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RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT

Motion to Authorize Committee to Study
Case of Privilege Relating to the Actions of the
Parliamentary Budget Officer—Debate Continued

Speech by:

The Honourable Claudette Tardif

Thursday, March 7, 2013

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RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT

MOTION TO AUTHORIZE COMMITTEE TO STUDY CASE OF PRIVILEGE RELATING TO THE ACTIONS OF THE PARLIAMENTARY BUDGET OFFICER— DEBATE CONTINUED

On the Order:

Resuming debate on the motion, as amended, of the Honourable Senator Cools, seconded by the Honourable Senator Comeau:

That this case of privilege, relating to the actions of the Parliamentary Budget Officer, be referred to the Standing Committee on Rules, Procedures and the Rights of Parliament for consideration, in particular with respect to the consequences for the Senate, for the Senate Speaker, for the Parliament of Canada and for the country's international relations.

Hon. Claudette Tardif (Deputy Leader of the Opposition): Honourable senators, in speaking to this motion I find myself in an awkward position because I am still not clear about what incidents of privilege the committee would be authorized to examine and report on if it is adopted.

In his ruling, His Honour found that Senator Cools had raised her question of privilege at the earliest opportunity as required under rule 13-3(1) because, in his words:

The international meeting at which the Parliamentary Budget Officer apparently made remarks that are the subject of this question of privilege was only reported last week in the *Ottawa Citizen*....

Therefore, because Senator Cools brought these remarks to the attention of the Senate at her first available opportunity, her question of privilege was timely. However, should the members of the Rules Committee now prepare themselves in advance by closely scrutinizing the remarks the PBO made at that conference in anticipation of having that matter referred to them? This is where I would like some guidance, because I am not clear that this is what the committee would be tasked with examining if this motion is adopted.

In his ruling, His Honour, after concluding that the issue had been raised in a timely matter, then asked whether the next two tests for a question of privilege had been met; namely, whether the matter directly concerns the privileges of the Senate, any of its committees or any senator; and that it be raised to correct a grave and serious breach. He found that the answer was "yes," but he did not refer to the conference in coming to this conclusion. He stated:

By asking the courts to decide the question of his mandate, the Parliamentary Budget Officer has disregarded the established authority and organizational structure of which he is a part. The question of his mandate is solely for Parliament to determine. The officer's actions run contrary

to the constitutional separation of powers between the branches of government. As a consequence, both the second and third criteria have been fulfilled.

The application to the court was made in November by the PBO and was widely reported at the time. My difficulty is that the motion proposed by Senator Cools does not indicate whether the committee would be tasked to examine the PBO's conduct at the recent Organisation for Economic Co-operation and Development conference or whether the committee would be examining the PBO's decision to make an application to the Federal Court in November concerning the powers and authority given him in the Parliament of Canada Act. The motion introduced by Senator Cools speaks only of unspecified actions of the Parliamentary Budget Officer.

Seeing how what took place at the conference triggered this question of privilege, I would hope that this is what the committee would focus on, with the court action relegated to a secondary role. In other circumstances, I might be able to support a motion that would have this as the committee's primary focus of examination, but I suspect that this is not what is intended, and that, therefore, gives me concern.

In her remarks on February 26, Senator Cools said of Mr. Kevin Page:

This Library officer's actions are so shocking that the Senate may well have to consider an order to this officer to withdraw his frivolous and vexatious application to the Federal Court of Canada.

The next day, the headline to a story posted on the CBC's website was "Senator says budget watchdog could be ordered to drop legal challenge." Honourable senators, if this is Senator Cools' objective, I am not comfortable being party to a process whereby the Senate of Canada will prevent a Canadian — any Canadian — from having their day in court.

An Hon. Senator: Hear, hear.

Senator Tardif: As His Honour has told this chamber, such a proposition would be abhorrent. In my view, every Canadian, including Mr. Kevin Page, has the right to go to court to defend their rights. What rights are we talking about?

As I noted in my remarks on February 27, 2013, Parliament gave the Parliamentary Budget Officer an obligation and statutory legal right in the Parliament of Canada Act to request and obtain information from the government. The government refuses to give him the information he is requesting under the Parliament of Canada Act, so he has gone to the Federal Court seeking clarification about how the act should be interpreted.

Honourable senators, there is nothing unusual about what is taking place. Every Canadian has a right to seek justice in our courts. Let me give a very instructive example.

In 1994, the government of Jean Chrétien introduced legislation to cancel a contract to privatize the Toronto Pearson International Airport that had been signed by the government of Kim Campbell during the election period. The legislation provided that the other parties to the contract would have all their expenses reimbursed but would not be allowed to seek damages in the courts for lost profits. That legislation was ultimately defeated by the Senate because it denied the rights of Canadians to their day in court. The Leader of the Opposition at that time, Senator Lynch-Staunton, stated that “this denial goes against one of the basic foundations of our society,” and further stated: “From now on the government will decide who has access to justice.”

