



CANADA

# Debates of the Senate

---

1st SESSION

• 39th PARLIAMENT

• VOLUME 143

• NUMBER 6

---

## STATUTES REPEAL BILL

Second Reading of Bill S-202

Speech by:

The Honourable Tommy Banks

Wednesday, April 26, 2006

## THE SENATE

Wednesday, April 26, 2006

### STATUTES REPEAL BILL

#### SECOND READING—DEBATE ADJOURNED

**Hon. Tommy Banks** moved second reading of Bill S-202, to repeal legislation that has not come into force within ten years of receiving royal assent.—(*Honourable Senator Banks*).

He said: Honourable senators, I see that many of those present have heard me speak about a similar bill to this before, so I will be brief when I talk about its provenance.

The situation which gave rise to this bill did not come from my assiduousness, my insight or my well known, brilliant perception of parliamentary history and procedure. Rather, it was thrust upon me by a letter from a constituent, which was sent to a colleague of ours in the other place in the year 2000. The constituent was a lady in Alberta who had followed, with great personal interest, the progress of a piece of legislation called the Canadian Heritage Languages Institute Act. The bill, which had been introduced in the House of Commons by the then government, went through the process of being passed in that House, was sent to this place, examined, debated and voted upon here, passed in the Senate and given Royal Assent in 1991, and nothing had happened.

How can this be? It had gone through the Commons, it had gone through the Senate, it received Royal Assent in 1991, and in 2000 no effect had been seen from that act of Parliament. I thought something was amiss, until someone older, wiser and more knowledgeable than I said, "Senator, you have to read the entire bill, including the bits down at the end." That is when I first discovered an innocuous looking paragraph, which exists near the end of all legislation, called "coming into force". In the case of the Canadian Heritage Languages Institute Act, that paragraph says:

This Act shall come into force on a day to be fixed by order of the Governor in Council.

This act was passed by both Houses of Parliament and received Royal Assent in 1991. That is the *raison d'être* of this bill. In 1991 the Parliament of Canada expressed its will, it took a carefully considered position and action, it debated, it studied and it voted. The bill was given Royal Assent and it became an act. Parliament passed this legislation, which was the expression of its collective will.

The bill that was passed included the coming-into-force section, which determined when the act would come into effect. It is a discretion to determine when to bring the act of Parliament into force. The government decided not to bring that act of Parliament into force in 1991, 1992, 1993, 1994, 1995, 1996 1997, or since. That act of Parliament has never been brought into force.

Government after government have decided not to bring this act of Parliament into force. In fact, they have decided not to bring this act of Parliament into force. However, the coming-into-force provision does not say that this act "may" come into force on a day to be fixed. It does not say that it "might" come into force on a day to be fixed. It says that this act "shall" come into force, and "shall" is quite a different thing. It is

not a mere lexicographical nicety, and it is not a slip of the pen. Shall means shall. When Parliament expresses its will in an act of Parliament, it is not the place of a government, any government, not the government of the day, nor any successive government, to frustrate that will or to ignore it or, worse, to defy it. That is not why the coming-into-force provisions are included in acts of Parliament.

There are sometimes good — not always good — reasons for including the coming-into-force provision in an act. Sometimes the act or sections of it have to be conditional upon other things happening, such as modifications of other legislation, intergovernmental agreements, treaties and the like, or for other good reasons. When Parliament grants this discretion to the government, it is with the clear intention and expectation that the government will bring the act into force.

• (1520)

Parliament does not enact legislation with the intent to provide the government and successive governments with a veto or with the unlimited discretion to decide not to bring the legislation into force. The point of the present bill is based upon that because Parliament is not a function of the government or of the ministry but, rather, it is the other way around. When Parliament expresses its will it is a form of instruction, if anything, to the ministry, to say what it wants the ministry to do and it is the business of the executive to do it.

