prima facie question of privilege.

Before turning to the substance of Senator Wallace's complaint, I will address the process used. A question of privilege can be brought before the Senate in at least five ways. First, and most frequently, there is the process under rules 43 and 44, requiring written and oral notice. Second, a motion moved on notice can be used. Third, Appendix III of the Rules outlines a process in cases involving a disclosure of confidential committee documents. Fourth, a committee can bring a possible issue of privilege to the Senate's attention by presenting a report. Finally, rule 59(10) provides that no notice is required to raise a question of privilege.

It was this fifth process that Senator Wallace invoked. I would draw honourable senators' attention to a series of three rulings given during March and April of 2009. They were raised under rule 59(10), and were all assessed by the Speaker in light of the criteria usually used to determine a prima facie question of privilege. In the third ruling, given on April 21, it was noted that:

> . . . rule 43 details a process for written and oral notice to properly raise a question of privilege. All of these are imperative, and are meant to be used. Unless the Senate makes a deliberate decision to change rule 43, rule 59(10) will only remain available for questions of privilege that arise out of circumstances that prevent a senator from providing the notices required under rule 43. To do otherwise would render the rule meaningless. Such a reversal of the clear obligations contained in the rules requires a deliberate and positive decision of the Senate.
>
> With respect to the substantive matter of the question of privilege, the Speaker's role is to review the case and determine whether there is a prima facie case for a question of privilege, guided, *inter alia*, by the four criteria identified in rule 43(1).

The process used by Senator Wallace, who raised an issue that had occurred during the course of the sitting, thus respected current Senate practices. As has been noted in previous rulings, the Senate would benefit if the Rules Committee were to consider the processes for raising questions of privilege.

The specific matter at issue is largely based on rule 136(5), which states:

> A Senator on leave of absence, or suspended under rule 141, for more than a full session may nonetheless make an appearance in the Senate once every session to avoid disqualification, but only on the sixth day the Senate sits after the Clerk lays upon the Table a notice of the Senator's intention to be present, signed by the Senator.

By way of background, Senator Lavigne is currently on a mandatory leave of absence. On March 3, 2010, he sent a letter to the Clerk indicating that he would take advantage of his right to be present. Once the letter had been tabled and recorded in the *Journals of the Senate*, the Clerk wrote to Senator Lavigne advising him that, if the Senate sat on dates identified in the letter, which reflected the normal pattern of sittings, the senator could attend on March 17, expected to be the sixth sitting day following the tabling of his letter. This date would, of course, change if the Senate varied from its normal pattern of sittings, a fact that was noted.

Despite receiving this information, Senator Lavigne attended the Senate on March 10, earlier than allowed, since it was only the third sitting day after the letter was tabled. This led to a point of order on March 11, on which I ruled. Senator Lavigne then wrote to the Clerk seeking clarification. As part of his response the Clerk noted the provision in rule 136(5) that stipulates attendance is allowed "once every session." In the event, on March 17, Senator Lavigne was again present at his desk. The question of privilege was raised as a result of this second attendance.

At this stage, the Speaker's role is to take into account the four criteria of rule 43(1). It is clear that the matter was raised at the earliest opportunity, satisfying the first criterion. It is also clear that Senator Wallace is willing to offer a remedy, referral to the Rules Committee, thereby satisfying the third criterion.

The second and fourth criteria can perhaps be best addressed together. They require that "... a matter directly concern[] the privileges of the Senate..." and that it "be raised to correct a grave and serious breach." Rule 136(5) only allows a senator on leave of absence or who is suspended to attend a sitting

once in a session, and only on the sixth sitting day following the tabling of a notice. This notice requirement is useful for the planning of house business and votes.

In this case, Senator Lavigne was correctly informed of the requirements of rule 136(5). While neither of his appearances respected the rule, it is not clear that this constitutes a contempt, an action tending to obstruct or impede the Senate or to offend against its authority or dignity. Instead, it appears to be an unfortunate misunderstanding. The fact that Senator Lavigne withdrew once it became apparent that his presence was a cause of concern supports this conclusion. A breach of the Rules certainly occurred, as addressed in the ruling of March 11, but there is insufficient evidence to determine wilful contempt to the authority of the Senate.

Before concluding, I would like to clarify any confusion that may have arisen about the use of the term "stranger." Since he is on a mandatory leave of absence, Senator Lavigne is not authorized to be on the floor while the Senate is sitting, except in the very narrow circumstances provided under rule 136(5). As such, the word "stranger" was used as a means to challenge his presence in the chamber. The term is relevant inasmuch as it provides a framework for dealing with the awkward situation in which a senator who is prohibited from being present is nevertheless in the chamber.

To return to the case at issue, the ruling is that no prima facie case of privilege has been established. There was, instead, a breach of order, which, as noted in the earlier ruling, is now a matter of record.

The Adoption of Bill C-268 by the House of Commons

April 20, 2010 *Journals*, pp. 247-249

On April 15, 2010, Senator Cools rose on a point of order to question whether Bill C-268, An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years), is properly before the Senate. She asserted that the bill "offends Senate rules, the established law of Parliament and the constitutional independence of both houses." She noted that the bill passed the House of Commons this session based on its standing order 86.1. While recognizing the control each house has over its own proceedings, she argued that the House of Commons could not pass Bill C-268 under that particular standing order since, at the time of prorogation, a previous version of the bill had been before the Senate. As part of her argument, Senator Cools explored a range of parliamentary issues. When they spoke later, Senators Banks, Carstairs, and Fraser found the points raised by Senator Cools to be intriguing.

