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THE SENATE

MOTION TO AMEND THE *RULES OF THE SENATE* TO ENSURE
LEGISLATIVE REPORTS OF SENATE COMMITTEES FOLLOW A
TRANSPARENT, COMPREHENSIBLE AND NON-PARTISAN
METHODOLOGY—DEBATE ADJOURNED

Speech by:

The Honourable Diane Bellemare

Thursday, May 12, 2016

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[*Translation*]

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MOTION TO AMEND THE *RULES OF THE SENATE* TO ENSURE LEGISLATIVE REPORTS OF SENATE COMMITTEES FOLLOW A TRANSPARENT, COMPREHENSIBLE AND NON-PARTISAN METHODOLOGY—DEBATE ADJOURNED

Hon. Diane Bellemare (Legislative Deputy to the Government Representative in the Senate), pursuant to notice of May 3, 2016, moved:

That, in order to ensure that legislative reports of Senate committees follow a transparent, comprehensible and non-partisan methodology, the *Rules of the Senate* be amended by replacing rule 12-23(1) by the following:

“Obligation to report bill

12-23. (1) The committee to which a bill has been referred shall report the bill to the Senate. The report shall set out any amendments that the committee is recommending. In addition, the report shall have appended to it the committee’s observations on:

(a) whether the bill generally conforms with the Constitution of Canada, including:

(i) the Canadian Charter of Rights and Freedoms, and

(ii) the division of legislative powers between Parliament and the provincial and territorial legislatures;

(b) whether the bill conforms with treaties and international agreements that Canada has signed or ratified;

(c) whether the bill unduly impinges on any minority or economically disadvantaged groups;

(d) whether the bill has any impact on one or more provinces or territories;

(e) whether the appropriate consultations have been conducted;

(f) whether the bill contains any obvious drafting errors;

(g) all amendments moved but not adopted in the committee, including the text of these amendments; and

(h) any other matter that, in the committee’s opinion, should be brought to the attention of the Senate.”

She said: Honourable senators, the motion I am moving today relates to the debate on the legitimacy of the Senate and our work. It seeks to increase the added value of our studies of bills and to have our work reported in a more transparent manner.

It arises out of a reflection that began with a speech I gave in September 2014 concerning Senate reform. At the time, I proposed that the Senate draw up, by convention, a list of considerations that committees should address when reporting to the chamber on their study of a bill.

In my opinion, the methodology that I am now presenting — which is transparent, comprehensible and non-partisan — would allow us to debate the merits of bills that are studied by going beyond a simple personal or partisan position and beyond our personal preferences.

It also seeks to meet two important objectives in order to improve the added value of our work.

First, it frames our constitutional duty to provide sober second thought in the context of the Senate as a complementary chamber to the House of Commons and not a rival chamber. As defined by the Fathers of Confederation and reiterated on a few occasions by the Supreme Court, the Senate is not a copy of the other place. Senators are not elected. We are appointed. However, our constitutional powers are vast and, therefore, we must use them responsibly, because we cannot legitimately compete with the House of Commons. Nevertheless, we have a duty to improve legislation passed in the other place when it seems appropriate, but we cannot legitimately oppose a bill passed by the House of Commons just because we don’t like it. I will repeat that this motion proposes matters for committees to consider when analyzing bills in keeping with our mandate.

Second, this motion seeks to improve debate in the chamber by requiring committees to report on their deliberations in a more transparent manner.

Honourable senators, let me now explain the motion. At this time, when a committee examines a bill, the *Rules of the Senate* require that committee to provide observations or explanations only when it amends or rejects the bill. In the other scenarios, with the exception of the budget implementation bill, the committee is not required to append any observations to its report.

Therefore, when a bill is studied in committee and no amendments are accepted, the committee can simply table a report in the Senate that contains the following wording: “Your committee, to which was referred Bill XYZ, has, in obedience to the order of reference, examined the said bill and now reports the same without amendment.”

This is true regardless of whether any amendments were proposed but rejected during the committee study. In fact, when amendments are rejected, the committee reports that the study was completed with no amendments. The same is true when a minority of senators on the committee propose to reject the bill.

In these two extreme cases, the debate continues in the chamber at third reading.

Without this information, senators who did not take part in the committee study have to ask questions or rely on the good judgment of the members of the committee that examined the bill. Alternatively, as has been the traditional practice, senators rely on their caucus whip and vote according to party lines.

As a result, when the legislative agenda is full, some controversial bills could pass third reading even though not all senators have been properly informed of the controversial aspects of the bill.

If we require committees to append to their report observations on matters that are essential to their study, senators will be better able to debate bills at third reading.

This will also lessen the impact of partisanship when bills are studied. As long as the Senate is organized as it is now and a large group of senators participate in their party's caucus, there is no guarantee that the Senate will take an independent approach to bills, as we are meant to do.

This motion sets out eight items that should be subject to a specific observation that could be as simple as "not relevant" in many cases. There may be other items that should be added. This motion can obviously be improved.

The motion proposes that the committee be required to append observations to the report. Why? There is a simple reason.

