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OFFICIAL REPORT
(HANSARD)

Monday, June 20, 2022

The Honourable GEORGE J. FUREY,
Speaker

CONTENTS

(Daily index of proceedings appears at back of this issue).

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THE SENATE

Monday, June 20, 2022

The Senate met at 6 p.m., the Speaker in the chair.

Prayers.

SENATORS' STATEMENTS

NATIONAL SICKLE CELL AWARENESS DAY

Hon. Jane Cordy: Honourable senators, yesterday, on Sunday, June 19, we celebrated World Sickle Cell Day and National Sickle Cell Awareness Day in Canada. The recognition of this day has been extremely important and meaningful to the sickle cell community in Canada. Not only does it bring awareness to the disease, but it allows us to celebrate advancement in sickle cell care and it encourages momentum for the work that is left to do.

Since first becoming involved with the sickle cell community through an advocacy event on Parliament Hill in 2013, I have come to know many sickle cell patients, caregivers, supporters and advocates. They speak passionately about their experiences and best next steps to support Canadians living with this disease. The goal is to develop a national strategy for early sickle cell detection and sickle cell care. Honourable senators, I believe this is an achievable goal.

While sickle cell disease is inherited and can affect anyone who has both parents with a sickle cell trait or sickle cell and another hemoglobin trait, it is primarily found in people who are Black, Southern European, Middle Eastern or of Asian-Indian ancestry. It is therefore important to note that systemic racism in health care is, unfortunately, a reality for sickle cell patients. Individuals who present at Canadian hospitals with pain are sometimes treated as drug seekers when compared to their non-racialized counterparts. Racial injustice in health care must be stopped. The Sickle Cell Awareness Group of Ontario have committed themselves particularly to equitable access to comprehensive standard care across the province.

To those who work so diligently on behalf of Canadians with sickle cell disease, I want you to know that your work, energy and enthusiasm are valued. I would like to express my deepest thanks to Lanre Tunji-Ajayi, Biba Tinga, and Rugi Jalloh for the work they have done and the work they continue to do. I also extend my thanks to MPs Darren Fisher and Dr. Kirsty Duncan for their advocacy for those with sickle cell disease and their families. They work tirelessly to keep sickle cell disease and the needs of those with sickle cell at the forefront. Honourable senators, it seems like most days out of the year are linked to recognizing some particular event or disease. It would be easy to dismiss such bills as frivolous; I assure you, they are not. They mean something.

When National Sickle Cell Awareness Day was passed in 2017, the community was overjoyed. Each new person who is made aware of this disease, donates blood or advocates for legislation moves the needle slightly and allows us to better care for Canadians struggling with the disease. This is the reason that on June 19, we celebrate. I encourage you to take some time to learn about sickle cell disease and to meet and speak with those affected in your communities. I have no doubt you will be as touched by their passion as I have been. Thank you.

[*Translation*]

LIEUTENANT-GENERAL JOCELYN PAUL

Hon. Michèle Audette: *Kwei*, honourable senators.

I rise today to recognize and honour a First Nations man who has become the highest-ranking member of the Canadian military. Lieutenant-General Jocelyn Paul is now commander of the Canadian Army.

On June 16, I attended the change of command ceremony where Lieutenant-General Paul assumed command of the Canadian Army. I have said this before, but it bears repeating: I am fiercely proud that a Wendat is now the highest-ranking member of the Canadian Army.

Again, this is a historic moment. I was deeply moved by the fact that an institution was promoting Indigenous spiritual and cultural practices. It was eye-opening and inspiring. Don't worry, colleagues, I will tell you all about it soon.

This historic moment is due to an ordinary man from Wendake, a Wendat who has distinguished himself through a brilliant and notable career in the Canadian Armed Forces, Lieutenant-General Jocelyn Paul. Those close to him simply call him "Joe."

Jocelyn Paul has an extensive university education, having earned a master's degree in anthropology in Montreal. Now that education will enable him to counter the misinformation he faces, when he is accused of working for the enemy.

In an interview with Radio-Canada upon accepting the position of commander, he said, and I quote:

> . . . the alliances that Indigenous communities forged with Europeans when they came to this land . . . were both commercial and military. Our ancestors have always defended the boundaries of the colony.

It was a historic moment, and it is important for people to hear about gentle warriors like Lieutenant-General Paul.

Tshinashkumitin. Thank you. *Tiawenhk*.

• (1810)

[*English*]

NATIONAL INDIGENOUS PEOPLES DAY

Hon. Mary Jane McCallum: Honourable senators, I would like to thank the Conservatives for allowing me this spot.

As tomorrow is National Indigenous Peoples Day, I would like to pay special tribute to First Nations across the country. I have long enjoyed the privilege of having a close link to community and grassroots people, specifically with the First Nations that reside in Manitoba. It is these very people whom I reference when I speak of the "collective Mary Jane" that I bring with me into my Senate work. It is also they who direct and guide me in the many initiatives I bring forward in both the chamber as well as committee.

As such, this National Indigenous Peoples Day I wish to acknowledge and praise the resiliency and ingenuity of these people, those who are far too often overlooked and underestimated. Colleagues, I often speak of the interjurisdictional gaps that First Nations face, gaps which oftentimes exacerbate the many issues they combat in their daily lives.

Living under the Indian Act and on federal land under federal jurisdiction while simultaneously being subjected to provincial jurisdiction and authority, First Nations face a unique and complex bind that often impedes their progress. However, make no mistake, First Nations are willing and able to rise up, address and overcome the many issues that plague them. I know this to be true because I see their capabilities every day.

First Nations are strong, wise, intelligent, responsible and resourceful. They are lawyers, scholars and doctors. They are the women who are respected knowledge keepers. They are bright-eyed youth who are motivated to become agents of change and create a better future for not only themselves but also the seven generations that will follow.

Yes, jurisdictional gaps and legislative constraints have come together to limit First Nations' progress in many areas. This is a reality we, as senators, should all continue to be aware of and work towards unbraiding as we debate and vote on future legislation.

Let me tell you, honourable senators, First Nations people are unlike any other on this planet. When met with unimaginable hardships, they have shown they are capable of doing much more than survive. When given the chance to, they have shown that they will prosper and thrive.

Kinanâskomitin. Thank you.

VISITORS IN THE GALLERY

The Hon. the Speaker: Honourable senators, I wish to draw your attention to the presence in the gallery of three refugees from Yemen who are visiting the Senate today on World Refugee Day: Lamees Alwasabi, Kais Al-ariani and Mohammed Al-shuwaiter. They are the guests of the Honourable Senator Jaffer.

On behalf of all honourable senators, I welcome you to the Senate of Canada.

Hon. Senators: Hear, hear!

ROUTINE PROCEEDINGS

DECLARATION ON THE ESSENTIAL ROLE OF ARTISTS AND CREATIVE EXPRESSION IN CANADA BILL

NINTH REPORT OF SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY COMMITTEE PRESENTED

Hon. Ratna Omidvar, Chair of the Standing Senate Committee on Social Affairs, Science and Technology, presented the following report:

Monday, June 20, 2022

The Standing Senate Committee on Social Affairs, Science and Technology has the honour to present its

NINTH REPORT

Your committee, to which was referred Bill S-208, An Act respecting the Declaration on the Essential Role of Artists and Creative Expression in Canada, has, in obedience to the order of reference of April 7, 2022, examined the said bill and now reports the same with the following amendments:

1. *Preamble, page 1*: Add the following after line 12:

"Whereas English-speaking artists and French-speaking artists, as integral parts of the two official language communities of Canada, should have equal opportunities to pursue their artistic endeavours in order to enhance the vitality and development of English and French linguistic minority communities;".

2. *Clause 4, page 2*:

(a) Add the following after line 18:

"**(d.1)** the Minister responsible for official languages;";

(b) add the following after line 24:

"**(g.1)** French-speaking artists and organizations representing those artists;

(g.2) artists who represent the ethnic and racial diversity and all other diversities of Canada and organizations that work on their behalf;".

Your committee has also made certain observations, which are appended to this report.

Respectfully submitted,

RATNA OMIDVAR

Chair

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

(On motion of Senator Omidvar, report placed on the Orders of the Day for consideration at the next sitting of the Senate.)

[*Translation*]

STRENGTHENING ENVIRONMENTAL PROTECTION FOR A HEALTHIER CANADA BILL

BILL TO AMEND—THIRD REPORT OF ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES COMMITTEE PRESENTED

Hon. Paul J. Massicotte: Honourable senators, I have the honour to present, in both official languages, the third report of the Standing Senate Committee on Energy, the Environment and Natural Resources, which deals with Bill S-5, An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act.

(*For text of report, see today's* Journals of the Senate*, p. 752.*)

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

(On motion of Senator Massicotte, report placed on the Orders of the Day for consideration at the next sitting of the Senate.)

[*English*]

CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT

BILL TO AMEND—SIXTH REPORT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE COMMITTEE PRESENTED

Hon. Peter M. Boehm, Chair of the Standing Senate Committee on Foreign Affairs and International Trade, presented the following report:

Monday, June 20, 2022

The Standing Senate Committee on Foreign Affairs and International Trade has the honour to present its

SIXTH REPORT

Your committee, to which was referred Bill S-9, An Act to amend the Chemical Weapons Convention Implementation Act, has, in obedience to the order of reference of June 14, 2022, examined the said bill and now reports the same without amendment.

Respectfully submitted,

PETER M. BOEHM

Chair

The Hon. the Speaker: Honourable senators, when shall this bill be read the third time?

(On motion of Senator Boehm, bill placed on the Orders of the Day for third reading at the next sitting of the Senate.)

STUDY ON MATTERS RELATING TO BANKING, TRADE AND COMMERCE GENERALLY

FOURTH REPORT OF BANKING, TRADE AND COMMERCE COMMITTEE TABLED

Hon. Pamela Wallin: Honourable senators, I have the honour to table, in both official languages, the fourth report (interim) of the Standing Senate Committee on Banking, Trade and Commerce entitled *Business investment in Canada* and I move that the report be placed on the Orders of the Day for consideration at the next sitting of the Senate.

(On motion of Senator Wallin, report placed on the Orders of the Day for consideration at the next sitting of the Senate.)

THE ESTIMATES, 2022-23

SUPPLEMENTARY ESTIMATES (A)—FIFTH REPORT OF NATIONAL FINANCE COMMITTEE TABLED

Hon. Percy Mockler: Honourable senators, I have the honour to table, in both official languages, the fifth report of the Standing Senate Committee on National Finance entitled *Supplementary Estimates (A) for the fiscal year ending March 31, 2023* and I move that the report be placed on the Orders of the Day for consideration at the next sitting of the Senate.

(On motion of Senator Mockler, report placed on the Orders of the Day for consideration at the next sitting of the Senate.)

[*Translation*]

THE SENATE

MOTION TO RESOLVE INTO COMMITTEE OF THE WHOLE TO CONSIDER SUBJECT MATTER OF BILL C-28 ADOPTED

Hon. Raymonde Gagné (Legislative Deputy to the Government Representative in the Senate): Honourable senators, with leave of the Senate and notwithstanding rule 5-5(j), I move:

That, notwithstanding any provisions of the Rules, previous or usual practice:

1. the Senate resolve itself into a Committee of the Whole at 5 p.m. on Tuesday, June 21, 2022, to consider the subject matter of Bill C-28, An Act to amend the Criminal Code (self-induced extreme intoxication), with any proceedings then before the Senate being interrupted until the end of Committee of the Whole;

2. if the bells are ringing for a vote at the time the committee is to meet, they be interrupted for the Committee of the Whole at that time, and resume once the committee has completed its work for the balance of any time remaining;

3. the Committee of the Whole on the subject matter of Bill C-28 receive the Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada, accompanied by no more than two officials;

4. the Committee of the Whole on the subject matter of Bill C-28 rise no later than 65 minutes after it begins;

5. the minister's introductory remarks last a maximum total of five minutes;

6. if a senator does not use the entire period of 10 minutes for debate provided under rule 12-32(3)(d), including the responses of the witnesses, that senator may yield the balance of time to another senator; and

7. the start time of the evening suspension pursuant to rule 3-3(1) be postponed until after the conclusion of the Committee of the Whole and, if the bells had been ringing at the time the committee began, the completion of those proceedings.

The Hon. the Speaker: Is leave granted, honourable senators?

Hon. Senators: Agreed.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

(Motion agreed to.)

• (1820)

[*English*]

LEGAL AND CONSTITUTIONAL AFFAIRS

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY THE IMPACT OF SUBSECTION 268(3) OF THE CRIMINAL CODE

Hon. Frances Lankin: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the impact of subsection 268(3) of the *Criminal Code*, enacted in 1997, including but not limited to:

(a) the reasons why there have been no prosecutions under this provision since its enactment 25 years ago; and

(b) the extent to which female genital mutilation is currently occurring in Canada and to Canadian girls taken abroad for such procedures;

That the committee make recommendations, as appropriate, to ensure the *Criminal Code* provision has its intended impact of ending such crimes being perpetrated against girls in Canada; and

That the committee submit its final report no later than December 31, 2023, and that the committee retain all powers necessary to publicize its findings for 180 days after the tabling of the final report.

QUESTION PERIOD

IMMIGRATION, REFUGEES AND CITIZENSHIP

PASSPORT SERVICES

Hon. Donald Neil Plett (Leader of the Opposition): Honourable senators, my question is for the government leader in the Senate. On Friday morning, Canadians who had waited overnight in front of Service Canada office in Laval in the hopes of obtaining their passports were expelled from the premises when the police were called in to disperse the crowd. This is not service; this is shameful.