Senator Comeau, during his intervention, questioned Senator Cools' position. He explained that, as a result of prorogation, Bill C-268 from the last session is no longer before either the Senate or the House of Commons. The Bill C-268 now before the Senate for second reading is a new bill. It was received by the Senate from the other place in this session. He also cautioned against passing judgment on how the House of Commons chooses to conduct its business. Senator Comeau did not see any breach of the Rules or the practices of the Senate, concluding that the bill is properly before us.

Honourable senators, it may be helpful to consider some larger questions related to this point of order before turning to the specifics of this case.

As honourable senators know, prorogation of Parliament is one of the prerogative powers of the Crown, exercised on the advice of the Prime Minister. Prorogation brings to an end all business before Parliament. As Erskine May, at page 274 of the 23rd edition, puts it, "The effect of a prorogation is at once to suspend all business, including committee proceedings, until Parliament shall be summoned again, and to end the sittings of Parliament."

This does not mean, however, that business from a previous session cannot be revived in a new session. The just-cited reference to Erskine May goes on to explain that public bills can be "carried over by order from one session to another." Similarly, the House of Lords can carry public bills over to a new session in certain circumstances. In other words, in the United Kingdom mechanisms have been established to revive business from a previous session in a new session.

Such an approach is also followed in Canada. In the Senate, this is routinely done by the referral of papers and evidence from past sessions to committees for work in a new session. In the House of Commons, bills are regularly revived in a new session of the same Parliament, and the process has been essentially automatic for Private Members' Public Bills since 2003. Government bills are also occasionally reinstated, based on separate orders of the Commons. Practices allowing for the reinstatement of bills also exist in at least some provinces, including Alberta, Manitoba, Ontario, and Quebec. Reinstatement of bills in a new session is not an unusual feature in modern parliamentary practice.

To turn to the specific issue raised by Senator Cools, much of the debate on the point of order dealt with standing order 86.1 of the House of Commons and how it should be applied and interpreted. As honourable senators know, each house is master of its own procedure, within the bounds of the Constitution and the law. Just as honourable senators would object to the other place examining Senate procedures, it is inappropriate for the Senate to question those of the Commons. As noted in Beauchesne, sixth edition, at citation four, one of the most important privileges is the right for each Chamber "to regulate [its own] internal proceedings..., or more specifically, to establish binding rules of procedure." This point has been made at different times in Speaker's rulings here.

We can, however, refer to the House of Commons *Journals*, the official record of the decisions of the other place. For March 3, 2010, we find the following entry:

> Accordingly, Bill C-268, An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years), was deemed introduced, read the first time, read the second time and referred to a committee, reported with an amendment, concurred in at report stage and read the third time and passed.

Honourable senators, this makes it clear that, at the beginning of this session, a new Bill C-268, which was identical in content and number to a bill from the last session that had died on the Senate Order Paper, was introduced in the House of Commons, read a first time, and passed all the necessary stages. The bill was, accordingly, introduced here the following day. The message accompanying the bill, as passed by the House of Commons on March 3, 2010, was in the normal form. The message stated that it was:

> ORDERED,
> That the Clerk do carry this Bill to the Senate, and desire their concurrence.

Based upon the already-noted principle that neither house should delve into the proceedings of the other, the Senate does not question the proceedings of the Commons, and accepts at face value a duly attested message received from that House. The Commons *Journals* do make clear, it must be emphasized, that the bill was introduced there on March 3. It was therefore a new bill from this session. The issue of which house had control of the bill last session is not relevant. The bill from the last session was not returned to or retrieved by the House of Commons. The same number was kept for ease of reference, as explained at page 1154 of the second edition of *House of Commons Procedure and Practice*.

It may be of interest for honourable senators to learn that this type of situation actually occurs quite frequently. Since the third session of the 37th Parliament at least nine bills, in addition to Bill C-268, have passed the House of Commons at the start of a session as a result of reinstatement provisions, and then proceeded immediately to the Senate. Of these bills, no less than five have received Royal Assent.

Procedures surrounding Bill C-268 thus fully respected parliamentary procedure and practice, and so debate can continue.

Senators' Statements

June 3, 2010 *Journals*, pp. 488-489

After Question Period on Thursday, May 13, 2010, Senator Tardif rose on a point of order respecting an intervention during Senators' Statements earlier in the sitting. That statement had referred to a line of questions put to the Leader of the Government during Question Period the previous day. Senator Tardif argued that it is unfair to make statements of this type, since Senators' Statements is not a period for debate.

Senator Comeau, on the other hand, did not see that there was a valid point of order. He noted that the statement being challenged had not anticipated an Order of the Day. When Senator Cools spoke, she quoted rule 22(4), and explained that it envisions a period of time during which senators can highlight particular events, but interventions are still subject to the normal rules about the content of speeches. Statements, Senator Cools urged, should be of a positive nature.

As was noted by all three senators who spoke on this point of order, there have been several rulings in recent years dealing with Senators' Statements. I invite all honourable senators to review those decisions and to consider how we can best use this period of the sitting. Since the Senate remains a largely self-regulating chamber, each of us must assume responsibility for the maintenance of order and decorum.

Rule 22(4), requires that a matter raised during Senators' Statements must be one the senator considers should be brought to the urgent attention of the Senate. The rule also requires that the issue be one of "public consequence" that cannot be raised through other means. This gives senators considerable freedom in determining issues to raise as statements.

The rule does, however, also impose some limits on statements. First, a statement must not anticipate any Order of the Day. Second, matters raised during statements are not to be the subject of debate. Finally, statements must respect the usual rules governing the propriety of debate, which would include rule 51 prohibiting "personal, sharp or taxing speeches." When framing their statements, honourable senators should be aware of these limitations, which are built into the very structure of rule 22(4).

In practice, Senators' Statements are normally used to comment on events, accomplishments, or anniversaries that the senator giving the statement views as important. This includes, for example, paying tributes or offering congratulations to distinguished Canadians or international figures.