When observations are appended to the report, they cannot be amended in the Senate. In other words, they don't need to be debated or voted on. However, this in no way prevents a senator from challenging them at third reading. These observations help make senators aware of the nature of the discussions the committee had about the bill and are not meant to delay discussions on the bill itself.

The first item on the list has to do with whether the bill generally conforms with the Constitution of Canada, including:

- (i) the Canadian Charter of Rights and Freedoms, and
- (ii) the division of legislative powers between Parliament and the provincial and territorial legislatures.

Admittedly, we are not Supreme Court judges. However, we are reasonable enough to determine how likely it is that a bill could end up before the courts. When legal experts and lawyers' associations testify before a committee and say that a bill presents some serious constitutional problems, there is a strong chance that this bill will end up before the courts. In other words, the committee studying the bill cannot ignore this problem when a single expert testifies that he has no problem with a bill on which the committee has received contrary opinions.

Based on the committee's observations, the Senate could determine whether to send the bill to another committee for further study, take a chance and pass it as is, or amend it if that seems possible. The Senate could thus tell the public and the other place "I told you so."

The second item has to do with whether the bill conforms to treaties and international agreements that Canada has signed or ratified.

This obviously includes treaties signed with First Nations. The purpose of this criterion is to inform the Senate about whether or not the bill complies with all the treaties and agreements that Canada has signed. That does not mean that we cannot pass a bill if there is any question about its compliance, but at least we will do so knowingly.

In the past, we have adopted legislative changes in order to comply with international agreements, despite opposition from some groups. The Senate has a duty to clarify these problems, even though they are not easily resolved. These issues must be debated.

The third item is whether the bill unduly impinges on any minority or economically disadvantaged groups. This criterion is part of our mandate. Our role is to prevent the exploitation of a group or a minority by a majority. This can be difficult to assess. However, for this criterion as for others, there are generally accepted philosophical references that can be useful for debate in the chamber.

Take, for example, a bill to increase foreign trade. Let us suppose that the expected benefits of this bill are great enough to warrant passing it. Let us also suppose that it would result in significant costs to a minority or a given group. What should we do? According to utilitarian philosophical principles, for example, which often support conventional economic analyses, such a bill could be defended as it would boost the country's prosperity if the benefits outweigh the costs. However, based on analyses that incorporate notions of welfare or well-being, such laws could reduce the welfare of a group if no compensation is offered to those who bear the brunt of the cost. In the case of force majeure, the Senate may have the duty to ensure that such a bill provides necessary compensation or at the very least to make observations.

The fourth criterion addresses whether the bill has any impact on one or more provinces or territories. This criterion relates to priority key constitutional mandate for which the Senate was created. It is inescapable. We are required to consider the effects of federal legislation on the provinces and territories that we represent. This allows us to systematically inform the chamber and Canadians of the regional impacts of a federal bill.

The fifth item involves checking whether the appropriate consultations have been conducted. This criterion is self-explanatory. The Senate needs to know which groups appeared before the committee. For example, it would be quite simple to make a list of the key witnesses and summarize their testimony, if necessary.

The sixth item involves checking to see whether the bill contains any obvious drafting errors. Honourable senators, the least we can do is to ensure that the bill does not contain any typos and the French and English versions are consistent. Even so, sometimes the text is not corrected.

The seventh criterion has to do with including all amendments moved but not adopted in the committee, as well as the text of these amendments. This criterion is also self-explanatory. This is not currently required under the Rules, but it would help to ensure that the committee debates are transparent, particularly when a Senate caucus has control over the committee report. As I said earlier, under the Rules, only amendments that have been moved and adopted by the committee are currently included in the report.

The final criterion pertains to any other matter that, in the committee's opinion, should be brought to the attention of the Senate.

Some of you will say that this motion will place a heavier burden on the committees. There is no doubt that it will. However, I believe that this increased transparency will improve the quality of the debates in the chamber and add value to our work. It will also encourage more independent and less partisan debate. Others will agree with Senator Joyal, who in 2014 raised the idea that such an approach would subvert the principle of adversarial debate. I thought about that, and I do not believe that this approach will kill debate. On the contrary, I think that the approach that I am proposing will promote debate by going beyond the confrontations dictated by the party line. This approach will allow senators to debate more specific aspects of the legislation being examined rather than just indicating whether they are for or against a bill. As Senator Carignan indicated on April 12 and Senator Housakos mentioned yesterday, this approach will help to ensure quality control of bills. It will help to identify any legislative gaps, constitutional impasses and unintended inaccuracies and to propose amendments to improve bills.

I don't know when or if this motion will be accepted. I appeal to your good faith, however, and above all, your sense of responsibility and invite you to use such a gauge when you analyze the merits of a bill for yourself. I also invite the committees to give it a try as they study the bills currently before them. Indeed, even though this motion is not part of the *Rules of the Senate*, nothing is stopping us from following this in practice. Furthermore, page 147 of *Senate Procedure in Practice* states, and I quote:

Whether a committee reports a bill with or without amendments, it may also make observations on the bill. Committees have used observations as a way of providing commentary on a wider range of issues surrounding the bill. This practice is in keeping with the Senate's traditional role as a revising chamber.