The point of the present bill is to say that no government is given by Parliament the discretion not to bring into force an act of Parliament year after year; that no Parliament intends that year after year its expressed will should be ignored by government after government. This question has been referred, in more than one similar case, to the highest of parliamentary authorities. The Law Lord Browne-Wilkinson said that to hold that the executive has an absolute and unfettered discretion whether or not to bring a section of an act into effect,

...would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the Royal Assent merely to confer an enabling power on the Executive to decide at will whether or not to make the Parliamentary provisions a part of the law. Such a Conclusion...is not only constitutionally dangerous, but flies in the face of common sense. It would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the will of Parliament.

Lord Birkenhead, commenting on another similar case, said:

Parliament enacts legislation in the expectation that it will come into operation. This is so, even when Parliament does not itself fix the date on which that shall happen.

Lord Lloyd of Berwick said on another similar issue:

It is, after all, the normal function of the executive to carry out laws which Parliament has passed, just as it is the

normal function of the judiciary to say what those laws mean.

Speaking of the legislation then in question, he said:

I read s.171 as providing that ss.108 to 117 shall come into force when the Home Secretary chooses, and not that they may come into force if he chooses. In other words, s.171 confers a power to say when, but not whether.

That, honourable senators, is the point — shall come into force but not may come into force; when it will come into force, but not whether it will come into force. Parliament is not a function of the executive because it is the other way around.

For what length of time is it reasonable for Parliament to grant this discretion to the government? At what point does a piece of legislation become stale-dated, so to speak? Legislation devised years ago that was drafted in circumstances entirely different from the present might be inappropriate. It certainly might be out-of-date and it could be dangerous. How long should such acts of Parliament gather dust in the attic before they simply disappear, before they should just cease to exist, or before they should be repealed?

In Bill S-202, I propose that the answer to that question is 10 years. If a government and successive governments fail to bring an act of Parliament into force within 10 years of its receiving Royal Assent, then the government should be obliged to come back to Parliament to show why that legislation should not be repealed. If it does not do so, then the legislation should be repealed as a matter of course. I mentioned the Canadian Languages Institute Act of 1991 and I could mention the Motor Vehicle Fuel Consumption Standards Act [Not in Force], R.S., 1985, which means that it is older than 1985. It deals with motor vehicle fuel consumption and was devised 21 years ago. It could be brought into force tomorrow afternoon but the situation to which it applies is entirely different from the situation that obtained 21 years ago. How many acts or sections of acts are sitting in the attic?

Honourable senators, this list contains 56 such pieces of legislation — acts of Parliament or sections of acts of Parliament — that successive governments have declined or refused, for whatever reason, to bring into force. There are 56 instances in which the will of Parliament has been ignored, flouted or challenged.

In its present form, the bill is slightly different in its mechanics, but not in its intent, from the one that I introduced under the previous Parliament. This change will allow the government a slightly better opportunity to make its case and to show a little more flexibility than was the case in the previous iteration with which some members may be familiar.

I would ask that this list be circulated to honourable senators so that all are aware of the 56 pieces of legislation. The first such list to be presented according to the bill by the Minister of Justice would be fairly long. I imagine that it would include most of these items. Subsequent lists in subsequent years would be shorter. Honourable senators, I would ask that this bill be sent with alacrity to committee for further consideration, and I thank you for your kind attention.

**Hon. David Tkachuk:** Would the honourable senator take a question?

**Senator Banks:** Certainly.

**Senator Tkachuk:** The honourable senator's speech was very good. I enjoyed his comments and reasons for bringing this bill forward. Has the fact that this legislation was never promulgated hurt the public good?