I again ask all honourable senators to remember that this chamber functions best when its business proceeds in a courteous and dignified manner. All honourable senators have a part to play in ensuring that this continues to be the case; they should show care in framing remarks, to ensure a useful and respectful exchange of ideas and information, without giving offence. The possibility of using the caucuses and the usual channels for consultations to address the appropriate topics for statements has been raised in the past, and could again be used to ensure that there is a clear understanding of the purpose of Senators' Statements.

Questions during Question Period
September 29, 2010 *Journals*, pp. 781-782

Honourable senators, I think the point of order that was raised has been well canvassed. I am prepared to rule that Question Period was conducted by honourable senators in the manner consistent with the *Rules of the Senate.*

As you know, rule 24 provides that when the Speaker calls the Question Period, a senator may, without notice, address an oral question to the chair of a committee if it is a question relating to the activities of that committee.

As I heard the question raised and put to the chair of the Standing Senate Committee on National Security and Defence, I did not interrupt the matter because I thought it was a legitimate question asked with a legitimate answer provided.

I will point out that in terms of answering a question, of replies to oral questions, as Speaker Jerome summarized in his 1975 statement on Question Period, several types of responses may be appropriate. Ministers — and this would also apply to chairs of committees — may: answer the question, defer their answer, take the question as notice, make a short explanation as to why they cannot furnish an answer at that time or say nothing.

Honourable senators, I think that the question that was put by the Honourable Senator Banks to the chair of our Standing Senate Committee on National Security and Defence was very much in order, and that is why the chair did not intervene and all honourable senators conducted themselves consistent with the rules.

However, regrettably, your chair was in error, and he apologizes, for I ought not to have allowed the question of the Honourable Senator Downe to the chair of the subcommittee because the subcommittee reports to this house through the chair of the committee. Therefore, I apologize for my lack of attention.

I found that the question that was being posed to the chair of the Rules Committee had not been put. No judgment was made on it. I intervened because I wanted to maintain the flow of business.

However, should at any time there be a desire to have the Rules Committee look at the rule, then that is up to the house to decide.

Question of Privilege — Statement About a Witness During Debate
October 5, 2010 *Journals*, pp. 795-798

On September 27, Senator Cowan, the Leader of the Opposition in the Senate, rose on a question of privilege pursuant to rule 43. His complaint focussed on statements made by Senator Brazeau on July 6, during debate at third reading of Bill S-4, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. In separate statements Senator Brazeau had both commented on several witnesses who had appeared on the bill and made specific reference to the past work of Dr. Pamela Palmater, Chair of the Centre for Study of Indigenous Governance at Ryerson University. Subsequently, on September 11, Dr. Palmater wrote to a number of senators to complain about an attempt to discredit her that was not based on fact. She also expressed concern that Senator Brazeau's comment could harm her professionally. With leave, Senator Cowan tabled a copy of the email from Dr. Palmater, which now forms part of our record.

Senator Cowan's argument was that, having been alerted of the complaint, the Senate must act to defend Dr. Palmater's reputation. Not to act might have a "chilling effect" on the work of committees in the future. Witnesses might be reticent about appearing, fearing they could be adversely affected. Senator Cowan argued that Senator Brazeau's statement, by potentially impeding other senators' ability to perform their duties, had amounted to contempt. The Leader of the Opposition indicated that he was not questioning the outcome of any vote on Bill S-4, although he did note that it is impossible to know whether this incident affected the result. In summary Senator Cowan stated,

> The critical point [in this question of privilege] is that if what Dr. Palmater says is true, and it is not dealt with, do any of us believe that, in the words of Erskine May [at page 150 of the 23rd edition], this will not "deter prospective witnesses from giving evidence" to us in the future? If future witnesses are deterred from sharing their knowledge with us, how can we perform our constitutionally prescribed duties as members of this legislative body?

Senator Comeau did not accept Senator Cowan's position. Rather, the Deputy Leader of the Government in the Senate focussed on the right of all senators to express divergent points of view. He even suggested that an acceptance of Senator Cowan's argument could amount to an infringement of "Senator Brazeau's fundamental privilege of free speech".

In their interventions Senators Mitchell, Banks, Tardif and Fraser supported Senator Cowan's position. They spoke about the prospective harm that can be done to witnesses and expressed fears about damaging reputations. When he took the floor, Senator Brazeau noted that he was surprised at the complaint. He referred to Dr. Palmater's website to support his understanding of her past career. Before this intervention, Senator Cools had expressed her dismay about the recent tenor of debate in Parliament. She did not feel that the prohibition contained in rule 51 against "personal, sharp or taxing speeches" is always fully respected. This said, Senator Cools did not see this matter as being a question of privilege, but rather one of due process and due respect. While some words may have been spoken without sufficient reflection, there was no evidence that they were deliberately harmful or aimed at deterring future witnesses.

In considering this matter I have followed normal practice and taken into account the arguments provided by senators during debate on the question of privilege, in addition to our Rules and the insights from the parliamentary authorities.

The basic privilege in this case is freedom of speech. As noted in the second edition of *House of Commons Procedure and Practice*, at pages 89 and 90, this is

> [b]y far, the most important right accorded to Members of the House ... [...] a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their [residents].

According to page 96 of the 23rd edition of Erskine May, this means that,

> [s]ubject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.

This privilege is powerful, and it comes with great responsibility. In the other place, "Speakers have ... stated that although there is a need for Members to express their opinions openly in a direct fashion, it is also important that citizens' reputations are not unfairly attacked." This is at page 98 of the second edition of *House of Commons Procedure and Practice*. Later, at page 617, the same work notes that,

> Members have a responsibility to protect the innocent [and should] avoid as much as possible mentioning by name people from outside the House who are unable to reply in their own defence.