• (1540)

To paraphrase Senator Lynch-Staunton, in our case, according to Senator Cools, it will be the Senate which will decide who has access to justice.

Senator Lynch-Staunton was adamant that this right should not be dependent on someone’s good will. He stated that the denial of access to the courts implies “at least to the layman, a horrendous violation of a fundamental right.”

The debate I am referring to took place in this chamber on June 21, 1994, and on that day, the Deputy Leader of the Opposition was, if anything, even more insistent about the right of any Canadian to seek access to our courts and this could not be denied by Parliament. Senator Kinsella, at that time Deputy Leader of the Opposition, stated:

Indeed, honourable senators, free Canadians can only find abhorrent the provision of this bill which seeks to deny Canadians access to a court of law.

He referred to the Canadian Bill of Rights and then cited article 10 of the Universal Declaration of Human Rights, which states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...

Senator Kinsella was very clear and compelling that day, saying if the rights of citizens are to be determined by law and not by the arbitrary will of governors, there must be independent courts to protect those rights.

The independence of the courts is critical. Today, there is a well-publicized dispute between the Government of Canada and the Parliamentary Budget Officer about his rights and obligations. Would ordinary Canadians feel confident that this dispute can be resolved impartially in a political environment —

Senator Moore: Not likely.

Senator Tardif: — in a Senate where the majority of members have been appointed by the same Prime Minister who claims that the Parliamentary Budget Officer is operating outside his lawful authority?

I may be confident that the Senate and its members would, in fact, rise above partisan political considerations and give the Parliamentary Budget Officer an impartial hearing in his dispute with the Prime Minister, but that is not the point. What will

Canadians think? Justice must not only be done; it must also be seen to be done. Are we confident that Canadians will believe that justice is being done if they see the Senate, the majority of whose members were appointed by Prime Minister Harper, ordering the highly respected Parliamentary Budget Officer to withdraw his application to the court, an application which Mr. Harper opposes?

We are all aware of events in recent weeks which have put the Senate in the public spotlight. Will this news enhance the public’s opinion of our institution?

For the first time in our nation’s history, the Senate, on its own, would attempt to forbid a Canadian from seeking access to our courts. That is what Senator Cools, who has moved this motion, has suggested could happen. If this is what could happen, I do not want to have any part in it. As our current Speaker told this chamber many years ago, it is abhorrent for Parliament to seek to deny Canadians access to a court of law. It is even more abhorrent for one chamber, acting on its own, to attempt to do so.

As I explained, Mr. Page has asked the Federal Court for determination on questions of law and jurisdiction. The Speakers of the Senate and the other place have requested and have been granted status as parties in the action. In fact, our Speaker filed his factum with the court on the very day he ruled that Senator Cools had established a prima facie case of privilege on the same matter.

Senator Ringuette: Wow.

Senator Tardif: Does the court have jurisdiction to hear the case? That is up to the court to decide after hearing from all sides. It is not up to the Senate to bar the courthouse door to prevent or forbid Canadians from entering the building.

Senator Moore: Absolutely.

Senator Tardif: Honourable senators, last week our Speaker found that Senator Cools had established a prima facie case of privilege. Senator Cools then availed herself of an opportunity to move a motion to refer the matter to our Rules Committee, pursuant to rule 13-7(1).

It is now up to all of us to decide whether we believe it is appropriate to adopt this motion and to thus embark along the path that Senator Cools has told us could lead to the Senate ordering — let me repeat that — the Senate ordering the Parliamentary Budget Officer to withdraw his application to the Federal Court. This is what we are now being asked to do.

Senator Tkachuk: No, you are not.

Senator Tardif: At this point in the process, I do not feel comfortable in making such a decision by casting a vote on the significant motion —

Senator Tkachuk: The committee decides.

Senator Tardif: — which, as the Speaker has noted in his ruling, could very well have serious constitutional implications concerning the separation of powers. I think all senators will agree that the situation we find ourselves in now is without precedent. If we adopt this motion, it represents groundbreaking action by the Senate.

For my part, honourable senators, I believe all of us would be in a much stronger position to make such a momentous decision if we could hear from the Parliamentary Budget Officer himself. He should be able to tell all of us, and not just the small number of honourable senators on the Rules Committee, why he has taken the actions that have drawn the condemnation of Senator Cools.

MOTION TO RESOLVE INTO COMMITTEE OF THE
WHOLE—DEBATE ADJOURNED

Hon. Claudette Tardif (Deputy Leader of the Opposition):
Therefore, honourable senators, pursuant to rules 5-7(b) and 6-8(b), I move:

That this motion be not now adopted but that it be referred to a Committee of the Whole for consideration.

Some Hon. Senators: Hear, hear!