**Senator Banks:** No, but that could happen. There are several acts and sections of acts, I would suggest, that would act against the public good should they be brought into force tomorrow afternoon. I do not think there is any instance in which harm has been done to the public good. However, there has been an absence of public good in the sense that 21 years ago Parliament enacted the MVFCS Act, which I mentioned before, to set limits on the nature of the kinds of fuels to be sold for public consumption in motor vehicles in Canada. That would have had a salutary effect on many things, including the economy and the issue of greenhouse gas emissions; but the government decided not to do what Parliament had decided to do. That was a harm to the public interest. The Canadian Heritage Languages Institute Act would have been a good thing for us to have in this country, but the government refused, declined or determined, for whatever reason, not to bring into effect a good piece of legislation that Parliament had debated and passed in all three of its parts, the House of Commons, the Senate and Royal Assent. In the larger, constitutional sense and in the sense law-making and the place of the Parliament of Canada, then the answer is yes, great harm has been done to the public because the will of Parliament has been ignored by successive governments.

**Senator Tkachuk:** I did not mean to say that harm has not been done. Rather, I wonder how many more bills might have benefitted from the fact of not coming into force. In other words, were all these bills necessary? Has the public good or the country been damaged? I am not saying that this should happen but, perhaps, the proposed 10 years in the bill might be too long. The honourable senator mentioned earlier that a number of bills have become irrelevant over time. Perhaps the time should be shorter.

**Senator Banks:** I thank the honourable senator for the question. In previous debates on earlier versions of the bill, many expressed the opinion that 10 years is too long.

• (1530)

The length of time is immaterial to me. This is mainly a question of cleaning out the attic of pieces of existing legislation that could be pulled out of the back pocket by any successive government at any time and put into place in situations in which they would not properly pertain.

The length of time is almost immaterial. When Senator Beaudoin was examining this bill, he suggested that it ought to, in fact, be five years, and he was prepared to make an amendment to that effect. I have arbitrarily selected 10 in order to give the government the greatest possible flexibility to look at this pile of legislation that is sitting in the attic and to decide how to deal with it.

In fact, one of the other things I have done with the present version of this bill respects the coming into force of the proposed legislation, that is, that it will not come into force for two years

after the bill has received Royal Assent, in order to afford the government the utmost of flexibility to indicate to Parliament why it still needs a particular piece of legislation — a particular arrow in its quiver. As I said, from time to time, there are legitimate reasons that coming into force needs to be deferred. It is a cleaning out of the attic. The length of time, the honourable senator is quite right, is immaterial. It could be two years or it could be 12 years.

**Hon. George S. Baker:** Honourable senators, I wish to inquire whether the honourable senator received any sensible explanation from the government regarding some of these particular acts. I have had a glance at them, and I notice that one or two of them are dependent upon provincial-government negotiation and approval.

For example, prior to the government being defeated, the House of Commons had two bills before it concerning drugs. One of them dealt with a lessening of the punishment of persons who had possession of a small or moderate amount of marijuana, for example. Under that proposed legislation, the punishment would be reduced to what is comparable today to a traffic ticket penalty.

Five provinces signed on to the Contraventions Act — thereby removing any conflict with the Criminal Code. A ticket for the possession of a small or moderate amount of marijuana would be issued, taking it out of the hands of the Criminal Code, where the punishment is today, and would be in the case of more than small or moderate amounts.

What would happen in Newfoundland and Labrador, and four other provinces in Canada, is that the accused person would still appear before a judge of a provincial court — the accused person would still then go through the entire procedure under the Criminal Code, and, if found guilty, receive a maximum fine of \$100, all because we were not signatories to the Contraventions Act.

Five provinces signed on to the Contraventions Act, five provinces did not, but there was another problem. We had not passed the Contraventions Act. Consequently, there we were, dealing with proposed legislation, which should have awaited, as Senator Nolin can attest, the passing of the Contraventions Act, which is still in a similar situation to what the honourable senator sees today.

I ask the honourable senator: Did he receive any explanation that made any sense to justify such laxness on the part of the government?

**Senator Banks:** Attempts were made. The short answer is yes. As I said earlier when I was speaking about this bill, there are legitimate contingencies — conditions, if you like — that have to be met before certain parts of certain legislation can be brought into force and effect. Many of the sections of acts that are contained in this list are in force in some parts of Canada, in some provinces, and not in others. There are legitimate reasons.