We must be clear, however, that it is generally true that senators have the right to express themselves freely and to say anything they want in any parliamentary proceeding. Only the Senate itself, through its Rules and practices, can constrain this right. Maingot, at page 26 of the second edition, makes this clear, stating that parliamentarians' freedom of speech is "subject only to the rules, customs, and practices" of their house.

It goes without saying that just because senators have the freedom to say something does not mean that they should avail themselves of this right in all cases. Honourable senators should be aware of the need to avoid impugning the reputations of those who do not sit in this place and who have no mechanism to defend themselves.

The case before us is somewhat complicated by the fact that it is not only parliamentarians who benefit from the protection of privilege. Witnesses are not to be molested or interfered with because of evidence that they have given or intend to give before a committee. To interfere with witnesses before their appearance or to punish them for evidence given can constitute a breach of the privileges of the Senate. This is recognized at page 150 of the 23rd edition of Erskine May, to which reference was made during debate on the alleged question of privilege.

The retrospective element of this protection is described when it is stated that,

> molestation of or threats against those who have previously given evidence before either House or a committee will be treated by the House concerned as a contempt. Such actions have included assaults or a threat of assault on witnesses, insulting or abusive behaviour, misuse (by a gaoler) or censure by an employer.

The prospective element of the protection is recognized in the quote to which Senator Cowan made reference, which states that "[a]ny conduct calculated to deter prospective witnesses from giving evidence before either House or a committee is a contempt".

The aspect of retrospective protection was not fundamental in this question of privilege. We may observe, however, that Senator Brazeau took note of some factors he felt gave context to statements in committee. While I again emphasize the need for caution when mentioning outside individuals in debate, the remarks were not of the type to which Erskine May refers. The Senate was not provided, in debate on the question of privilege, with evidence of deliberate malice, deliberate misstatements or a deliberate attempt to punish.

In terms of prospective protection, which is central to this question of privilege, the basic allegation was that subsequent criticism of the witness could keep unknown future witnesses from appearing, at some point in time. Nothing specific was offered as an illustration to show that this was anything more than a possibility. Against this vague concern, we must set the undoubted freedom of speech that all senators enjoy, subject always to our Rules, customs and practices. There is nothing concrete in this case to

suggest a real conflict between the two privileges of senator's freedom of speech and the protection of identified future witnesses.

The potential for conflict between unfettered freedom of speech and the need to use it in a responsible manner has been recognized in other countries. In Australia, most parliamentary houses have established a "right of reply". In the federal Senate, for example, a person who claims to have been adversely affected in a proceeding can submit a request that a response be published. This request goes through a control process before being put into effect. Since 1988 the Australian Senate has also recognized that freedom of speech must be exercised in a responsible manner, to avoid the damaging effects that allegations can have.

In the case at issue, the Speaker's role is to evaluate whether a prima facie question of privilege is well-founded, using the four criteria in rule 43(1). There can be little doubt that the first criterion was met, since Senator Cowan only became aware of Dr. Palmater's concern on September 11.

In relation to the third criterion, that the concern be raised to seek a genuine remedy, Senator Cowan has indicated that he is ready to move referral to the Standing Committee on Rules, Procedures and the Rights of Parliament.

Lastly, in terms of the second and fourth criteria, it is not evident how Senator Brazeau's exercise of his undoubted freedom of speech has, in a concrete and direct way, prevented the Senate from discharging its basic functions of examining legislation, investigating public affairs and ensuring accountability. The concerns raised were speculative. Moreover, let us remember that nothing indicates that the remarks in question affected the outcome of any decision by the Senate. These two criteria have, therefore, also not been fulfilled.

The ruling is that the conditions of rule 43(1) have not been met and I am unable to apprehend that there is a prima facie question of privilege. This case does, however, serve to underscore how careful we must all be when we use the privileges we enjoy as parliamentarians. With our freedom of speech comes the responsibility to use it in a careful and considered manner that avoids harm.

Question of Privilege — Contents of the *Debates of the Senate*
November 17, 2010 *Journals*, pp. 955-957

Honourable senators, let me thank all honourable senators for their interventions on this matter. It is important that the matter was brought to the floor of the house. I am prepared to deal with it.

First and foremost, the official record of this house is the publication that is on our desks every day called the *Journals of the Senate*. That is the only official record. If you look at page 948 of the *Journals of the Senate* from November 16, 2010, it describes that Commons Public Bills were called; Orders No. 1 and 2 were called and were postponed until the next sitting. Then:

> Resuming debate on the motion of the Honourable Senator Mitchell, seconded by the Honourable Senator Banks, for the second reading of Bill C-311, An Act to ensure Canada assumes its responsibilities in preventing dangerous climate change.
>
> The question being put on the motion, it was negatived on the following vote.

Honourable senators, that is the official record.

I will come to the matter of Hansard that has been the subject of discussion.

As I listened to the debate around the matter, yesterday the proceedings were perfectly in order in the disposition of Bill C-311. There was lots of time; there was a delay of an hour for the vote; but the decision was made. Since a decision of the house was made, I feel it is my obligation to remind honourable senators that, as recorded in Beauchesne, sixth edition, at citation 479:

> A Member may not speak against or reflect upon any determination of the House, unless intending to conclude with a motion for rescinding it.

Page 617 of the second edition of *House of Commons Procedure and Practice* states:

> Members may not speak against or reflect upon any decision of the House. This stems from the well-established rule which holds that a question, once put and carried in the affirmative or negative, cannot be questioned again. Such reflections are not in order because the Member is bound by a vote agreed to by a majority.

Comments criticizing or reflecting about a clear decision taken by the Senate shall not be made. I am not suggesting that such comments have been made in this discussion, but I wanted to put this as part of the background. What was done yesterday was dealt with in an orderly manner and we are not commenting on it.