Yesterday, Brian Lilley reported the surge in passport applications that has completely overwhelmed this Trudeau government is actually just 55% of what the government processed before the pandemic — an average of 75,000 per week now versus 90,000 to 98,000 per week then.

Leader, what is your government's response to this report? Is this correct? If no one who processes passports was laid off, as Minister Gould has said, then why can your government not keep up with the demand?

Hon. Marc Gold (Government Representative in the Senate): Thank you for the question and for underlining the very troubling situation that affects so many Canadians waiting for their passport renewals.

I don't know whether all details are correct. I do know that the government has invested significantly to engage additional personnel to support and supplement the current working staff to address this problem. The challenge is a serious one, and the government is working hard to address it.

I'm advised that the focus is on ensuring that anyone who has travel planned within 25 business days are given priority for service and, although there is no question that processing times are longer than prior to the pandemic and longer than they should reasonably be, 72% of applications are being processed within the service standards.

Senator Plett: I'm a bit disturbed by the fact that you would say you aren't sure whether the facts are correct. These facts are very correct, and it's on the record that 75,000 applications are being processed a week now versus 90,000 to 98,000 per week before. Those are statistics that are not disputed by anyone, including your government.

Last week, *Blacklocks* reported that of the 26,000 Service Canada employees who handled passport applications, over 18,000 are still working from home, or about 70%. Maybe it's time they stopped playing the groundhog game.

Why is it that your government is overwhelmed and can't provide Canadians with this basic government service? Is it because the staff processing passports are still mainly working from home, leader?

Senator Gold: When I said I wasn't sure of all the facts, I wasn't referring to the statistics so much as all the circumstances surrounding the cause of the delays.

I'm not aware of the proportion of workers who are still working at home nor the many different reasons that may explain that. I'll certainly look into it and report back. Again, I can assure the chamber that the government is very aware of the unreasonably long delays and the impact that's having on Canadians and is doing its very best to address the situation.

TREASURY BOARD SECRETARIAT

ACCESS TO INFORMATION

Hon. Salma Ataullahjan: Honourable senators, my question is for the government leader in the Senate. The Information Commissioner's 2021-2022 Annual Report shows a 70% increase in complaints over the previous year: the highest volume of complaints since this office was created almost 40 years ago in 1983.

Commissioner Maynard stated, "A number of institutions are not meeting their legislative obligations, while some appear to consider them as optional."

The commissioner says that the pandemic can no longer be used as an excuse for failing to live up to these obligations.

Leader, your government came to office promising openness and transparency. Instead, under your watch, access to information is now arguably the worst it has ever been. What will you do to address the crisis in the system for access to information across your government?

• (1830)

Hon. Marc Gold (Government Representative in the Senate): Thank you, senator, for the question. Indeed, transparency, accountability and openness, these are guiding principles that the government strives to promote. It has invested over $50 million in additional funds to improve access to information, and is engaged in a review of its access to information process to explore opportunities to improve proactive publication, improve services and reduce delays. I am also advised that deputy heads have been reminded of their obligations under the law, and are being held to account to ensure they respond appropriately to requests.

Senator Ataullahjan: In a report released in April, and again in an annual report last week, Commissioner Maynard made specific mention of the excessive delays for access to information requests at Library and Archives Canada, where almost 80% of responses do not comply with the timelines laid out in the legislation. The commissioner is very critical of Minister Rodriguez in her reports, saying she is not convinced the minister has an understanding of the critical situation at Library and Archives Canada. As well, the commissioner said the minister's response to her recommendations lacked any sense of urgency and in some cases did not even address her recommendations.

Leader, the commissioner says Minister Rodriguez won't commit to anything other than the status quo at Library and Archives Canada, which she finds wholly inadequate. How will the delays ever be resolved if the minister doesn't even realize there is a problem?

Senator Gold: Thank you for the question. With respect, senator, it is not the case the minister does not recognize the problem. The government and the minister thank the commissioner for her report and take access to information seriously. There are more requests, indeed, and they are more complex. The government is taking action.

I am advised that Library and Archives Canada is creating a task force to address the issues. It is reducing the backlog and developing a long-term plan. The government, for its part, added $25 million in Budget 2022 to make documents related to residential schools accessible to all survivors. The government hopes these measures will improve the situation as set out in the report.

FINANCE

PROMPT PAYMENT OF FEDERAL GOVERNMENT CONSTRUCTION WORK

Hon. Pat Duncan: Honourable senators, my question is for the Government Representative in the Senate. Senator Gold, tomorrow marks three years since Bill C-97, Budget Implementation Act, 2019, No. 1, received Royal Assent in this chamber. Section 387 of that act, the Federal Prompt Payment for Construction Work Act, is still not in force.

Do you have any indication of when this act will come into force, and do you have any information as to what's holding up the proclamation of this act?

Hon. Marc Gold (Government Representative in the Senate): Thank you for your question, senator. The government believes that contractors and subcontractors in the construction industry deserve to be paid promptly. Regarding the specifics of your question, I will have to make inquiries with the government and report back to the chamber.

Senator Duncan: Senator Gold, how do we know if the government will proclaim any of the measures under order-in-council proclamation of Bill C-19 that we are currently studying at the National Finance Committee? Are any of these measures under question?

Senator Gold: Thank you for your question. I can't answer the specifics of your question. I would imagine and hope that questions of this nature would have been posed to officials when they appeared at the various committees looking at Bill C-19, and more than that, I will certainly make inquiries, Senator Duncan, in the event that the bill receives third reading vote this week as planned.

JUSTICE

THREE-YEAR REVIEW OF THE CANNABIS ACT

Hon. Marty Deacon: Honourable senators, my question is for the Government Representative in the Senate. Senator Gold, about this time last year I inquired about plans to begin a three-year review provided for in the Cannabis Act as I was concerned we would miss the deadline on starting this important work. The three-year mark was this past October, but the only reference made to the cannabis industry by government was the launch of the cannabis strategy table to engage with the industry in this year's budget document. This will not really look at the public health aspect, and I would suggest this falls short of the kind of review envisioned by the Cannabis Act.

When will the government begin this important review of the Cannabis Act and its impact on Canadians?

Hon. Marc Gold (Government Representative in the Senate): Senator, thank you for your question. The Cannabis Act established a new control framework for cannabis, and was designed to better protect public health, public safety and minimize harms associated with cannabis use. As you properly point out, the act requires a legislative review to start within three years after coming into force and a report to be tabled in both houses of Parliament within 18 months after the review begins. The government remains committed to putting into place a credible, evidence-driven process for the legislative review which will assess the progress made towards achieving the objectives of the act.

TREASURY BOARD SECRETARIAT

ACCESS TO INFORMATION

Hon. Michael L. MacDonald: Honourable senators, my question is for the Leader of the Government in the Senate and concerns our access to information system. According to an answer to a written question from Conservative member of Parliament Kelly McCauley tabled in the House of Commons, the Trudeau government paid private consultants over $39 million to process access to information requests. This $39 million has been spent just since January 1, 2020.

Senator Gold, the annual report of the Information Commissioner says that in 2021-22, access to information staff in 28 federal institutions had no access or limited on-site access for processing physical files. Given this, how can the government justify paying tens of millions of taxpayer dollars to consultants to censor government documents?

Hon. Marc Gold (Government Representative in the Senate): Again, I'm not sure it's accurate to describe the work that was done as censoring government documents. Be that as it may, I don't have the details of the work that was done. I will certainly make inquiries and report back.

Senator MacDonald: According to the answer tabled in the other place in February of this year, the Department of National Defence awarded a contract of $125,000 of taxpayer dollars to one consultant firm to process just one Access to Information and Privacy, or ATIP, request. As well, the document showed that Health Canada and the Public Health Agency of Canada paid $36,000 to one consulting firm for a contract between February and March of 2020, and processed no access to information requests — not one.

Senator Gold, how does the government possibly justify these contracts?

Senator Gold: I will have to make inquiries as to the nature of the contracts, as well as the nature and extent of the requests. As senators will undoubtedly know, one request can encompass a desire to access thousands if not millions of documents, which may or may not be easily accessible and would have to be reviewed under the appropriate circumstances. So again, as dramatic as the figure seems, I will have to make inquiries and provide proper factual context for the answer.

HEALTH

FOOD LABELLING

Hon. Donald Neil Plett (Leader of the Opposition): Honourable senators, my second question, again, is for the Leader of the Government in the Senate.

Leader, it concerns Health Canada's proposed warning label for ground beef and pork, which I raised with the Minister of Agriculture earlier this month at a Committee of the Whole. When she was in the chamber, Minister Bibeau said:

> The final decision hasn't been taken yet, but you can count on me to always advocate for our producers with my colleague the Minister of Health . . .

During Question Period in the House of Commons earlier today, it sounded very much as though a decision has been taken and our beef producers were right, leader, to be worried. In Question Period, the Parliamentary Secretary to the Minister of Health defended these warning labels, indicating Canadians will now have a choice to make an informed decision to limit their saturated fat. Leader, could you confirm that your government is going ahead with warning labels on ground beef and pork?

• (1840)

Hon. Marc Gold (Government Representative in the Senate): Thank you for your question, Senator Plett. No, I am not able to confirm that. To the best of my knowledge, the decision has not formally been taken. However, I can confirm that the government remains committed to providing Canadians and consumers with the information all Canadians deserve to have with regard to the benefits and possible consequences of the food they consume. That would include foods that are high in saturated fat or others that may cause, if eaten in too great a quantity or concentration, some health consequences — at least for some Canadians.

Senator Plett: One thing we can be assured of in your answers is that the government is always concerned. They don't show that, leader.

As I said, regardless of what the minister said earlier this month, it sounds like the deal is done. Our beef and pork producers and their livelihoods are again being thrown under the bus for an incoherent, inconsistent Trudeau government policy.

Leader, if the Trudeau government slaps a warning label on Canadian ground beef and pork, it will be the only country in the world to do so. I find it strange that there isn't another country in the world that seems to care about the health of Canadians — only our government. Leader, what do you think that will do to our beef exports worldwide? Last year, Canadian beef exports were worth about $4.5 billion. Do you think a warning label will help our beef exports or hurt them?

Senator Gold: I think it's the position of the government that health labels on beef, pork or any other matter help Canadians make informed decisions. Canadians will, I expect — as will folks around the world — continue to purchase ground beef. Canada produces high-quality beef that is enjoyed in this country and elsewhere, and it's the expectation of the government that this will continue to be the case.

AGRICULTURE AND AGRI-FOOD

FERTILIZER TARIFF

Hon. Donald Neil Plett (Leader of the Opposition): Leader, I think we should have more Monday sittings. I get a lot of questions.

My last question today, leader — even if we do have time; I should have prepared a fourth one — concerns an issue I have previously raised with you: the 35% tariff on Russian fertilizer imports being paid by Canadian farmers.

The difficult financial situation this tariff has put on Canadian farmers is completely of the Trudeau government's own making, leader. I can think of no other country that is imposing a similar tariff on their farmers, likely because it's a ridiculous thing to do at a time of food insecurity worldwide. The only solution the Trudeau government has brought forward isn't a solution at all. It's to expand the Advance Payments Program to let farmers take on further debt.

Leader, what is the average amount Canadian farmers have had to pay your government in fertilizer tariffs? Does your government track this information, or does it care?

Hon. Marc Gold (Government Representative in the Senate): Again, thank you for your question. I don't have the answer to the amounts that have been contributed through that program.

The government does care. The government is working with the agricultural sector to address the rising input costs and the consequential impact those costs are having on producers. Some of this is beyond the control of any government, being international in nature. However, the government is committed to working with the agricultural sector so as to support them and so that they in turn can not only support the needs of Canadians but flourish as an important industry that contributes to our exports in the world.

Senator Plett: Leader, how is it possible that Putin's illegal invasion of Ukraine is justification for 35% fertilizer tariffs on our own Canadian farmers but not serious enough to prevent Minister Joly's office from sending a representative to a lavish party at the Russian embassy? Does this make sense to you, leader?

Senator Gold: The attendance of the official at the party was a mistake and unacceptable. It has been so stated by the minister and by the Prime Minister himself. It shall not happen again.

ORDERS OF THE DAY

BUSINESS OF THE SENATE

Hon. Raymonde Gagné (Legislative Deputy to the Government Representative in the Senate): Honourable senators, pursuant to rule 4-13(3), I would like to inform the Senate that as we proceed with Government Business, the Senate will address the items in the following order: second reading of Bill C-14, followed by second reading of Bill C-5, followed by third reading of Bill S-7, followed by Motion No. 49, followed by all remaining items in the order that they appear on the Order Paper.

[*Translation*]

CONSTITUTION ACT, 1867

BILL TO AMEND—SECOND READING

Hon. Dennis Dawson moved second reading of Bill C-14, An Act to amend the Constitution Act, 1867 (electoral representation).

He said: Honourable senators, I am pleased to rise in the chamber to speak in support of this government bill, Bill C-14, the Preserving Provincial Representation in the House of Commons Act. This bill will ensure that no province has fewer seats in the House of Commons than it did in 2021.

As we all know, our Constitution requires that representation in the House of Commons be readjusted every 10 years. This includes reviewing the number of seats allocated to each province and the electoral boundaries to reflect the changing demographics of our country.

Over the past 10 years, Canada's population has grown by more than 3.5 million, from just over 33 million in 2011 to nearly 37 million today.