I must say, partly in answer to the honourable senator's question, that, by and large, when I first took this bill to the previous government, the ministry was entirely in favour of it. The house leader of the government in the other place had it vetted all around and was prepared to proceed with it.

The push back on this bill came mainly from the bureaucracy — because this bill creates a lot of trouble for the bureaucracy. The bureaucracy likes to have arrows in its quivers, arrows that they can pull out from time to time to use in situations that are analogous to but not precisely the one for which they may first have been intended. That is part of the corollary danger to which I was referring earlier.

Yes, there are some circumstances in which I suspect the government of whatever day could come to Parliament and say, "With respect to this particular section of this particular act of Parliament, it is not in force for the following good and valuable reason, and we request that that be removed from the list and not, as a matter of course, be repealed." "Parliament would be, I am sure, amenable to a reasonable argument being made in that case."

My point is that, if it has been 10 years, it is time for the government to return to us and say, "Here is why this has not happened. Here is why we have not done what you have said, and here is why we need to continue to keep this in our back pocket."

**Hon. Pierre Claude Nolin:** Some of us are quite supportive of what the Honourable Senator Banks is attempting to do. Since our last discussion in the Legal and Constitutional Affairs Committee of the Senate — PCO had been instructed by the committee to look into the record and to give us an official list of what was not in force at a specific date.

Has an answer to that question ever been received?

**Senator Banks:** I thank the honourable senator for his questions. To my knowledge, no, that official list has not been received — and I have been in my office as recently as this morning.

The only list that I have ever been able to get is the one that I believe the honourable senator has <sup>before</sup> — which I obtained through the good offices of the Library of Parliament. I suspect that it is probably correct. This has been going on for approximately five years now, but I do not recall having ever seen a list from the Department of Justice.

I must say that the Department of Justice has been assiduous to some degree in continuing to meet with me and urging upon me to effect certain modifications to this bill — which would assuage some of their concerns. I have listened very carefully to them, and some of what they have said has been contributory to the differences that exist in the present bill as opposed to the previous one.

I have resisted many of their suggestions, however, because they would have the effect of virtually gutting the bill and rendering it useless — if one could, in effect, simply strike something off a list. That would not require the administration, the executive, the bureaucracy or the government to come back to Parliament, after 10 years, or 5, or 12, and say, "Here is why we need to have this again."

I do not ever recall having received a list from the Department of Justice that would set out those acts to which I refer any better than the present list.

• (1540)

**Senator Nolin:** Senator Banks may recall that there was a gentleman from PCO who, in good faith, told us that we do not

know the exact situation of which bills are not in force. That, too, is part of the problem because — and the honourable senator may answer yes or no, and I want to share that with colleagues who were not privy to the discussions that we had on the committee — they think that there is a problem but they cannot isolate the problem because there are too many. That is the problem. To say “yes” to such a valuable bill, they would have to go back into all the files and check what is not in force. For them, that is too cumbersome, I think. That is why I was asking if the honourable senator has received a reply. Yes or no? The answer is probably no.

**Senator Banks:** No, I have not received a reply. It is too bad that it would be a significant amount of trouble for the government to have to tell us what legislation Parliament has passed and that they and their predecessors have failed to bring into force. I am very sorry that it would take time and that

someone would have to go back and look into all those dusty records and check out the attic and find out if the list is even longer than this one. However, the fact that it would be troublesome is not, in my view, an argument against cleaning out that attic.

I thank the honourable senator for that question because he is quite correct; there was an undertaking made that I do not recall having been met.

**Hon. Anne C. Cools:** Honourable senators, I think Senator Forrestall is eager to speak. We have to adjourn by four o'clock so I will move the adjournment on Senator Banks' bill. I would like to thank him for all his work and for all his endeavours. It is a very worthy cause.

On motion of Senator Cools, debate adjourned.

---