Earlier in the day, questions were raised as to whether or not it is in order for a bill that is at second reading to be put to a vote, and whether there is some relationship to the number of members who would have spoken on a bill that is at second reading. Of course, as all honourable senators know, according to our rules, second reading is a debate on the principle of a bill. More clearly, if some honourable senators are opposed to the principle of the bill, they will not adopt the bill at second reading. That has occurred in the past and that was the question that was put forward. There have been several cases of such bills. One is Bill 86, An Act to amend The Farmers' Creditors Arrangement Act, 1934. The motion for second reading passed in the negative. Another is An Act to amend the Lord's Day Act, which was put for second reading and also passed in the negative. The answer to that question is that that has occurred.

As to the question around the timeliness of raising a question of privilege and whether or not rule 59(10) was available, I think, in light of what Senator Tardif has said, it appears that this rule might have been available. More typically, because the vote was 24 hours ago, the more normal proceeding of using a written notice would have been used.

I am unable to find a prima facie question of privilege in this matter. However, I think the wise counsel from Senator Cools is important. I will undertake to make inquiries because of the integrity of our reporting system and the professionalism and tremendous work that all honourable senators recognize is done by those who work so diligently in producing the Debates, while providing, as Senator Cools pointed out, opportunities for errors of spellings, et cetera, to be corrected through examination of the blues. I know there is no intent on any honourable senator's part to cast aspersions on the excellent work that our reporters do.

Honourable senators, I will conclude by saying that all honourable senators understand that there are technical limitations. The microphones can pick up only one voice at a time, when they are on, so what is recorded on the tape is what is picked from the microphones that are open at the time and does not cover absolutely everything said at the time.

That is my ruling. I will undertake to report on the administrative side of the issue.

Report against a bill under rule 100 without clause-by-clause

December 1, 2010 *Journals*, pp. 1033-1034

Yesterday, during debate on the sixth report of the Standing Senate Committee on Banking, Trade and Commerce, a point of order was raised as to whether the report, which recommends that the Senate not further consider Bill S-216, was properly before the Senate. This concern arose from the fact that the committee had not gone through the bill clause-by-clause, a usual requirement under rule 96(7.1). That rule states that "[e]xcept with leave of its members present, a committee cannot dispense with clause-by-clause consideration of a bill". Against this requirement, there is rule 100, which states, in part, that "[w]hen a committee to which a bill has been referred considers that the bill should not be proceeded with further in the Senate, it shall so report to the Senate, stating its reasons".

There are relatively few instances in which Senate committees have used the process allowed under rule 100. Research has identified eight cases since 1975, of which the 1998 example of Bill C-220 is the most recent. According to the available records, committees have always made the decision to report against a bill without starting clause-by-clause study. That is to say, the basic issue of whether a committee considers that a bill should be proceeded with is decided, either explicitly or, most often, implicitly, before clause-by-clause. If the committee decides to make a recommendation under rule 100, it does not ever reach the clause-by-clause stage.

This helps to understand how rule 96(7.1), which was added to the *Rules of the Senate* in 2005, is to be used. This rule only applies if the committee actually gets to the stage of considering a bill clause-by-clause. If that point is not reached, because a committee decides to recommend against the bill pursuant to rule 100, the requirement of rule 96(7.1) does not come into play. To oblige that a committee go through a bill clause-by-clause when it has already decided to report against the bill would be contradictory and inconsistent.

A review of the blues of the meeting of the Banking Committee on November 25, indicates that, although the term "dispense with clause-by-clause" was used at one point, this was quickly corrected to "not proceed with clause-by-clause". A motion to that effect was put to a recorded vote and carried. A report was then proposed, with a recommendation that the Senate not continue consideration of the bill. This report was adopted on another recorded vote. The proceedings, except for the passing reference to dispensing with clause-by-clause, which was corrected, were thus in order. Not proceeding with clause-by-clause when the committee is recommending against a bill is, as already noted, proper practice.

Honourable senators, as a ruling of September 16, 2009, noted, "[w]hile 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*." This is in keeping with rule 96(7), which prohibits committees from adopting inconsistent special procedures or practices without the Senate's approval, and also reflects points to be found at pages 1047-1048 of the second edition of *House of Commons Procedure and Practice*.

This said, the practice in our committees has been that they are permitted considerable freedom in governing their proceedings. When there are concerns about the propriety of proceedings in committee, they should be raised at that time and in that venue, when corrective action can be more easily taken.

The ruling is that the sixth report is properly before the Senate, and debate can continue.

Questions dealing with an Order of the Day
December 8, 2010 *Journals*, p. 1064

Honourable senators, I should like to deal with this matter now.

I want to begin by thanking Senator Comeau for raising the matter because I had intended to rise, under rule 18, to express certain disquiet from the chair on both Senators' Statements and Question Period. The rule on Senators' Statements that we all understand is clear. We cannot anticipate items that are on the Order Paper. Sometimes statements are made that cannot help but come close to the line. I think there is enough generosity in the chamber to recognize that.

However, equally, during Question Period, while we do not have an equivalent to rule 22(4), which as Senator Comeau cited does not allow us to anticipate items on the Order Paper, we ought not to be raising questions around items that are on the Orders of the Day. I would like to recall, from the parliamentary procedural literature, paragraph 410 in Beauchesne's 6th Edition, at page 122, dealing with "Oral Questions". Item 14 states:

> (14) Questions should not anticipate an Order of the Day although this does not apply to the budget process.

As all honourable senators know, there have been a number of questions in the past little while that did deal with bills or other items on the Orders of the Day. I simply wish to conclude by saying that I invite all honourable senators to be careful about the statements and to give some reflection to what the procedural literature suggests. Whether or not this is something that the Rules Committee might want to look into and specify in the rules will be a judgment that the committee can make.