[*English*]

This growth in population has not been equally distributed across provinces, and it is essential that all citizens be factored into Canada's federal electoral districts. I would like to take this opportunity to first talk to you about how provincial seats are allocated.

To begin, this process requires the Chief Electoral Officer to calculate the number of seats allocated to each province, using the population estimates provided by Statistics Canada. The calculation itself is a mathematical formula, prescribed in the Constitution Act of 1867, that follows a simple, four-step process and does not allow discretion on the part of the Chief Electoral Officer.

[*Translation*]

The first step in the formula is the initial allocation of seats to the provinces, which is obtained by dividing the population of each province by the electoral quotient.

The electoral quotient is obtained by multiplying the quotient of the last decennial redistribution, which was 111,166 electors per riding, by the average of the population growth rates of the 10 provinces over the last 10 years, or 9.65%.

The 2021 electoral quotient is 121,891. This number roughly corresponds to the average riding size across the provinces.

[*English*]

Second, there is the application of the Senate clause and the grandfather clause, which set floors and ensure that each province has no fewer seats than it does in the Senate and no fewer seats than it had in 1985, respectively. These clauses continue to ensure that smaller provinces and those with declining populations continue to be well represented in the House of Commons.

[*Translation*]

The third step in the formula is the application of the representation rule, which ensures that a province whose population was overrepresented in the House of Commons relative to its share of the national population at the completion of the previous redistribution process remains overrepresented at the next redistribution process.

Once the special clauses and the representation rule are applied, the number of seats in each province is then determined.

[*English*]

Finally, three seats are allocated to the territories: one each for the Yukon, the Northwest Territories and Nunavut. This final step provides the total number of seats in the House.

• (1850)

On October 15, 2021, the Chief Electoral Officer published the results of this calculation and announced that the new House of Commons seat allocation by province for the 2022 to 2032 decennial would increase the size of the House from 338 to 342 seats. While the new allocation provides the addition of one seat for British Columbia, three seats for Alberta and one seat for Ontario to reflect their faster growing population, it would also see a reduction of one seat for the province of Quebec. This loss of one seat for Quebec is concerning, which is why the government introduced Bill C-14, the "Preserving Provincial Representation in the House of Commons Act."

[*Translation*]

Bill C-14 would amend section 51 of the Constitution Act, 1867, which is about the readjustment of representation in the House of Commons. More specifically, it would ensure that Quebec keeps the seat it would have lost.

However, and this is very important, we must also keep all existing protections and allow for incremental seat increases in provinces with growing populations.

[*English*]

This means that the gains previously mentioned for British Columbia, Alberta and Ontario will obviously be kept under Bill C-14. Thus, the proposed approach strikes, in my view, an appropriate balance between ensuring effective regional representation and providing for representation by population as it has evolved in Canada. For better clarity on how to achieve this, Bill C-14 is proposing to update the existing grandfather clause found in Rule 2 of the Constitution Act, 1867 to ensure that no provinces are allocated fewer seats than what they had in 2021 during the Forty-third Parliament.

[*Translation*]

It would establish a new floor of seats in the House of Commons for all provinces and ensure that Quebec would continue to have at least 78 seats in the next electoral redistribution.

Given that no change is being made to the other steps in the seat distribution formula, its calculation and objectives remain the same: Provinces with a small or slow-growing population are protected, and Bill C-14 allows for incremental seat increases among provinces with growing populations.

If this bill is passed, the number of seats for the 2022 to 2032 decennial will be 343 rather than 342, and Quebec will keep 78 seats instead of losing one.

However, as many of you know, the redistribution of federal electoral districts is already under way, since the Chief Electoral Officer announced the new distribution of seats in October 2021. Therefore, I would like to take this opportunity to also speak about the readjustment of electoral boundaries that is currently under way and how it relates to Bill C-14.

[Senator Dawson]

[*English*]

As is required by the Electoral Boundaries Readjustment Act, 10 independent, non-partisan electoral boundary commissions — 1 for each province — were established on November 1, 2021. It is important to mention that the independence and non-partisan nature of these commissions are by design. This independence serves to limit political interference in the process and maintain integrity and transparency in our democratic system and institutions.

With the release of the final 2021 census data on February 9, 2022, the commission began their review of the boundaries. This review is given a period of 10 months, wherein the commissions will hold public hearings open to the Canadian public, including members of Parliament, and will culminate in one report from each commission. Once the commissions have completed their reports on the new electoral districts, they will be sent to the Speaker of the House through the Chief Electoral Officer.

These reports will be tabled and referred to the Standing Committee on Procedure and House Affairs for study, and members of the House will have the opportunity to file written objections.

[*Translation*]

Once the study is complete, the reports will be returned to the commissions. Within 30 days of receiving the reports, which can contain objections and recommendations, each commission must decide whether to modify the boundaries or district names before submitting its final report. At that point, the Chief Electoral Officer will draft a representation order that describes the electoral districts established by the commissions and submit it to the relevant minister. Finally, the representation order will be proclaimed by the Governor in Council and published in the *Canada Gazette*.

Bill C-14 contains essential transitional measures so that this critical work can be done without interruption or political interference, while ensuring that the new distribution enables Quebec to keep its 78 seats.

[*English*]

First, once Bill C-14 comes into force, it will require the Chief Electoral Officer to recalculate the number of seats allocated to each province. As we have previously established, this would not change the number of seats of any other province but Quebec, and will allow the work done by those provincial commissions to go uninterrupted. However, for the Quebec commission, Bill C-14 will require that the process for the review of electoral boundaries restart under the new calculations provided by the Chief Electoral Officer.

[*Translation*]

That way, the Quebec commission will have time to do its work and will have a new time frame of 10 months to reconsider its boundary proposal based on the grandfather clause, as updated in 2021.

Since Quebec would be the only province affected by the passage of Bill C-14, that means that a new boundary proposal and separate representation order will be prepared, as required, for Quebec only.

In closing, Bill C-14 makes a minor change to the Constitution that would increase the seat floor and guarantee that no province is allocated fewer seats than in 2021. By so doing, the bill strikes the right balance for ensuring both strong regional representation and representation by population. The bill also sets out essential transitional measures to allow the commissions to work uninterrupted while also ensuring that Quebec keeps the same number of seats during the next electoral redistribution.

Thank you, honourable senators.

Hon. Julie Miville-Dechêne: Would Senator Dawson take a question?

Senator Dawson: Certainly.

Senator Miville-Dechêne: Senator Dawson, I want to thank you for sponsoring both this bill and Bill C-11. It must be a lot of work for you.

My question may be a thorny one. As a Quebecer, I will vote in favour of this bill. Everyone in Quebec agrees that it must not lose any seats. However, as someone who studied political science, I am particularly interested in the issue of representation and the somewhat equal number of constituents represented by one member of Parliament. Obviously, I know that Canada's system isn't perfect and that MPs from remote areas already represent fewer constituents than MPs from big cities.

Nevertheless, this bill would set a seat floor for provinces with the slowest-growing populations. Are you uncomfortable with this compromise — since this is essentially a compromise on the principles of representation — or, rather, would you say that a number of compromises have already been made in the past? I'm thinking of other provinces that have fewer constituents per MP.

I'd like to hear your thoughts on this, since I've been pondering these matters of principle myself.

Senator Dawson: Thank you for your question, senator.

I myself studied political science at Laval University and the University of Ottawa, and I agree with you about the inherent problems with representation. However, the bill has nothing to do with that kind of representation at all. That is not what this bill is about. It is about representation among the provinces and a grandfather clause to preserve 78 seats, similar to the one we created to protect the Maritime provinces a few years ago.

We could certainly debate this and even get deeper into issues of future electoral reform, but unfortunately this bill does not give me the latitude to address that.

[*English*]

Hon. Donna Dasko: Would Senator Dawson take another question?

Senator Dawson: Yes, madam.

Senator Dasko: Thank you. Senator Dawson, listening to your presentation, I think I heard one mention of the principle of representation by population. I wonder whether that principle is becoming eroded more and more. My province of Ontario is under-represented in terms of seats. If I do the math on the total number of seats that you have, 343, the province of Ontario should be getting 137 seats out of this, given that we have 40% of the population.

• (1900)

But how many seats are we actually getting under this? Is it 122? We currently have 121. If you do the math and add 1, it's 122. To me, that shows clearly that there is not representation by population. Perhaps we're moving even further away from this principle, and I worry about that.

We in the Senate know that we are unequally — or some might say unfairly — represented. Ontario only has 24 seats; it should have something like 42, proportionally speaking, but it doesn't. But that's the Senate; the House of Commons is supposed to employ representation by population.

Are you worried that we are moving further away from the principle as we go forward in time? Thank you.

Senator Dawson: As I mentioned to your colleague, I totally agree. I think this issue should be looked into. One of the reasons there is a commission is so that we don't get into political constraints of having parliamentarians from each province fundamentally wanting to defend their rights. But when we talk about grandfathering the Maritimes and Quebec, it means there is an inherent imbalance in the system.

That being said, there is certainly a lot of room to have a debate on the issue. Unfortunately, this is not the issue that is being debated here today. We do not interfere in the process of determination. What we are doing is determining that there is minimum representation, as we did many times in the past when we grandfathered Prince Edward Island with the four senators and when we grandfathered the Maritimes in 2010 or 2011.

This is a subject that deserves to be debated, but I think that is not the objective of the bill. One of the reasons they drafted it as simply as they could is that if we want to get into that debate, we all know that reform of Parliament will take a bit longer than reform of one more seat for Quebec.

Senator Dasko: Will you take a supplementary question, senator?

Senator Dawson: Yes, Senator Dasko.

Senator Dasko: Thank you, senator. I understand the grandfathering. As you articulated, there are principles of grandfathering in the bill and in the way we distribute seats. However, the solution to grandfathering would be to increase the

size of the House of Commons such that we could accommodate fairly the provinces that are larger and that are not fairly represented. Those provinces would be Ontario, Alberta and British Columbia. That would be the solution if we're truly moving toward — or if we had — a representation-by-population system. That is what we would be doing. I wonder if you could comment on that.

Senator Dawson: I think the Speaker pro tempore could tell you, having served in the other place, that this debate occurs every time we talk about the electoral map and its challenges.

Sometimes I repeat myself. When I arrived here 45 years ago this month, there were 285 seats. If we had grown Parliament at the same rate that Canada grew, we would probably have 375 seats. However, one of the decisions that was taken was that if you try to moderate, the distinction between the bigger provinces and the smaller provinces would only grow. Again, it is not the objective of the bill, but I would certainly support any motion in that respect. However, we don't play that game. They're playing it over there.

If the elected parliamentarians wanted to change the electoral system for their chamber, I would let them do it, and I would hope they will let us do the same when we want to reform things here.

Hon. Paula Simons: Would the senator accept another question?

Senator Dawson: Yes.

Senator Simons: Inspired by Senator Dasko's question, I wanted to ask you this: Albertans have a bad habit of nurturing a sense of grievance, growing it like a hothouse flower. However, in this instance, our concerns are legitimate. British Columbia and Alberta are two of the fastest-growing provinces in Confederation; British Columbia has a little more than 5 million people, Alberta a little less than 5 million people. Each of these provinces gets only six Senate seats, which is interesting when you consider the smaller provinces in Atlantic Canada, which have so many more seats than Alberta and British Columbia.

When I see something like this, I certainly don't begrudge my fellow Canadians in Quebec their concerns about representation, but I am concerned that the continual grandfathering of the smaller provinces will perpetuate not only the inequalities that Senator Dasko mentioned but the even more acute inequalities, one might argue, of British Columbia and Alberta — which are continuing to grow, and will never reasonably expect proper representation in the Senate and need the House as their only opportunity to have their voices heard equally.

Senator Dawson: That is a good comment and quite justified, but this is not the forum for me to debate it in relation to Bill C-14. To be frank, I do believe, having served in the other place, that it is the right forum to debate the issue. They should debate it; I agree with you. I tried to go back and I wasn't welcome, so I came here instead.

Hon. Senators: Oh, oh!

[*Translation*]

Hon. Claude Carignan (Acting Deputy Leader of the Opposition): Honourable senators, I rise today in support of Bill C-14, An Act to amend the Constitution Act, 1867, in relation to electoral representation. My comments today will be brief, for I intend to go into greater detail at the third reading stage of Bill C-14. I hope my observations will answer Senator Julie Miville-Dechêne's questions in particular.

Bill C-14 basically amends the grandfather clause in the electoral boundaries formula. Currently, this grandfather clause, referred to as the "1985 clause," sets out that no province will have fewer electoral districts when the electoral map is redrawn than it had in 1985. The amendment in Bill C-14 updates that clause for the Forty-third Parliament. In other words, it states that no province will have fewer electoral districts when the electoral map is redrawn than it had in the Forty-third Parliament.

This provision is ultimately intended to ensure that Quebec does not lose a seat, as the Chief Electoral Officer of Canada's new projection called for.

As you know, colleagues, section 51(1) of the Constitution Act, 1867, requires that the electoral map be readjusted every 10 years. The introduction to section 51(1) reads as follows:

> The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time. . . .

Canada has been changing immensely since its creation in 1867, and successive governments take advantage of the decennial census to adjust the representation rules in order to adapt to the contemporary realities of our society, including on a demographic level.

For this reason, in 1986, Parliament passed Bill C-74, the Representation Act, 1985. The two objectives of this bill were to limit the growth of the number of elected members that the formula used back then would have caused, as a way to save money, but also to prevent Parliament from becoming too big, which would have limited the privileges of each member.