In other words, the Rules allow this. This practice is not used very often, but it could be used more.

In closing, the Senate's constitutional powers are very important. Very few upper chambers elsewhere in the world have such powers. As a result of some research I did in 2014 with my legislative assistant, I can tell you that the vast majority of senates around the world have a suspensive veto and not an absolute veto, as is the case in Canada. In fact, only about a dozen senates out of the 80 that we polled have an absolute veto.

Adopting this motion will allow the Senate to demonstrate that when it passes a bill, that means that the bill reasonably meets all the criteria set out to ensure that it is consistent with all of our laws and democratic practices. If it has no obvious deficiencies, apart from having a certain political stripe, we can seriously ask ourselves if the Senate can legitimately oppose it. Furthermore, if a bill does not meet the reasonable expectations that come from an objective examination, the Senate and senators will be able to clearly explain their decision to Canadians. That is what I am proposing to you with this motion. Thank you.

Hon. Senators: Hear, hear!

[English]

Hon. Dennis Glen Patterson: I'd like to ask the honourable senator if she would take one or more questions.

[Translation]

The Hon. the Speaker: I'm sorry, Senator Bellemare, but your time is up. Do you want five more minutes?

Senator Bellemare: Yes, Mr. Speaker.

[English]

Senator Patterson: Thank you, Your Honour.

I believe this motion was put forward the day you were announced as the Legislative Deputy to the Government Representative in the Senate. Do I take it that your motion to add these eight mandatory conditions to the workload of a committee has the blessing and imprimatur of the Government Representative in the Senate?

[Translation]

Senator Bellemare: Senator Patterson, thank you for your question.

[English]

Senator Patterson, you can read the speech I made in this chamber on September 30, 2014, where I was explaining why we should have such an approach to the study of our bill. It's been a long time since I wrote my speech. I had wanted to do it for a long time, so I thought I would do it now, but it is not related whatsoever to my appointment.

On the other hand, there's a link that you can read into it. I'm an independent and unaffiliated senator, and I take my constitutional duties very seriously. This is the approach I took last year in many studies. This is why I opposed Bill C-377, and this is why I voted in favour of Michael Chong's bill, for example.

This is why I voted on many bills, like the bill dealing with the Pope, even though that's not my preference at all. I respect the Pope. That's not what I want to say, but with all those names and those weeks, I had some reservation.

This approach enables senators to exercise their duty in an honest, careful way, with respect to the Constitution and the fact that we are appointed. We are not elected. We are different from MPs, but our responsibility is to correct bills. We didn't do that when we adopted Bill C-525 last year. Senator Tannas and I and others, Senator Wallace, were completely upset about it.

Nobody explained in this chamber the amendments I tried to push on this bill because the way it was written was not correct. Nobody talked about that.

In many cases, and in my own personal case, I experienced the fact that our studies in committee, even though we had a lot of experts, remained in committee and did not really help us and all the senators to have real debate at third reading.

Because of this concern, I sometimes had to oppose my whole group last year because I was following my elements. I invite you to do the same thing, because I think that's the proper way. I

think that is what Canadians expect of us. They respect judges. We are not judges, but at least we need criteria to study the bills that we are being asked to adopt.

Senator Patterson: The honourable senator suggests that this will allow us to look at bills in an honest, careful way. I guess I'm wondering if she thinks we have been examining bills in the 150 or so years of the Senate in a dishonest and careless way.

Further to that, I'd like to ask this: You've offered these guidelines not as a helpful outline but as an obligation, which to me looks like a tremendous amount of additional work, examining such issues as the impact on the division of legislative powers between Parliament and the provincial and territorial legislatures. Court decisions over the years have waxed eloquent on that subject alone. And whether the bill conforms with treaties and international agreements — I'm just wondering if you're not concerned about creating a tremendous amount of extra work in the already busy obligations of Senate committees examining bills. Perhaps it might have been better to suggest these guidelines as an outline rather than as a mandatory obligation.

Senator Bellemare: Actually, what I propose is to have a checklist. When people come to committee and talk to you about the constitutional aspect of it, you have to report. You don't have to dig into every item on the list, but you have to at least be open to report on those issues when experts come and tell you about them.

Hon. Yonah Martin (Acting Leader of the Opposition): On a point of order. We had given Senator Bellemare five minutes. She may ask for another five. I thought it might be a concise response, but she said, "For instance." If she wishes more time, she would have to seek leave of the Senate.

The Hon. the Speaker: Senator Martin, I was being a little indulgent here because Senator Bellemare indicated she would be short in her answer. I will give her more time and then time will have expired. Thank you for bringing it to our attention, Senator Martin.

Senator Bellemare: Thank you, Your Honour.

What I'm saying is that it's kind of a checklist. For instance, we adopted bills in past years that went back to the Supreme Court. People had heard about that, and in the report there was no indication about it.

I'm not here to judge. It's not that at all. I'm here so that we can do a better job. That is the only difference.

The Senate is changing. We have been experiencing a crisis of all time, and Canadians want us to change. They want us to be more independent in our studies, less partisan. They don't want us to act like the other chamber, because we're not the other chamber.