Bill — Requirement for Royal Recommendation
March 10, 2011 , *Journals*, pp. 1296-1297

I am prepared to rule on the point of order that was recently brought up with respect to Bill S-223, An Act to amend the Canada Pension Plan (retroactivity of retirement and survivor's pensions).

On March 1 Senator Comeau raised a point of order challenging the proceedings on Bill S-223. He argued that the bill creates new expenditures which require a royal recommendation. Consequently, the Senator contended that the bill cannot originate in the Senate under rule 81.

Neither Senator Tardif nor Senator Callbeck, who introduced the bill, agreed with this position. They noted that the monies that would go to the recipients identified in the bill are already available in the Canada Pension Plan (CPP) fund. They also referred to a legal opinion obtained by Senator Callbeck. According to this opinion, the payments from the CPP are not part of the Consolidated Revenue Fund (CRF), and therefore Bill S-223 does not meet the test of a money bill under the terms of the *Constitution Act, 1867*.

Questions about the royal recommendation, what it is, and how it can be identified, frequently lead to points of order in the Senate like this one. Honorable Senators will remember a series of rulings on this topic in February 2009.

The *House of Commons Procedure and Practice* identifies the royal recommendation as an instrument by which the Crown advises Parliament of its approval of a legislative measure involving the expenditure of public funds. The royal recommendation can only be secured by a Minister and bills that require a royal

recommendation cannot originate here in the Senate. Since 1976 the text of the royal recommendation is in the following words: "His/Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled [long title of the bill]...".

The question raised by this point of order must be resolved in accordance with the forms and practices that are currently in place. The language of Bill S-223 clearly states that a CPP benefit will be extended to certain individuals who are not receiving it now. The bill states that "This enactment amends the *Canada Pension Plan* so that a person who applies for a retirement pension after reaching 70 years of age or who applies for a survivor's pension would be eligible to receive retroactive payments for a maximum of five years instead of the current maximum of 12 months."

On its face, the language of Bill S-223 certainly entails a requirement for the royal recommendation that also necessitates its initial consideration by the other place before coming to the Senate. However, the sponsor of the bill denies that this is the case on the basis that the bill is not properly a money bill since the funds of the CPP are not really part of the CRF.

The original Act that created the CPP dates from 1965. Its objective then was to "establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors." The bill implementing the CPP was introduced in the House of Commons and was accompanied by a royal recommendation.

The funds that finance the CPP are public money. Although the Canada Pension Plan account is a separate account recording the financial elements of the plan, section 108 of the CPP provides that it is established within the CRF. While it is not used as a source of general revenue by the government, this does not mean that it is not public money for the purposes of rule 81. This rule states that "The Senate shall not proceed upon a bill appropriating public money that has not within the knowledge of the Senate been recommended by the Queen's representative."

Parliamentary practice stipulates that any new or additional legislative authorization for spending from the CRF must be accompanied by a royal recommendation. Bill S-223 seeks to alter the conditions that are attached to the CPP by increasing the period of retroactivity to five years from the current 12 months. Although spending from the CPP is derived from its own separate account, it is made through the CRF. As such, any changes to the CPP which would entail increased spending require a royal recommendation.

In conclusion, it is my ruling that the provisions of Bill S-223 require a royal recommendation and that, as a consequence, it cannot originate in the Senate. The point of order is well founded; proceedings on the bill must cease and Bill S-223 will be discharged from the Order Paper.

(*Accordingly, the Order of the Day for the second reading of Bill S-223, An Act to amend the Canada Pension Plan (retroactivity of retirement and survivor's pensions), was discharged and, by order, the Bill withdrawn*.)

Bill — Requirement for Royal Consent

March 21, 2011 *Journals*, pp. 1336-1341

I am prepared to rule on the point of order that was raised by Senator Cools on February 9, and which was also discussed the following day. The point of order asks questions about Bill C-232, An Act to amend the Supreme Court Act, and the possible need for Royal Consent and also what procedure should be followed if Royal Consent is required.

Our Parliament and our federal system of government have existed for almost 144 years. The basis of our governance structure is the *British North America Act, 1867*, a statute adopted by the Parliament of Westminster, now the *Constitution Act, 1867*. Before and since Confederation, a key component of our government has been the Crown, which forms the third constituent element of our bicameral Parliament. While the heritage which we share here in the Senate is rooted in the traditions of Westminster, over the course of time, as Canada has matured, it has become thoroughly our own in practice. With this perspective in mind, I have reviewed the point of order on the complex issue of Royal Consent.

At the outset, I wish to thank all honourable senators for their contributions to the discussion on this point of order. In particular, I wish to express my sincere appreciation to Senator Cools for raising this subject. It is not the first time that the senator has focused the attention of the Senate on the importance of Royal Consent. The senator has applied her formidable research talents and diligence to present a well documented position that underlines the importance of Royal Consent. We have all benefited from her knowledge of the history of parliamentary practice.

In making the argument for the need for Royal Consent, Senator Cools explained that the Sovereign, the Queen herself or the Governor General acting on her behalf, retains to this day certain prerogative powers. Among these prerogative powers, according to Senator Cools, is the appointment of judges. It is her contention that Bill C-232 would constrain the Queen's power of appointment by disabling individuals who would otherwise be qualified for a place on the bench of the Supreme Court. As this is the basic purpose of the bill, Senator Cools suggested that the Senate might have no right to debate let alone adopt this bill absent Royal Consent. Senator Cools argued that the third reading question on the bill could not properly be put and, were this to happen, proceedings on the bill would be rendered null and void. For this reason, Senator Cools asked the second question of her point of order, what procedure should be followed if Royal Consent is required, and was there a requirement to signify Royal Consent early in the proceedings? The position of Senator Cools was subsequently supported by the interventions made by Senator Comeau, the Deputy Leader of the Government, and Senators Carignan and Segal.