At the time, it was predicted that if nothing was done, the House of Commons would have 369 members after the 2001 census. Let's not forget that we have 338 members today, after the last boundaries readjustment process, which was done after the passage of the Fair Representation Act in 2011. I will come back to that.

The second objective of Bill C-74, which was passed in 1986, was to introduce a grandfather clause providing that a province's number of MPs could not decrease even if the provincial population decreased slightly. This is what is now known as the 1985 clause, and it is directly affected by Bill C-14.

Then, after the 2011 census, Prime Minister Harper's Conservative government passed the Fair Representation Act, as I mentioned earlier. This bill was intended to correct a certain

imbalance in the representation of the provinces in the House of Commons. Two of the "whereas" clauses in this bill read as follows:

> Whereas the principle of proportionate representation of the provinces must balance the fair and equitable representation of faster-growing provinces and the effective representation of smaller and slower-growing provinces;
>
> Whereas the populations of faster-growing provinces are currently under-represented in the House of Commons and members of the House of Commons for those provinces therefore represent, on average, significantly more populous electoral districts than members for other provinces;

• (1910)

After this bill was passed, the number of seats in the House of Commons increased from 308 to 338. However, the 1985 grandfather clause was not amended by the Fair Representation Act that was assented to on December 16, 2011.

Following the last census of the population of Canada by Statistics Canada, which was tabled in the fall of 2021 and updated in February 2022, the Chief Electoral Officer of Canada has to readjust the electoral map to reflect the country's changing demographic, as required by section 51 of the Constitution Act, 1867.

The most recent count would increase the number of MPs in three provinces, with Ontario getting one more MP, Alberta three more and British Columbia one more. However, given its slower population growth, Quebec would lose one seat, going from 78 MPs to 77. Parliamentarians in the House of Commons unanimously denounced this situation and proposed various solutions. The Bloc Québécois introduced a bill to ensure that Quebec never has less than 25% of the seats in the House of Commons. This bill is still being examined in the other place, but I wouldn't bet on its chances of moving forward. Then, the government introduced Bill C-14, which we are beginning to examine today. It was passed in the other place on June 15, 2022.

When we debate this bill at third reading, I will talk about the formula for changing the electoral map, the concept of effective representation, the role of the Senate, and the importance of the new 2021 grandfather clause.

I therefore invite you to vote in favour of this bill at second reading.

Hon. Éric Forest: I'm pleased to rise today to speak to Bill C-14, which would protect Quebec's 78th seat in the House of Commons.

As you know, the electoral boundaries are redistributed every 10 years to ensure that all ridings have approximately the same weight. The idea is to ensure political equality among citizens, which is a fundamental democratic principle. Although the Constitution affirms the principle of representation proportional to the population, it's important to note that it does allow for exceptions to this principle to ensure effective representation that reflects our country's regional and geographic diversity.

For example, it states that a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province. Each of the three territories has its own member of Parliament, regardless of any fluctuations in population. There is also a grandfather clause that guarantees that no province can have fewer seats than it had in 1985. Note that the grandfather clause allows for a minimum of 75 seats for Quebec, which is not enough to guarantee it the 78 seats it currently has.

I should also point out that these exceptions to representation by population have been challenged in court and have been recognized as legitimate.

Under the current readjustment formula, Quebec would lose one seat. According to the Chief Electoral Officer's proposal, Quebec's weight in the House of Commons would be further reduced to 22.5%. In 1867, Quebec representatives accounted for 36% of the House of Commons and fell below 25% in the 1999 redistribution.

Bill C-14 ensures that Quebec will not lose a seat in the redistribution process. This bill is the result of a political compromise: Bill C-14 was passed in the House of Commons on division. That said, I would be remiss if I did not mention that even though Bill C-14 allows Quebec to keep its 78th seat, it does not allow Quebec to keep its relative weight in the House of Commons because seats are being added for the rest of Canada. In fact, Quebec's representation in the House of Commons will drop from 23.1% to 22.7%, even if it retains the 78th seat as provided for in Bill C-14.

According to the office of Quebec's minister responsible for Canadian relations, Sonia LeBel, Bill C-14 is a very good first step, but the minister points out that Quebec must still maintain its relative weight and says she will continue to work toward achieving that goal. The Legault government is sticking to Quebec's traditional constitutional stance and demanding protection from the erosion of its relative weight in the House of Commons.

It is worth noting that the 1992 Charlottetown Accord guaranteed Quebec 25% of the seats in the House of Commons. It is also worth noting that, in 2010, when the Harper government introduced a bill that would have reduced Quebec's weight in the House of Commons, the National Assembly unanimously reiterated that:

> . . . Québec, as a nation, must be able to enjoy special protection for the weight of its representation in the House of Commons. . . .

The National Assembly also called on members of all political parties in Ottawa to reject any bill that would reduce the weight of Quebec's representation in the House of Commons.

I understand that the section of the Constitution that pertains to the number of seats for each province can be unilaterally amended by Parliament, but the same is not true of the principle of proportional representation, which requires the approval of seven provinces representing 50% of the population.

In conclusion, I would argue that while Bill C-14 prevents Quebec from being the first province to lose a seat in the House of Commons since 1966, the fact remains that without this constitutional change, Quebec is doomed to see its political weight erode, as it has since 1867, because of its demographic weight.

The Hon. the Speaker pro tempore: Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

(Motion agreed to and bill read second time.)

The Hon. the Speaker pro tempore: Honourable senators, when shall this bill be read the third time?

(On motion of Senator Dawson, bill placed on the Orders of the Day for third reading at the next sitting of the Senate.)

[*English*]

CRIMINAL CODE
CONTROLLED DRUGS AND SUBSTANCES ACT

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Marc Gold (Government Representative in the Senate) moved second reading of Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act.

He said: Honourable senators, I rise to begin second reading of Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act.

This bill will make significant improvements to the way we approach criminal sentencing in Canada. It won't solve every problem, but it will help refocus our criminal justice system on rehabilitation, community well-being and genuine community safety. I'm proud to be the sponsor.

My office has already had discussions about this legislation with many honourable senators, and some of you have asked whether it will really achieve anything meaningful. Clearly, I think it will.

• (1920)

Let me begin by quoting some other credible voices on this point so that you don't have to just take the government's word for it.

The Canadian Bar Association says Bill C-5, "takes important steps towards reforming the Criminal Code to allow a more evidence-based, principled approach to sentencing proceedings."

It predicts the bill:

> . . . will lead to a fairer and more just sentencing regime, one that recognizes that criminal offences can be committed in various ways and that one size does not fit all, particularly when it comes to offenders from traditionally marginalized communities.

That's the Canadian Bar Association.

A director of the South Asian Bar Association of Toronto told the Standing Committee on Justice and Human Rights in the other place that "we need legislation like Bill C-5" because it will "introduce discretion into the criminal justice system again."

Senior legal counsel for the African Nova Scotian Justice Institute also testified in support, calling Bill C-5 "a necessary step towards justice."

The Native Women's Association of Canada calls Bill C-5 "a meaningful step towards reconciliation" and predicts that it will "immediately begin decreasing Indigenous women's over-incarceration rates."

In other words, this is an important and consequential bill that is highly valued by many relevant stakeholders. I look forward to sending this bill to committee for proper study. I hope that at the end of our deliberations we can turn the promise of this bill into lived reality for the many Canadians who will benefit from its provisions.

[*Translation*]

For many of us, criminal law is personal. There are senators in this chamber who have been directly affected by crime. Many of them have loved ones and acquaintances who were victims of crime and they have felt the anger, grief and vulnerability that can cause, as well as the determination to ensure that no one else goes through the same thing.

Many of us also know people who have been charged with crimes and are caught in the web of the justice system, a system that is not always fair. Our prisons are full of people who were subjected to a combination and some degree of poverty, abuse, mental illness, addiction, behaviour disorders and learning disabilities, often overlaid with the legacy of colonialism and racism, along with institutions that are designed to control, rather than support, these people and their communities.

I saw this situation many times when I was a member of the Parole Board of Canada. When you get to know people who are in this situation and you understand how much wasted potential is unnecessarily kept behind bars, it can, dare I say, it should make people want to change things. This bill will do that on two fronts: It addresses the concerns about victimization and overincarceration, and it contains several elements designed to improve the capacity of our criminal justice system to respond fairly and effectively when people break the law.

Bill C-5 reserves harsh penalties for serious criminal behaviour while recognizing that in some cases, the interests of justice and public safety are better served by flexible and creative approaches to sentencing or even by the absence of sentencing.

[*English*]

The part of Bill C-5 that has attracted the most attention is the repeal of a number of mandatory minimum sentences. Before I get to that, though, I'm going to discuss other aspects of the bill that will also have positive and significant impacts but have garnered fewer headlines.

The first is set out in that part of the bill that amends certain provisions of the Controlled Drugs and Substances Act. Bill C-5 would require police and prosecutors to consider alternatives to criminal charges for simple drug possession.

Essentially, this section of Bill C-5 largely incorporates the former private member's bill, Bill C-236, which was sponsored by Member of Parliament Nathaniel Erskine-Smith in the last Parliament.

This approach is in line with the Canadian drugs and substances strategy, which is led by the Department of Health, rather than Justice or Public Safety. It is based on four pillars that include prevention, treatment and harm reduction, as well as enforcement. The idea is to treat problematic drug use primarily as a medical and social issue because, colleagues, that's what it is.

This approach is also consistent with guidelines issued in 2020 by the Director of Public Prosecutions. Those guidelines instructed federal prosecutors to bring charges only for "the most serious manifestations" of drug possession offences, such as if a coach or a teacher consumes drugs when there are children in their care.

The approach is further informed by a 2020 report by the Canadian Association of Chiefs of Police which endorsed "alternatives to criminal sanctions for simple possession of illicit drugs" and said that diversion from the criminal justice system can have positive effects including "reducing recidivism, reducing ancillary crimes and improving health and safety outcomes. . . ."

[*Translation*]

It was long thought that a strong criminal justice approach to drug users and those involved in drug production and trafficking would result in a steady decrease in drug use, a significant reduction in the production of controlled drugs and a drug-free environment.

However, more than 50 years of the tough-on-drugs approach has not resulted in a significant reduction in the use or distribution of drugs. This approach was based in large part on the idea that problematic substance use was voluntary and that if those with a drug problem really wanted to, they could simply stop using drugs.

What research has shown is that there is a neurobiological basis for substance abuse and that it must be dealt with as a medical issue just like any other health issue. Consequently, attitudes toward drug use have evolved. Today, many health professionals, anti-drug organizations, members of law enforcement and Canadians are calling for a public health approach to drug use. This is clear from the way Canadians have reacted to the opioid crisis and the high number of deaths it has caused.

The proposed amendments to Bill C-5 include a set of principles that recognize the change in attitudes and encourage peace officers to remember that problematic substance use should be addressed primarily as a health and social issue when they use their discretion to decide whether or not to charge an individual possessing an illicit drug.

[*English*]

Under Bill C-5, rather than laying charges for drug possession, a peace officer shall — not may, but shall:

> . . . consider whether it would be preferable . . . to take no further action, to warn the individual or, with the consent of the individual, to refer the individual to a program or to an agency or other service provider in the community that may assist the individual.

The bill stipulates that prosecutions for simple possession would only occur if the prosecutor is of the opinion that a warning, referral or other alternative measures would be inappropriate.

To guide police and prosecutors in determining what is appropriate and what is not, the bill sets out a series of principles. They're in clause 20. I won't read them all out. Essentially, they prioritize the health, dignity and human rights of people who use drugs as well as those of their families and communities, and recommend charges and prosecution only where public safety would otherwise be at risk.

• (1930)

As I mentioned, the approach to drug possession proposed by Bill C-5 is similar to the way the Public Prosecution Service of Canada has been operating for two years now, but now the bill will enshrine this approach in law and expand its application to police and provincial Crown attorneys.

[*Translation*]

In addition, the committee in the other place made three amendments regarding the Controlled Drugs and Substances Act. The first amendment sets out what kind of information can be kept in police records, how that information can be used and to whom the information can be disclosed. For example, it can be disclosed anonymously to researchers to be used in studies on the impact of these measures and whether diversion measures are more frequently used for members of a particular community. It's important to note that this information cannot be used as part of legal proceedings.

The second amendment is particularly important. When a person is convicted of simple drug possession, their past and future convictions must be kept separate and apart from other records of convictions within two years after the sentence. This means that their criminal record will be suspended and they will not have to submit a request and pay and fees.

The same thing will happen to all existing records of simple drug possession in the two years after the implementation of the bill. This will enable individuals convicted of simple drug possession to continue living their lives. They can continue their schooling, explore employment opportunities or participate in their communities without being held back by a prior conviction of simple possession.

This addition provides the bill with a mechanism to reduce the stigma associated with simple possession convictions.

Finally, the last addition specifies that social workers, health professionals and service providers are not committing an offence when they come into possession of drugs in the course of their duties and intend to dispose of them lawfully within a reasonable period.

[*English*]

In practice, the goal of this whole section of Bill C-5 is to make prosecutions for drug possession an uncommon occurrence and to codify the idea that the role of police and prosecutors is not to catch addicts and lock them up, but to be part of a community infrastructure that supports everyone's safety and well-being. This way, when police come across an 18-year-old kid with a small amount of cocaine, for example, instead of being stuck in the court system for a year and then being saddled for just two years with a criminal record — which means no one wants to hire them or rent them a place to stay, or generally having their youth ferment into estrangement, anger and despair — that kid will get a second chance. They will be more likely to go to a community treatment program, finish high school and start building a life. That's better for the individual and for the safety of their community because healthy people living productive lives commit fewer crimes and create fewer victims.

Honourable senators, if this were the entirety of the bill it would be enough on its own to be worthy of our support, but, of course, there is more.

Bill C-5 also undoes restrictions imposed a decade ago on conditional sentence orders. When Minister Lametti met recently with the Indigenous senators working group, he expressed a particular enthusiasm for this part of the bill. A number of criminal justice stakeholders, even people who have made critiques of other parts of Bill C-5, have equally expressed enthusiasm in regard to this part of the bill. This is notably the part that the Native Women's Association of Canada believes will immediately begin decreasing Indigenous women's overincarceration rates.

Honourable senators, conditional sentence orders have existed in Canada since 1996. In cases where a judge determines that a sentence of less than two years is appropriate and that community safety would not be at risk, conditional sentence orders give judges the option of imposing a community-based sentence instead of incarceration. These types of sentences are accompanied by conditions set by the judge, such as house arrest, curfew or mandatory treatment programs. The alternative is often provincial or territorial jail, which is where sentences of less than two years are served in Canada. The benefit of a conditional sentence order is that people aren't removed from their communities unnecessarily, with all the long-term consequences for them and their families that imprisonment entails.

[*Translation*]

A conditional sentence order would allow a mother to stay with her children rather than being sent to jail, which would keep her children out of the child welfare system. A CSO would allow someone to keep their job rather than having to struggle to earn a living when they get out of jail. In remote northern communities, a CSO means that a young person who commits a minor property crime does not have to be sent to jail in Iqaluit, Yellowknife or Whitehorse, hundreds or even thousands of kilometres away, when they could securely be held accountable for their acts and would certainly have better rehabilitation prospects in their home community.

[*English*]

Once they were given the option of imposing conditional sentences in the 1990s, courts started making use of them to a significant degree. In 2004-05, for example, nearly 19,000 conditional sentence orders were issued across Canada. That's 19,000 people who would otherwise have been in provincial or territorial prison even though they posed no public safety risk.

In 2007 and again in 2012, a whole series of restrictions were placed on the use of conditional sentence orders. There was a long list of offences that became ineligible for them regardless of whether a judge thought a conditional sentence order was appropriate in the circumstances, and conditional sentence orders became unavailable for any offence where the maximum possible sentence was 14 years or more.

Colleagues, it's worth pausing to fully understand that last part. Let's take an example of an offence where the maximum possible sentence is 14 years, such as trafficking in stolen property worth more than $5,000. That offence can cover a wide range of behaviour, from a kingpin running a massive criminal enterprise to a man or a woman who drives across town with some jewellery in the trunk because their partner told them to do so. A judge might want to give that person a conditional sentence believing they pose no threat and don't need to go to prison. However, under the 2012 changes, she's barred from getting a conditional sentence because of the theoretical 14-year maximum. In other words, she has to go to jail simply because it's possible to imagine different circumstances where a different person might deserve 14 years for the same broad category of behaviour. Colleagues, it doesn't really make sense and it ruins lives.

By 2018-19, about 8,000 fewer conditional sentence orders were being issued annually compared to 15 years earlier. That's 8,000 people per year sent unnecessarily to jail, and Elspeth Kaiser-Derrick, a researcher at the University of British Columbia, has found that Indigenous women have been particularly affected. She studied the cases of 44 Indigenous

women who received conditional sentence orders. Her work shows that because of the restrictions imposed in 2007 and 2012, only 8 of those 44 women would be eligible to receive a conditional sentence order today.

There is currently a case before the Supreme Court of Canada involving a woman named Cheyenne Sharma, a 20-year-old mother from the Saugeen First Nation who transported cocaine for her boyfriend to avoid getting evicted along with her daughter.

• (1940)

Due to the 2012 restrictions, she is not eligible for a conditional sentence, a fact that the Ontario Court of Appeal has ruled violates her Charter rights. According to the court:

> By restricting the availability of the conditional sentence, the impugned amendments —

— that is, the restrictions on CSOs —

> — deprive the court an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction. . . .

That's what Bill C-5 would fix by reverting, more or less, to the way things were when the concept of conditional sentences was first introduced.

CSOs would remain unavailable for certain serious offences, like serious criminal organization offences, attempted murder, torture, terrorism and advocating genocide. As has always been the case, a CSO can't be imposed where the law requires a prison sentence.

[*Translation*]

According to data on the impact of restrictions imposed between 2007 and 2012, we can expect to see more CSOs and fewer people in prison, especially Indigenous women who don't really need to be there.

Honourable senators, it's important to remember that, as the courts began to hand down more CSOs in the late 1990s and the 2000s, crime rates in Canada dropped. It makes perfect sense that, when people maintain ties to their community, are treated in accordance with the court-ordered conditions and are not pointlessly uprooted from their home, family and work, they are more likely to lead stable, law-abiding lives.

[*English*]

Importantly, colleagues, many people serve their first sentence in a provincial prison before ending up in federal custody. By preventing that initial provincial or territorial prison term, a CSO can be a circuit breaker that keeps people out of the federal system altogether.

Also, as I briefly mentioned earlier, CSOs can have a positive intergenerational impact. When a parent, say a single Indigenous mother, gets a CSO instead of a jail sentence, her children are more likely to stay in a stable family home instead of winding up in child welfare. That means those kids have better prospects, and we all have a better chance of interrupting the cycle of hand-me-down imprisonment promoted by a justice system too often at odds with social welfare.

In summary, Bill C-5 makes diversion the default response to drug possession and it removes obstacles to conditional sentences. On their own, these are significant measures that would make our justice system fairer and more effective, reduce disproportionate impacts on Indigenous and racialized communities and make us all safer.

As I said before, even if the bill stopped here, it would be worthy of support, but it goes further still: Bill C-5 also repeals 20 mandatory minimum penalties.

I will discuss which ones and why in a moment, but I will give a bit of background first. A mandatory minimum sets a sentencing floor. Where one exists, the judge can impose a higher sentence but not a lower one, regardless of the details of the case or the circumstances of the individual. Mandatory minimums have been part of criminal justice in Canada since the Criminal Code was created in 1892, ranging, at that time, from one month's imprisonment for corruption in municipal affairs to five years for stopping the mail with intent to rob.

In the 130 years since, hundreds of mandatory minimums have been proposed, dozens have been enacted and some have been repealed. The justification for them has generally been that they make a statement about the type of criminal behaviour we find most egregious, that they guard against the occasional irrational judge who might be tempted to let someone off easy and that they deter potential offenders. That's the justification.

In reality, though, there is no evidence that they work as a deterrent. We have an appeal system that guards against outlier judicial decisions, and most Canadians know what behaviour is egregious without being conversant in the sentencing provisions of the Criminal Code.

So there are real questions about the utility of mandatory minimums. It's pretty clear, in fact, that they don't make a statement. Moreover, it's evident they exacerbate systemic racism and the overrepresentation of Indigenous people, Canadians of African descent and other historically marginalized groups.

[*Translation*]

Most of what we know about the overrepresentation of Indigenous and Black individuals and members of marginalized communities in the criminal justice system comes from national statistics collected by various governments and federal organizations. For example, we know that Black and Indigenous individuals are overrepresented among people charged with crimes.

According to data from Correctional Service Canada, Black and Indigenous individuals are overrepresented in federal institutions. In addition, between 2010 and 2020, Black people

were 53% more likely and Indigenous people were 36% more likely to have been admitted to a federal penitentiary for an offence punishable by a mandatory minimum sentence.

Indigenous and racialized individuals are always significantly overrepresented in the criminal justice system, and mandatory minimums exacerbate the situation.

[*English*]

Mandatory minimums notably prevent courts from meaningfully applying *Gladue* principles meant to guide the sentencing of Indigenous people convicted of an offence. Those principles, established by the Supreme Court of Canada in *R. v. Gladue* in 1999 and reaffirmed in 2012, are based on subsection 718.2(e) of the Criminal Code sentencing guidelines:

> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

According to the Supreme Court, sentencing judges have ". . . a judicial duty to give the provision's remedial purpose real force" by considering, amongst other things:

> . . . the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts. . . .

Overall, we don't do nearly a good enough job in Canada of making those principles a reality in every case. I am encouraged, however, that recent federal budgets have allocated new resources for Gladue sentencing reports as well as for similar initiatives that can apply to people from other communities that are overrepresented in our criminal justice system. But the over-reliance on mandatory minimum penalties has often meant that even when judges want to give *Gladue* principles real weight, their hands are tied.

Let's be clear: Mandatory minimums are not the sole cause of the over-incarceration of Indigenous and Black people in Canada, but they are definitely part of the problem. Giving judges more discretion to deal justly and specifically with the person in front of them is definitely part of the solution.

Bill C-5 focuses mostly on drug-related mandatory minimums enacted in 2012 and firearms-related ones enacted in the 1990s and amended in 2008. Those represent the majority of all admissions to federal custody with a mandatory minimum. Colleagues, this is an important point to emphasize: It's true that the bill only deals with 20 of the 70-odd mandatory minimums in our criminal statutes, but most people who get a mandatory minimum get one of these 20.

I will address the drug-related ones first. Bill C-5 eliminates all mandatory minimum penalties for drug offences. Let me say that again: If the bill passes, there will be no such thing as a mandatory minimum for a drug offence in Canada. This would be a huge development. Between 2007-08 and 2016-17, out of all admissions to federal custody for offences that currently have a mandatory minimum penalty, drug offences made up 75% of them.

The disproportionate impacts are staggering. Of everyone charged with exporting or importing drugs during that time, 42% were Black. With regard to Indigenous people, the numbers show a very disturbing trend. In 2012-13, only 1% of people charged with importing or exporting drugs were Indigenous. By 2016-17, that number had grown to 12.5%. That's a 1,200% increase in the first five years after this mandatory minimum was enacted.

• (1950)

In other words, colleagues, in the last 10 years, thousands of people have been getting mandatory minimums for drug offences and they are disproportionately Black and Indigenous.

Bill C-5 is not designed to and won't fix all the related problems, like the social determinants of crime and inequities in policing, but if we pass it, judges' hands won't be tied by mandatory minimum statutes in these cases. Instead, they will be able to consider the particular circumstances of the person before them and impose a sentence that makes sense for that individual with regard to public safety, rehabilitation and the realities of colonialism, racism and intergenerational trauma.

As a package, Bill C-5 represents a major shift in the way our criminal law deals with drugs. As I have outlined, it would obligate police and prosecutors to avoid bringing criminal charges for drug possession in most cases. When drug possession charges are laid, conviction records would automatically expire two years after the end of the sentence. All mandatory minimums for drug offences would be eliminated, and that means conditional sentences would be an option where appropriate and where consistent with public safety.

Once again, I will say what I have said before: If Bill C-5 stopped there, that would be enough to make it worthy of our support but, again, it goes further, which brings me to the repeal of mandatory minimums for a variety of firearms and weapons offences.

This is an area where Indigenous people are heavily overrepresented, and that overrepresentation has been getting worse. In 2007-08, 17.5% of people admitted to federal custody with a firearms-related mandatory minimum were Indigenous. By 2016-17, the number had grown to 40%.

[*Translation*]

I know that a great deal of concern has been expressed about this part of the bill, and that the offences related to firearms and weapons are undoubtedly serious. I will therefore review the mandatory minimum penalties that Bill C-5 would repeal,

keeping in mind that even without a mandatory minimum, judges can and do impose harsh sentences when they deem such sentences are appropriate.

By way of clarification, our legislative regime distinguishes between a prohibited firearm, a restricted firearm and non-restricted firearms, in addition to prohibited weapons, ammunition and devices. Prohibited firearms include short-barrelled handguns and those listed in the regulations.

Examples of restricted weapons include handguns that are not prohibited, short-barrelled rifles and centrefire semi-automatic rifles, as well as those prohibited by the regulations.

Lastly, non-restricted firearms include any firearm that is not prohibited or restricted. Most common long guns fall into this last category.

[*English*]

The bill would repeal mandatory minimums related to trafficking or importing and exporting prohibited or restricted weapons. To be clear, these provisions do not apply to the trafficking of firearms. Prohibited weapons under the Criminal Code are things like tear gas, crossbows and brass knuckles. Canadian judges currently have no choice but to impose a one-year prison term on a first-time offender who brings, say, pepper spray into Canada. Now, there may be instances where that sentence is appropriate, but surely we'd want the judge to be able to consider the differences between, say, a black-market shipment of pepper spray for resale and someone who forgot they had a can in their glove compartment when they crossed the border.

Bill C-5 would also repeal several mandatory minimums involving possession of a firearm or prohibited weapon, device or ammunition. Now, one of these is already void because the Supreme Court of Canada struck it down in 2015 in *R. v. Nur* on the grounds that it was far too easy to come up with a hypothetical scenario where a three-year minimum for a first offence would be cruel and unusual.

For instance, it could apply to a licensed firearms owner who stores his firearm at his cottage even though his licence requires storage at his primary residence. Or in the case of possession of a firearm obtained by the commission of an offence, one could easily imagine a woman who finds herself in possession of a firearm stolen by her boyfriend and who might not deserve the year in prison that the law currently requires.

The bill would further repeal the mandatory minimum for use of a firearm or imitation firearm in the commission of another offence. As you might imagine, this charge is usually brought concurrently with the charge for whatever the other offence is, and it applies even if there is no bodily harm involved. But importantly, this provision does not apply to the use of a firearm in the commission of many serious offences like manslaughter, attempted murder, sexual assault or kidnapping, because those offences have dedicated provisions that apply when a firearm is used.