Senator Fraser and Senator Tardif, the Deputy Leader of the Opposition, had a contrary view on the need for Royal Consent with respect to Bill C-232. Speaking on February 10, Senator Fraser took note of the fact that prerogative powers can be abolished or limited by statute law. With respect to the Supreme Court, the senator noted that it came into existence by ordinary federal statute in 1875. So far as the senator could determine, there was no indication that Royal Consent was sought, let alone obtained, for the *Supreme Court Act*. On this basis, Senator Fraser concluded that there is strong precedent that Bill C-232 does not require Royal Consent. Senator Tardif focussed the first part of her arguments on previous rulings in the Senate which suggest that debate should be allowed to continue even if it is determined that Royal Consent is required, particularly as the bill is far from reaching the final stage of the legislative process. The senator then reiterated the arguments of Senator Fraser, pointing out that the *Supreme Court Act* was a law passed by Parliament and that it is the right of Parliament to modify this law, including the criteria by which nominees might be qualified for appointment. As this is within the power of Parliament, Senator Tardif concluded that Bill C-232 does not require Royal Consent.

In reviewing the issues raised by these questions, I will first deal with the procedure to be followed with respect to obtaining Royal Consent, and will then examine Royal Consent itself. In attempting to provide the Senate with guidance on these issues, I have taken the initiative to go more deeply into the subject. The end result, I believe, is a clearer picture of what Royal Consent is and the role it plays today in our Canadian parliamentary system.

Beginning with the question of when Royal Consent should be sought or signified, there is certainly no prohibition to providing Royal Consent at the outset of deliberations on a bill. However, accepted

Canadian practice suggests that Royal Consent need only be given prior to the third reading. There are several recent rulings by Speakers of the Senate that are consistent with this view. The intent of these rulings is to allow debate to the greatest extent possible. Debate should not be constrained by a procedural requirement, despite its constitutional importance, which can be signified at any stage. To do otherwise would undermine a fundamental purpose of Parliament. Accordingly, I confirm that Royal Consent, when it is required, can be postponed to the last stage.

Canadian practice also indicates that Royal Consent needs to be signified in only one house. More often than not, this has been in the House of Commons, where most government bills originate. However, Bill C-232 is a private members bill which originated in the House of Commons, and I note that no objection was raised in that chamber on the grounds of Royal Consent. In cases where a bill originates in the Senate and Royal Consent is determined to be required, it should be provided in the Senate prior to third reading. To ensure that this happens, it would be appropriate for a Speaker of the Senate to refuse to put the third reading question in the Senate until Royal Consent is signified.

One other point needs to be clarified. It has been stated that the absence of Royal Consent, when needed, could nullify the proceedings with respect to the related bill. This is true, but only within limits. To nullify proceedings in the Senate, the bill would still have to be in its possession. The authority of the Senate over bills applies only during the time bills are actually in the Senate, either in the chamber for second or third reading or in committee. If the bill has been sent to the other place for its consideration, or has been passed and is now ready for Royal Assent, it is too late for the Senate on its own authority to undo its decisions. Moreover, if the bill subsequently receives Royal Assent, which is the approval of the Crown, and becomes law, the question of Royal Consent becomes moot.

Turning to the more substantive question, it is clear that Royal Consent remains important and relevant. It provides an insight into the nature of our Parliament composed as it is of the Crown, Senate, and the House of Commons. In looking into this point of order, it is also evident that Royal Consent is sometimes confused with Royal Recommendation and Royal Assent, two other features of our parliamentary practice which highlight the importance of the Crown. A Royal Recommendation signals an authorization for the expenditure of public funds. It is provided by a minister in the House of Commons as a message of the Governor General approving the spending of public monies as proposed in a bill. Royal Assent, on the other hand, is the final stage in the legislative process when a bill passed by both Houses of Parliament is enacted into law by the approval of the Governor General or a deputy, either here in person in the Senate or through a written declaration. Royal Consent is neither of these. It is instead a procedural requirement whenever a bill is considered by Parliament that touches the interests of the Sovereign, either the Queen herself or the Governor General acting on her behalf. According to *House of Commons Procedure and Practice*, the precedents in Canada indicate that Royal Consent is needed "when the property rights of the Crown are postponed, compromised or abandoned, or for any waiver of a prerogative of the Crown."

The origins of Royal Consent date back many centuries to a time when the King actually ruled; when the Sovereign exercised personal authority and power, well before Parliament established its ultimate supremacy. A noted 19th century British constitutionalist, Lord Brougham, explained during debate in the House of Lords in 1844 that, in an earlier age, Royal Consent was used as a veto of the Crown expressed within Parliament to avoid any collision between the Sovereign and Parliament that might subsequently become overt with the refusal of the Crown to actually grant Royal Assent. However, with the recognition of parliamentary supremacy and the subsequent development of responsible government, the use of Royal Consent became not so much a veto as an acknowledgement that a prerogative power was involved in proposed legislation. While the lack of Royal Consent can ultimately block the passage of a bill, it should not be used to override the right of Parliament to free debate, the absolute right of Parliament to discuss any topic, to exercise its fundamental right to free speech guaranteed in the *Bill of Rights* of 1689.

Today, many of the powers of the Crown are exercised through the executive, the government of the day headed by the Prime Minister. These are the powers performed through the Governor-in-Council and virtually all are statutory authorities sanctioned by Parliament. At the same time, there remains a range of discretionary powers available to the Crown, its ancient customary powers. The range of these prerogative powers has contracted over time, yet what remains is certainly not insignificant. They are exercised by convention and by historical precedent, without the sanction of Parliament. The most notable and recognizable of these powers perhaps is the right of the Queen or the Governor General to dissolve Parliament and to appoint the Prime Minister. Others include the right to declare war or peace, the making of treaties, the issuing of passports, and the creation of Indian reserves.