The bill would specifically repeal the mandatory minimums for use of a firearm in the commission of robbery or extortion, but only when there is no link to a criminal organization and where the firearm is not restricted — in other words, a hunting rifle — as opposed to an assault rifle or handgun. The idea here is that there are more likely to be mitigating factors in incidents where a troubled youth picks up the family's hunting rifle as opposed to gang shootings.

Obviously, armed robbery in whatever circumstances is a very serious crime, and where the circumstances of the offence justify the imposition of a severe sentence, judges will impose it. But let me give an example of the kind of case where more judicial discretion would be warranted.

In 2016, in Hay River, Northwest Territories, a 21-year-old Mountain Dene man named Cameron Bernarde went into a convenience store carrying a rifle — a rifle with a rusted barrel and the bolt hanging open, meaning it could not fire. The clerk gave him $200 from the till although later the clerk told reporters he had ". . . never been robbed by such an incompetent person." That makes sense. Cameron has fetal alcohol spectrum disorder, a history of sexual abuse and, according to the testimony of a psychologist, the developmental age of a 9-year-old.

Cameron pleaded guilty and was given the mandatory minimum sentence of four years in prison. His lawyer challenged that sentence as grossly disproportionate, arguing that it was unconstitutional. The constitutional challenge was unsuccessful, but even the judge who upheld the mandatory minimum in Cameron's case said that without it she would probably have imposed three years rather than four. In other words, because of this mandatory minimum, a young Indigenous man with serious psychological difficulties got a whole extra year in jail beyond what the judge would otherwise have considered appropriate.

These are the kinds of human details that can be obscured and the kinds of injustices that can result when we rely simply on a shorthand like "armed robbery" to describe a range of behaviours and a range of contexts.

Bill C-5 equally repeals the mandatory minimums for recklessly discharging a firearm or discharging a firearm with intent. Again, this would only apply where there is no link to a criminal organization and where the firearm is not restricted.

Once again, these offences are obviously very serious and, again, where appropriate, a judge will impose the appropriate sentence. But again, let me give an example where the circumstances might warrant judicial discretion.

Cedric Ookowt is from an Inuit family in Baker Lake, Nunavut. His father has a history of alcohol abuse. In 2015, when he was 18 years old, a good friend of his committed suicide and Cedric started drinking heavily. A few months later, in 2016, Cedric was walking down the street intoxicated and another man, named Arnold, who had bullied him for years, attacked him, punched him in the face and tried to steal his bottle of alcohol. Cedric went home, got a rifle and, from a nearby hill, fired a shot into Arnold's house, not knowing whether anyone was home. It turns out Arnold's uncle was home, but thankfully he wasn't injured.

• (2000)

The sentencing judge found that the mandatory minimum of four years was excessive. He noted that Cedric had already begun rehabilitation programs, including treatment for substance abuse at the Baffin Correctional Centre in Iqaluit.

[*Translation*]

The judge also cited the Supreme Court of Canada in *Gladue* and in a similar case, the 2012 *Ipeelee* decision, which stated the following:

> . . . courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

The judge set aside the mandatory minimum sentence and instead imposed a sentence of two years less a day. That meant that Cedric could stay in Iqaluit and continue his time in incarceration and his treatment there, in an Inuit environment. If the minimum sentence of four years had been imposed, Cedric would have been transferred to a federal penitentiary in the southern part of the country, because every sentence of two years or more is served at a federal institution.

The decision was then reversed on appeal, although Cedric had served his two-year sentence by then and the Court of Appeal chose not to send him back to prison for two more years. However, it is important to note that the Court of Appeal did not decide that it was appropriate to impose a sentence of four years. It simply stated that the mandatory minimum sentence was not excessive to the point of being considered unconstitutional. I note that this jurisprudence is subject to an application for leave to appeal to the Supreme Court of Canada, but the proceedings were delayed after the introduction of the latest version of the bill, which, as I mentioned, proposes to eliminate the minimum sentence being challenged.

[*English*]

It's too early to know how the rest of Cedric's life will turn out. The judge who heard the testimony and weighed the evidence thought that two years of treatment at a correctional centre in Nunavut was a better option in that case than four years of incarceration thousands of kilometres from Inuit community and culture. By repealing this mandatory minimum, we're acknowledging that the judge is closer to the facts and the people involved than we are, and it should be their call to make.

Along with the repeal of one more mandatory minimum for selling contraband tobacco, that's all of it. As senators will recall, a debate on this mandatory sentence for selling contraband tobacco in 2013 and 2014 raised particular concerns of targeting and criminalizing those who were poor and marginalized, such as First Nations people.

Colleagues, altogether Bill C-5 provides for diversion instead of incarceration for drug possession, fewer obstacles to conditional sentences, complete elimination of mandatory minimums for drug offences and more room for judicial discretion with regard to certain weapons and firearms offences.

As I noted earlier, this suite of measures is not a panacea, but it will help. It will help a great deal to take a bite out of systemic discrimination and make our communities safer, especially if it's accompanied by resources for community programming and social supports. There have been some positive developments on this front, colleagues. Budget 2021 included $216 million over five years, with $43 million annually thereafter for youth diversion programming. There was also $75 million over three years for the development of an Indigenous Justice Strategy, including working with Indigenous peoples and organizations to address systemic barriers in the criminal justice system.

The 2020 Fall Economic Statement included $29 million to support and expand Community Justice Centres — funding that recently led to a tripartite agreement between the federal government, the B.C. government and the BC First Nations Justice Council to expand Community Justice Centres in that province.

[*Translation*]

There are also significant investments that seek to reveal gaps in the data on overrepresentation, including national data on police services and the courts, and data on offenders serving provincial or territorial sentences, which does not currently include Indigenous or ethnocultural identifiers.

Budget 2021 included several millions of dollars for Statistics Canada and Justice Canada to support the development of data collected through research to inform policy responses to the overrepresentation of Indigenous and racialized persons in the criminal justice system. In addition, the budget allocated more than $100 million over five years for a disaggregated data action plan to support the collection of new data on the experiences of Indigenous peoples and racialized groups in the criminal justice system. This includes a collaboration between the Canadian Association of Chiefs of Police and Statistics Canada, which will enable police to provide statistics on Indigenous and ethnocultural groups.

[*English*]

These investments are a good start. Clearly there is a need for continued investment at all levels of government and for continued hard work to turn numbers in budgets into concrete results on the ground, like the recent developments in British Columbia. I'm encouraged that we are finally heading in the right direction, and Bill C-5 is an important part of that.

Honourable senators, I know there are calls to go even further and, for instance, repeal all mandatory minimums or fully legalize all controlled substances. These are legitimate positions. Senators are free to advocate for them both during this debate and at committee, but I encourage honourable senators to recognize nonetheless that Bill C-5 is not some minor tweak. It's not just nibbling around the edges. It's a really big deal. It will genuinely help people. It will make our communities healthier and safer.

[*Translation*]

I want to point out that a last change was made to Bill C-5 in the other place, requiring Parliament, and thus both chambers, including ours, to undertake a full review of the provisions and functioning of this bill. This review will take place four years after its entry into force.

Honourable senators, I hope that we will be able to conduct a more thorough and detailed study of this bill as quickly as possible. Every month, hundreds of people are convicted across the country. This affects Indigenous women, who will go to prison instead of being given a conditional sentence to be served in their community, Indigenous children, who will consequently be placed in child protective services, Inuit youth in trouble, who are incarcerated thousands of kilometres from their homes, and many Black and Indigenous people, who will be sentenced fruitlessly to years of mandatory incarceration.

[*English*]

I'll close with this: I know many Canadians have been waiting for a bill like this for a long time, and I truly am sympathetic to those who wish it did even more. But I'm also aware — as I'm sure you are too — that this is a difficult thing for a government to do. It's very easy to impose harsher sentences and get tough on crime. It fits nicely on a bumper sticker. It works well in a fundraising email. But here the government is trying to do something hard — really hard — by repealing mandatory minimums and allowing for more flexibility and nuance in sentencing.

As it is, this bill has generated heated accusations of the government being soft on crime in the other place, and I'm sure we will hear some of that in this chamber too. It's worth keeping in mind, however, where the country truly is after decades of arguing incorrectly that more jail time somehow makes us safer. Hopefully, that narrative has started to change and will change more. But, in my respectful opinion, colleagues, there is considerable merit in an approach that doesn't start by shooting the moon — one that makes a real and tangible difference. In this regard, I'm optimistic that we can bring Canadians along on the journey to a better justice system rather than getting so far out ahead of the mainstream that we invite the pendulum to swing back.

When I began my remarks, I quoted the African Nova Scotian Justice Institute which calls Bill C-5 "a necessary step towards justice," and the Native Women's Association of Canada which calls it "a meaningful step towards reconciliation."

• (2010)

I hope we can take this step together and soon. Honourable senators, I encourage you to support Bill C-5 in principle and to send it to committee for proper study. Thank you.

Hon. Mobina S. B. Jaffer: Senator Gold, will you answer a question?

Senator Gold: Of course.

Senator Jaffer: Senator Gold, congratulations on an extremely well-thought-out and very difficult speech. Also, congratulations to the minister. As you said in your speech, it is not an easy thing to change politically and in all other ways. I compliment you and the minister. The minister has been very courageous in doing this.

But, senator, you know where I'm coming from and, of course, I support what you said, every single word you said. But to everything you say — that one size does not fit all, that we have to introduce discretion into the justice system, and, as you say, that this is difficult — yes, it's difficult. I am saying to you not to shoot for the moon. I am saying to you that there are some cases to consider. In my calculation — and we will sort this out in committee — you said 20; I would have said 22, but that doesn't matter.

The government is making mandatory minimum changes on 20. From what I've counted, there are around 73 mandatory minimums, and the judges have held at around 37. My figures may be wrong. I'm not sure — 37 mandatory minimums seem to be unconstitutional.

I say to you that there is now a mishmash out there, 20 and 37, and then there is 73. Would the government look at, in unusual and cruel circumstances, allowing the judge, on mandatory minimums, to have the discretion to not impose mandatory minimums?

Thank you, Senator Gold, once again for an excellent presentation.

Senator Gold: Thank you, Senator Jaffer. Look, the government looked carefully at that issue and many others and came to the conclusion that it would address those offences which represent a significant majority — I think I mentioned 75% — of cases where people are actually incarcerated. And not only simply that but the types of offences — drug offences, notably, but also offences committed with long guns — that have a serious disproportionate impact on Indigenous individuals and racialized Canadians. It is clearly a major step that the government is taking to address a significant chunk of the problem.

These questions we will study, and I look forward to the study in committee. The government and the officials will have a chance to hear your questions and respond to them, but I think the short answer is that this is a major step and an overdue step in the right direction, a promise that was made during the campaign, as you know. The committee will do its job, as we always do, to make sure that the law is properly understood, and all questions are answered. The government is satisfied that the step that it's

taking now is a major step forward. It doesn't preclude further steps in the future, but this is an important bill that deserves to be studied seriously, as we will, with your support, at second reading.

Hon. Denise Batters: Senator Gold, in your speech you referenced a one-year mandatory minimum sentence for a prohibited weapon, which, you said, includes pepper spray. Senator Gold, come on. We both know that before that charge even gets to court, police and Crown prosecutors would lay criminal charges appropriately. Such a criminal charge would not probably even be laid if it were not appropriate. But since you used that example, how many criminal convictions have there been in the last five years in Canada for pepper spray where the accused has received a one-year mandatory minimum sentence? I would guess that number might hover somewhere around zero.

Senator Gold: Thank you for the question. Again, these questions are best answered — you can ask them to me; everything is fair game — by the officials who have it.

I used the example to illustrate the point, senator, that in every circumstance, especially dealing with weapons as opposed to prohibited firearms, handguns and the like, there are possibly a range of circumstances.

The point to emphasize is that if circumstances like that arise, then we want judges to have the discretion to do the right thing. It's true; you quite properly point out that police have discretion; prosecutors have discretion. It's also true, painfully true, that this discretion is not always exercised in an equitable way in dealing with certain offenders, racialized offenders, Indigenous offenders.

What Bill C-5 does is to give to the judge — who is faced with a decision that has been made by police, by prosecutors, to lay a criminal charge in the case of a prohibited weapon — the discretion to tailor the sentence to the circumstances of the case. That is what judges should do, and I think that's why Bill C-5 is worthy of our support.

Senator Batters: Senator Gold, since you did reference that particular mandatory minimum being used for pepper spray in your speech, could you please get us that number and provide it to this chamber when you have it?

Senator Gold: Well, I'll certainly make inquiries. I will do that, but I really do want to underline the point that this is not a bill about pepper spray. This is a bill about judicial discretion to avoid injustice where circumstances and justice require that discretion be exercised and where the law simply does not allow the judge to have that discretion.

Hon. Kim Pate: Thank you, Senator Gold. I share Senator Jaffer's perspective. Thank you for a very well-crafted speech.

I'd like to ask you this, though. When I've met with members from the Department of Justice, the assertion that this will result in a significant decrease in the number of people in prison has not been borne out by the Department of Justice's own research. In fact, they indicate that maybe, as you've indicated — and most of the examples you used were of provincial and territorial incarceration — there may be some decrease for Black and some Indigenous folks, but there won't be a huge decrease at all, in fact, no significant decrease in the numbers of Indigenous and Black prisoners serving two years or more.

In addition, most of the changes that are talked about in the drug laws have already been achieved through health policy and negotiations between provinces and municipalities.

Finally, I'd like to ask you this. You mentioned the testimony of the Canadian Bar Association, the South Asian Bar Association, the African Nova Scotian Justice Institute, PhD candidate Elspeth Kaiser-Derrick, all of whom went on to recommend that the bill go much further. Wouldn't you agree that, in fact, in most cases, the evidence, including from Aboriginal Legal Services, from the Canadian Association of Chiefs of Police and many other witnesses at the Justice and Human Rights Committee in the House of Commons, recommended not that we shoot for the stars but, in the interim, until other mandatory minimum penalties are repealed, that judges be permitted the structured discretion to not impose mandatory minimum penalties in exceptional circumstances?

Senator Gold: Thank you for your question. The government's position is that the research and the testimony do, in fact, support the proposition that if and when Bill C-5 is passed in this form, it will have a real impact on the overrepresentation of racialized Canadians and Indigenous Canadians who are subject to it.

It's true that where circumstances are such that a serious prison term — that is to say, two years or more — is thought appropriate by a judge, it's the federal system that receives the inmates. But it's equally true, as I said in my speech, that it's important to do things to break that all too familiar pattern of beginning in the provincial system and then, regrettably, escalating to the federal system.

• (2020)

We'll study this in committee. I hope we will send it to committee for proper study, and all of these questions will, of course, be addressed. I have every confidence in the committee to address them as diligently as we do all of our work. Thank you for your question.

Senator Pate: Senator Gold, would it be possible to provide that information? My last discussions with officials from the Department of Justice indicated that a full 34% of all Charter challenges they are dealing with have to do with mandatory minimum penalties, and they hope that this will have a significant impact but they cannot produce figures to shore up that hope. Would it be possible for you produce those figures for us, please?

Senator Gold: Of course, I'll certainly make the request. I'm sure the committee will make its request, and they will produce all the evidence, figures and research that they have.

The art of legislating is the art of dealing with the facts that one has and making a decision in public policy that is deemed to be in the best interests of moving the justice system — in this case the criminal justice system — forward in a more just, equitable and humane way.

Again, I have confidence in the process that we have embarked upon. I have confidence that the committee will have access to all the information upon which the government made its decision. I am hopeful that in the process of examining the legislation in second-reading debate, in committee and again in third-reading debate, when we're back in the fall, that honourable senators will see the merits of this bill as being a major step forward, not perhaps the last step forward or the only step forward, but a major step forward in addressing an unjust situation in our criminal justice system.

[*Translation*]

Hon. Renée Dupuis: Senator Gold, as the sponsor of the bill and the Government Representative in the Senate, could you provide information about the gender-based analysis plus that was done when the bill was drafted? The government requires such an analysis, and we know that a confidential document was submitted in the memorandum to cabinet. However, that is not what I am talking about; I am talking about the content of the analysis. I think that would help the committee do its work in reviewing this bill.

Senator Gold: Thank you for your question. I will find out what is out there and what can be tabled. I encourage honourable senators to pursue this line of questioning before the committee. That said, I will still look into it.

Senator Dupuis: Senator Gold, thank you for encouraging me to ask the question in committee. I have been doing that consistently for years in the Senate, and I am trying to find a more efficient way of obtaining the information that is often "missing," as the Auditor General regularly laments in his annual report. I take note of your commitment to get the information, and I thank you.

Hon. Michèle Audette: My questions for the Government Representative in the Senate are the following. Did the process of drafting and preparing this bill take into account the *Gladue* decision, the United Nations Declaration on the Rights of Indigenous Peoples, and all of the recommendations of the National Inquiry into Missing and Murdered Indigenous Women and Girls regarding the changes needed to reduce the very high percentage of Indigenous women and men in our federal institutions and prisons?

Also, can you confirm that there will be a mechanism to follow up on what the government is proposing, which will ensure that all this will be encouraging to the nations, to Indigenous women and men?

Senator Gold: Thank you for the question. It's clear that the bill was guided by the need to give judges the ability to appropriately apply the *Gladue* principles.

The bill is also clearly a response to the real and shameful problem of overrepresentation of Indigenous women and Canadians from marginalized communities in prisons.

At second reading, the objective is to present and debate the principles of the bill, and, if the Senate so desires, to support the bill. The next step would be to refer it to committee, which can then get to work, delve into the details, and call the minister and his officials to testify and answer more specific questions.

I encourage you to participate in the process. All senators have the right to attend and participate, even if they are not members of the committee. This is how we can adequately respond to your valid and legitimate questions.

[*English*]

Hon. Dan Christmas: Thank you, Senator Gold, for your remarks. I appreciate the many examples of individuals who could benefit from the removal of mandatory minimums.

Senator Gold, my question is similar to other senators'. If these mandatory minimum sentences were removed, do we have any projections or studies as to what the anticipated reduction of federal incarceration rates will be for Indigenous people as a result of this bill?

Senator Gold: Thank you for the question. I don't know whether projections of that kind have been done, Senator Christmas. I do know, though, as I tried to set out in my remarks, that when the mandatory minimum sentences were added to additional offences, the rates of incarceration for Indigenous Canadians and members of other communities increased.

It is reasonable to expect — given the statistics that I cited — that there will be a diminution. Whether or not there are actual projections, I just don't know. I would encourage that to be explored in committee, where whatever information that is available can be explored.

Senator Christmas: Thank you, Senator Gold. I would very much be interested to see what studies and projections were done. I think that kind of data will be most useful.

I also appreciate the reintroduction of community service orders, and I believe the success of that amendment will depend upon a significant increase in support services that are offered to the communities. Quite often judges are so hesitant to refer individuals back to the communities because of the lack of services.

You mentioned some funding increases, but has Indigenous Services Canada been a part of this bill? Will they significantly increase the amount of support services that the communities will need to assist people on community service orders?

• (2030)

Senator Gold: That's a good question, and I don't know specifically the degree or extent or involvement of Indigenous Services with the drafting of this bill. Again, I expect that answer will be easily available at committee.

You raise a larger point, and I raised it in my speech but it bears repeating. We're dealing here with a situation when we're focusing on the overrepresentation of Indigenous offenders and those from racialized communities. We are focusing on the criminal justice system, but there is a whole world and history that has led us to this place, and we know it. We, in the Senate, know it well. The Aboriginal Peoples Committee knows it well, and there has been work done on the United Nations Declaration on the Rights of Indigenous Peoples.

We also know, to your point and as I mentioned in passing, that the success of any of these measures depends upon a whole-of-society approach to address our history, and in some cases what is required clearly, as you pointed out quite correctly, is resources: it's funding. It's fine to have a diversion program if you are in downtown Toronto or Montreal, but if you are in a much more remote area where there are no resources, no treatment centres, no appropriate facilities, then it is a hollow promise. There have been investments. There need to continue to be investments at the federal, territorial and provincial levels, and within First Nations communities and others.

There are all kinds of ways to capture the idea to not let the best be the enemy of the good. In this case, we have a societal problem and a history that we are trying to tackle. It will take time and generations, perhaps, but every step in the right direction — and this is a step in the right direction in my humble opinion — is worth taking and celebrating. This should be done without fooling ourselves, however, that it is a panacea and without ignoring all the other supports — financial, social and others — that need to be put into place to make this a lived reality and make the improvements in the justice system tangible for Canadians.

Hon. Paula Simons: Would the Government Representative in the Senate take one more question?

Senator Gold: Sure, one more.

Senator Simons: I wish I could say one last question, but I cannot make you that promise.

Senator Gold: My hearing wasn't so good. Of course.

Senator Simons: Much like Senator Jaffer and Senator Pate, I think there is so much tremendous potential in this bill, and you have made an eloquent case for why this is an important and necessary first step.

However, will there be any kind of commitment from the government to use this as a beta case to see how well these changes work and to build upon that and consider a second tranche of charges? Once we have proof of concept, will there be any kind of expectation that the government will build upon this foundation to offer more judicial discretion for the next range of charges?

Senator Gold: Thank you for the question. I don't know, and certainly on behalf of the government I cannot make that commitment, but I will point to a few things. First of all, an amendment introduced in the other place that is now part of Bill C-5 does require a parliamentary review. That will be one way in which we in the Senate, because we play a role in this, can monitor the impact of the bill to determine what improvements might be made or an expansion, if that's the direction that the evidence leads us to.

The other point is a more political one, and I made it in my remarks, which is that not unlike medical assistance in dying, not unlike the legalization of cannabis, in a democratic society, a government can and does lead. Sometimes courts lead, to be sure, but sometimes governments lead, as we did in the legalization of cannabis. I think the point was made by our colleague in another context that when the issue of legalizing cannabis was first introduced, I'm not sure this chamber was altogether on board. However, with time, study, discussion, sober and reasoned non-ideological — in the worst sense of ideology — discussion we brought ourselves to a point where we could and did take a major step, and Canadians are and have followed us.

Similarly, I think the government is of the view that it is doing the right thing now in terms of what Canada is ready for, and I believe that this government will always be open to continuing to try to improve the system. However, at this juncture, it's the government's view that this is an important and major contribution towards equity and fairness in our system. I don't want us to get ahead of ourselves. I want to pass this and get it to committee. I want it to get out of committee and have third reading debate. And if it does pass third reading, which I hope it will, then there will be opportunities through the parliamentary review process and the political process to see what more can be done, if that is warranted.

Senator Pate: Thank you, Senator Simons, for sparking another question from me. In discussions with the government, it was clear that the primary focus for this legislation was to address mandatory minimum penalties, which was in the 2015 election platform, as you know, as well as in the Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls and the Calls to Action of the Truth and Reconciliation Commission. It has been clearly laid out that this is only a step forward, even though there is a patchwork of mandatory minimum penalties; and, unlike the medical assistance in dying, where our most recent debates were sparked by 1 lower court decision, we have more than 43 court decisions, and counting, that have struck down mandatory minimum penalties.

Would it be too far for me to go to say that it has been brought to my attention that this is likely the only opportunity and there are many people, both within the government and outside, who want to see us push on this piece of legislation to actually help it achieve the aim that the government has ascribed to it?

Senator Gold: Senator Pate, I'm not sure I actually agree with, if I understood correctly, your question. There are clearly people who want this bill to go further. There are those who deplore that it is taking any steps whatsoever, and we will hear that debate both in committee and beyond.

There have been many challenges to many mandatory minimums, and the courts have upheld some and struck down others. Many are currently before the courts as well.

With respect, I don't think that calling this a patchwork approach does justice to the thought that went into it. It focused on those 20 offences that represent the great majority — that's the government's understanding — of the impact of mandatory minimums on the lives of those who were subject to the criminal justice system and those I mentioned, notably drug and long gun offences, where the impact is disproportionately felt by members of the Indigenous and racialized communities.

Finally, I don't think that we know that this is the last chance or the only chance. The legislative process is an iterative one in a democracy. This government has presented this major step forward. It is too much for some and too little for others. That doesn't make it right just because it's sort of like the story of *Goldilocks and the Three Bears*, but the government is of the view that it is a responsible and appropriate response to a real social problem and, if passed, will make a real difference.

• (2040)

Senator Pate: Senator Gold, I think you know that if, in fact, that were true, the government would have produced that evidence. But the evidence they have produced was that 9 in 10 Canadians want to see an elimination of mandatory minimum penalties. Wouldn't you agree that data has been clearly sought and received by the Department of Justice?

Senator Gold: Senator Pate, I don't think that in my speech and my defence of the principles of this bill did I rely upon the views of Canadians or public opinion. I'm talking about the number of offences for which the majority of persons are sentenced and committed by virtue of mandatory minimums. That was the data that I was referring to.

The government, like all democratic governments and certainly our democratically elected government, must and should be responsive to public opinion, but it also has a responsibility to do what it believes is the right thing in the circumstances. We do not pass laws by referendum but through the processes in which we are engaged now. Again, it's the position of the government that the scope of this bill is supported by the evidence. It's supported by the facts on the ground and, if passed, it will make a difference on the ground.

Senator Pate: I apologize. I obviously didn't articulate that very well, Senator Gold. What I was saying is that if that evidence existed to show that these mandatory minimum penalties would significantly impact the incarceration rates, that data would have been produced and would have been part of your speech. I don't envy your position of having to defend that, but it would have been. There have been numerous questions and certainly there is an abundance of evidence that the data has not been produced. You have not been able to provide the actual numbers. Have I missed something?

Senator Gold: I understand your question. I have presented to the best of my ability the reasons for which the government believes that this is an appropriate bill to be debated and, of course, passed. The government is relying upon the evidence of the kinds of offences for which mandatory minimum penalties are required under the current law, the consequences to Canadians who are subject to these mandatory minimums and the overrepresentation of those Canadians, whether Indigenous or other racialized communities, as a result. These questions and the questions about whether forecasts have been done as to what the possible impact will be, all that, as I said, I have answered. I don't know whether forecasts were done in that regard, and that's why I undertook and encouraged it to be a subject of study in committee.

It remains legitimate for a government to legislate based upon the state of knowledge and information that it has, what we call legislative facts. In that regard, the government has a set of legislative facts upon which it has relied, and Bill C-5 is a product of that. That's why it has been supported in principle by organizations that represent those who are the most intimately affected by the mandatory minimum penalty provisions in the Criminal Code.

[*Translation*]

Hon. Claude Carignan (Acting Deputy Leader of the Opposition): Honourable senators, I rise at second reading of Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act.