Peter Hogg has explained in his work, the *Constitutional Law of Canada*, "the royal prerogative consists of the powers and privileges accorded by common law to the Crown." He went on to state that "The prerogative is a branch of the common law because it is the decisions of the courts which have determined its existence and extent." This relationship to the common law is in fact an essential characteristic of the prerogative powers of the Crown not yet framed in statute law by Parliament. When any of these prerogative powers do become defined by statute law, strictly speaking they cease to be a prerogative power. Professor Hogg makes this point very clearly when he writes "the prerogative could be abolished or limited by statute and once a statute had occupied the ground formerly occupied by the prerogative, the Crown had to comply with the terms of the statute." Royal Consent is part of that process of putting the prerogative power within the framework of statute law. It is an internal parliamentary procedure that acknowledges that a common law power of the Crown is coming within the scope of Parliament.

In 1951, for example, Parliament considered Bill 192, to have the Governor General surrender the authority to grant permission previously required to allow a citizen under the Petition of Right to institute proceedings against the Crown in the Exchequer Court. This power existed in common law and its origins are traceable to the petitions received by the King from subjects seeking legal claims against the Crown in the courts. When the petition was accepted favourably, the King issued an order or fiat addressed to the court directing in effect: Let justice be done. Immediately prior to third reading of Bill 192, the Minister of Justice informed the House of Commons that the Governor General had given his consent to have this bill put before Parliament for its determination.

Two years later, Royal Consent was signified again when Parliament debated and passed the *Crown Liability Act*, which made the federal Crown liable in tort for damages in much the same way as if it were a natural person. Previously, in common law, the Crown was almost entirely immune from any suit. On this occasion, Royal Consent was signified early in the process. Under the old financial procedure the bill had been preceded by a resolution stage before first reading. When the bill was read a first time, the Minister of Justice announced to the House, in the Royal Consent formula used in Canada, that the Governor General, having been acquainted with the purport of the measure to be introduced, had given consent, so far as Her Majesty's prerogatives were affected, to the consideration of the bill.

These examples, honourable senators, have been cited to demonstrate an essential criterion by which it is possible to determine whether Royal Consent is needed in a particular case, namely whether the prerogative in question exists through common law or through statute law. Where the power is related to common law, Royal Consent may be necessary; when related to an exercise of authority under the statute law, Royal Consent is not required.

A review of the precedents of the Canadian Parliament reveals that Royal Consent has been invoked only about two dozen times over the course of almost 144 years and many, many bills. More than a third of them occurred in the nineteenth century and some of these related to railways. The construction of railways was a large undertaking that involved liens with the Crown and the use of its land. Other bills that prompted the need for Royal Consent over the years dealt with the establishment of national parks

and Indian reserves. There is no evidence that any legislation relating to the Supreme Court was ever the object of Royal Consent.

The Supreme Court was established under the authority of section 101 of the *British North America Act, 1867*. This constitutional provision states that: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." The creation of the Supreme Court was achieved by the enactment of a bill in 1875. This court has its origins in statute law; there is nothing of its existence based on any antecedent history; it has no basis in common law. The appointment of judges to the bench of the Supreme Court is pursuant to this 1875 Act. There is no common law prerogative power of appointment involved in this case.

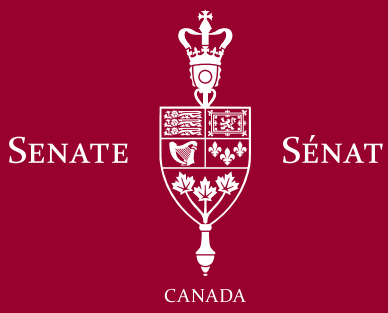
It is important to add that the *Letters Patent of 1947* are not, and were not, affected by the statutory creation of the Supreme Court. As provided in paragraph IV, the Governor General is authorized and empowered to constitute and appoint on behalf of the Sovereign, all such judges as may be lawfully constituted or appointed. The Supreme Court is a lawfully constituted court and the authority of the Governor General to exercise the power of appointment was, and remains, on the advice of the appropriate minister. It is not a power that can be exercised by the Governor General independently on his own authority. Indeed, paragraph II of the *Letters Patent of 1947* makes this clear. It stipulates that the Governor General, on the advice of the Privy Council for Canada, is to act on the basis of, among other authorities, "such laws as are or may hereinafter be in force in Canada."

Bill C-232, if adopted, would be one more amendment to the *Supreme Court Act*. It would establish certain qualifications for appointment to the Supreme Court in addition to the ones that already exist. In addition to being a judge of a superior court or a member of a provincial bar with a minimum number of years of experience, this bill would require that candidates have a certain level of understanding in both official languages such that they would not need the assistance of interpretation. In accordance with the explanation already provided, this is an exercise of authority under statute law and there is no need to seek Royal Consent as part of the consideration of Bill C-232.

Honourable senators, this has been a lengthy ruling on an interesting issue. This point of order has provided an opportunity to outline the nature and scope of Royal Consent and to recognize its continuing relevance. A particular benefit brought out through the point of order was the recognition of the distinction to be made between the prerogative powers of the Crown based on common law and those exercised through statute law. Again, I wish to express my appreciation to Senator Cools and to all senators for their very helpful contribution to this discussion.

In conclusion, it is my ruling that, when required, Royal Consent can be delayed to the last stage of a bill's consideration and, with respect to Bill C-232, Royal Consent is not needed.

Index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