Bill C-5 includes the following measures, which I will address in order in my speech. First, it increases the number of offences for which a judge may sentence an offender to a term of imprisonment to be served in the community. As the legislative summary for the bill states, and I quote:

> A conditional sentence is one where an offender is sentenced to a term of imprisonment of less than two years, to be served in the community subject to particular conditions. . . .

Second, Bill C-5 repeals a number of minimum sentences of imprisonment. Third, it proposes diversion measures for simple possession offences involving drugs other than cannabis.

One of the objectives of Bill C-5 is to comply with the Ontario Court of Appeal ruling in *R. v. Sharma*. That ruling declared paragraph 742.1(c) of the Criminal Code unconstitutional. That paragraph prohibits the use of imprisonment in the community for offences punishable by a maximum term of imprisonment of 14 years or more. It also found subparagraph 742.1(e)(ii) to be unconstitutional. This subparagraph prohibits imprisonment in the community for indictable offences punishable by a maximum term of imprisonment of up to 10 years and involving the importation, exportation, trafficking or production of drugs.

However, Bill C-5 goes further than the findings in the *Sharma* case, because it also proposes to allow imprisonment in the community for a range of offences that involve the use of a weapon or result in bodily harm, including the offences of sexual assault and criminal harassment.

There is a disconnect, or even a failed approach, in Minister Lametti's decision to introduce Bill C-5 to comply with a ruling that is currently being appealed before the Supreme Court by federal prosecutors from the Public Prosecution Service of Canada.

I would point out that this case has been under consideration before the Supreme Court of Canada since March 23, so the court should be handing down its ruling in the next few months.

Either Minister Lametti's decision to introduce Bill C-5 was premature, given that the Supreme Court could have handed down a ruling during our study of the bill that would have struck down the appeal court's declaration of unconstitutionality, or the federal prosecutors filed an unnecessary and no doubt costly appeal to the Supreme Court at Canadian taxpayers' expense.

I want to note that the previous version of Bill C-5 was Bill C-22, which died on the Order Paper because of the last election. During the study of Bill C-22, federal prosecutors sent a letter to the Supreme Court of Canada on March 8, 2021, asking the court to postpone the appeal hearing. In that letter, the federal prosecutors promised to drop the appeal if Bill C-22 came into force, since they felt that this would render the appeal moot.

After the election was called, the federal prosecutors decided to pursue their appeal after all. However, I note that their arguments in appeal contradict the need for the measures proposed by Minister Lametti in Bill C-5 regarding community-based sentences. I will come back to this later.

I remind senators that this bill proposes to give judges the discretion to impose community-based sentences, meaning offenders serve their sentence at home rather than in prison. Those sentences would be allowed even for offences that are practically the most serious in the Criminal Code, those punishable by a maximum term of imprisonment of 14 years or more.

To convince you, I will cite a few examples of criminal acts that are inherently dangerous but for which Bill C-5 would allow community-based sentences: manslaughter without the use of a firearm; hostage taking without the use of a firearm; trafficking of fentanyl or certain firearms; sexual assault with intent to wound, disfigure or endanger the life of an individual 16 years of age or older, provided that the assault is not committed with a firearm; robbery with a firearm, unless committed for the benefit of a criminal organization. I am of the opinion that there is no logic in allowing community-based sentences for such serious offences that pose such a danger to the safety of Canadians.

[*English*]

My argument can be based on the federal prosecutor's brief to the Supreme Court in their appeal proceedings of the *Sharma* decision, which I mentioned. Their brief provides a compelling review of excerpts from Hansard, supporting the idea that the government's intention was always that community imprisonment be reserved for less serious Criminal Code offences. On this point, their brief quotes the following statement by former MP Robert Goguen, who spoke as parliamentary secretary to the Minister of Justice on September 21, 2011:

• (2050)

> This government is addressing the concerns of Canadians who no longer want to see conditional sentences used for serious crimes, whether they are violent crimes or property crimes.

[*Translation*]

In their brief, the prosecutors could have also cited another statement made by Mr. Goguen on the same day, and I quote:

> Conditional sentencing came into effect in 1996, when the government wanted, among other things, to reduce excessive use of incarceration for less serious crimes. I repeat: less serious crimes. . . .
>
> However, in the years following the creation of this type of sentencing, there has been a complete lack of consistency when it comes to determining when conditional sentencing is appropriate.
>
> At the time, many court decisions gave a conditional sentence for serious and violent crimes. This contributed to the public's loss of faith in the justice system. Clearly, many people, and some provinces and territories, wondered whether the limits on conditional sentencing set out in the Criminal Code were sufficient.

The problem that Mr. Goguen described in 2011 is one that I believe will recur if Bill C-5 is passed. It is one of the major reasons I oppose this bill. By allowing the courts to sentence offenders who have committed an inherently serious and dangerous offence to serve their time at home instead of in a provincial jail, I am concerned that this bill will trivialize these crimes. I am concerned that it will be more difficult to protect the public from the people committing these offences and that, consequently, Canadians' confidence in the criminal justice system will be undermined over the coming years.

[*English*]

I share the same concern about another important measure in the bill, namely repealing a series of minimum prison sentences. For example, it proposes to abolish several minimum sentences for the offences of using, importing and trafficking firearms. What a bad time for the federal government to propose these measures, which would reduce the severity of sentences imposed by judges at a time when there is a striking increase in gun-related crime, particularly in Montreal. It is therefore not surprising that the Government of Quebec has officially expressed its serious concerns to Ministers Lametti and Mendicino regarding this bill.

[*Translation*]

Quebec's ministers of justice and public safety wrote a letter to their federal counterparts on May 4, 2022, in which they asked the federal government to remove the repeal of minimum sentences for gun crimes from the bill:

> Taken together, the amendments in Bill C-5 will impact Quebec's responsibilities with respect to the administration of justice and policing matters on its territory.
>
> Repealing mandatory minimum sentences for certain gun-related offences could contradict initiatives that the Government of Quebec adopted recently to tackle gun violence. We believe that the approach in Bill C-5 also contradicts actions that your government has taken to combat this kind of violence.
>
> We note that the situation in Quebec is unprecedented. In Montreal, offences involving firearms and other weapons have increased markedly over the past year.
>
> Clearly, the federal government's actions must be consistent with provincial and territorial realities. Quebec is therefore requesting that the bill not repeal mandatory minimum sentences for the gun-related offences identified therein.

On another note, the bill proposes diversion measures for individuals who commit the offence of simple drug possession.

I recognize the importance of the spirit of the principles set out in the law to justify diversion measures. For example, the bill sets out the following principle:

> **(c)** criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use;

It also states:

> **(e)** judicial resources are more appropriately used in relation to offences that pose a risk to public safety.

That said, I'm opposed to the rather vague nature of the existing wording in the bill regarding the application of the diversion measures. For instance, the bill states that:

> A peace officer shall . . . consider whether it would be preferable . . . to refer the individual to a program or to an agency or other service provider in the community that may assist the individual.

What does "other service provider in the community that may assist the individual" mean, and what kind of assistance does that refer to? Does that mean a drug treatment centre offering several months of closed therapy? If so, how is a police officer who arrests a heavily drug-intoxicated person in the street at 3 a.m., in a remote region, supposed to find a therapy centre that is prepared to immediately assess the person and admit them for therapy, assuming the person agrees? If this is the kind of diversion measure that Bill C-5 is intended to allow, I can well imagine that it will be very difficult to enforce, particularly in remote communities that too often lack access to substance abuse prevention and treatment resources.

I'm also wondering whether the diversion measures proposed in Bill C-5 take precedence over the diversion measures that are currently allowed under the Youth Criminal Justice Act for those under 18. This question is worth asking, considering that the text of Bill C-5 does not provide for any incorporation by reference of the two acts.

As a final point, I am concerned that Bill C-5 does not require the provincial government to select and authorize the community or therapeutic organizations or the type of services that will be offered as diversion measures. In my view, the province's agreement is essential in order to prevent the federal government from interfering in provincial jurisdictions in the areas of health care and social services under the guise of its jurisdiction over criminal law. The language used in the principles set out in Bill C-5 shows, in my view, that the diversion measures in the bill seek primarily to achieve objectives that promote health and not solely criminal law objectives.

For all these reasons, I urge you to vote against this bill. Thank you.

Some Hon. Senators: Hear, hear.

(On motion of Senator Duncan, debate adjourned.)

[*English*]

CUSTOMS ACT
PRECLEARANCE ACT, 2016

BILL TO AMEND—THIRD READING

Hon. Marc Gold (Government Representative in the Senate) moved third reading of Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016, as amended.

He said: I rise to begin debate at third reading of Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016. This is legislation intended to update the way personal digital devices are dealt with at the border, following court decisions on this point, first, in Alberta and, more recently, in Ontario.

• (2100)

[*Translation*]

To begin, I want to thank Senator Boniface for her work as the sponsor of this bill, Senator Wells for his contribution as the critic, and all senators, especially those who sit on the Standing Senate Committee on National Security and Defence, for their efforts and their commitment. In this bill, as is often the case in democratic countries, we are dealing with issues that seem divergent, such as fundamental rights, including the right to privacy and the protection of our security. In this case, it is about protecting the safety and privacy of children who are victims of sexual predators, as well as the ability of border officers to detect and stop people who are trying to bring child pornography into Canada on computers and cell phones.

[*English*]

I'm sure we all appreciate the challenge this presents to us as legislators. Certainly, people of goodwill and good faith can disagree about how best to strike this balance. Indeed, there has been a disagreement about what the legal threshold should be to allow border officers to examine a digital device. As originally drafted by the government, the bill proposed a threshold of "reasonable general concern." Last week, we adopted on division a report from the National Security Committee that changed it to "reasonable grounds to suspect." Colleagues, let me take a moment to remind honourable senators of a bit of background and the government's rationale for the "reasonable general concern" threshold.

[*Translation*]

First, it should be noted that we currently do not have a legal threshold for examining personal digital devices at the border. Bill S-7 would never have given new powers to the border officers. Both the initial version and the current amended version would restrict the power to examine digital devices. The debate was never on the scope of that restriction.

[*English*]

By restricting this authority at all, Canada would be joining New Zealand as two of the only countries in the world whose laws don't give border officers carte blanche to search personal digital devices. Laws in the U.S., the U.K. and Australia all allow no-threshold searches, as does Canadian law, at least for the time being.

Our Customs Act was drafted well before cellphones and laptops existed, so it naturally makes no mention of them. It says simply that any goods being brought into Canada can be examined by border officers, in keeping with the long-standing principle that the expectation of privacy is lower at the border than in most other contexts. For many years, Canada Border Services Agency, or CBSA, treated digital devices as goods like any other, and there were court rulings that endorsed that approach.

In 2012, however, acknowledging the changing nature of phones and computers in the 21st century, CBSA instituted its first internal policy about the examination of personal digital devices. This policy carved out digital devices as a special category of goods, even though the law didn't require it. The policy was then strengthened in 2015.

Under the 2015 policy, border officers can only examine a personal digital device if there is ". . . a multiplicity of indicators that evidence of contraventions may be found. . . ." The policy also directs officers to ". . . disable wireless and Internet connectivity . . ." before conducting an examination and to ". . . only examine what is stored within the device." In addition, officers are instructed to take notes of the indicators that led to the search, as well as the areas of the device that are accessed during the search and why. This policy was slightly amended in 2019, but its essence remains in place to this day.

In other words, CBSA already has considerable guardrails around the examination of digital devices, and, colleagues, these examinations are rare. In 2021, for example, less than 0.01% of travellers had their devices searched. Nonetheless, the Alberta Court of Appeal ruled in a case called *Canfield* in 2020 that merely having an internal policy was insufficient and that personal digital devices must be treated differently in law.

There are a few points worth highlighting about that decision. First, this was not a case of officer misconduct. Child pornography was indeed found during the examination, and the court agreed that the officer's decision to conduct the search was reasonable and supported by objective facts that could be articulated. Second, the events took place in 2014, before CBSA strengthened its policy regarding digital devices in 2015. Third, the court was silent about the merits of CBSA's policy, saying only that there needed to be some threshold in law. Finally, the court was explicit that a threshold lower than "reasonable grounds to suspect" might be appropriate. The court noted that "reasonable grounds to suspect" is the threshold used in the Customs Act for strip searches and that the search of a digital device is comparatively less intrusive.

According to the court:

> . . . in our view the threshold for the search of electronic devices may be something less than the reasonable grounds to suspect required for a strip search under the *Customs Act*.

[*Translation*]

The government agrees, so it developed a new threshold consistent with the court's reasoning. The "reasonable general concern" threshold is lower than "reasonable grounds to suspect" but higher than the current absence of any threshold whatsoever in the Customs Act. Contrary to assertions that "reasonable general concern" is vague and meaningless, the Minister of Public Safety and CBSA representatives clearly explained to the committee why this expression was chosen and how it is meant to be applied.

[*English*]

As the minister said, ". . . the term "reasonable" means that the noted factual indications of non-compliance need to be objective and verifiable." This is, indeed, the way reasonableness is understood in law. In various contexts at the border and elsewhere, when courts consider concepts like "reasonable grounds to suspect" and "reasonable grounds to believe," they're not merely looking for any grounds for suspicion or belief that an officer may dream up. They're looking for reasonable grounds, something that can be articulated and something that can be verified that would lead to belief, suspicion or concern, as the case may be, on the part of a reasonable person.

The minister went to on to explain that:

> . . . the term "general" intends to distinguish it from higher thresholds that may require officers to identify specific contraventions before beginning the exam.

In other words, a police officer conducting a search as part of a criminal investigation has more time and capacity to collect information in advance, and we can, therefore, demand that the officer be relatively precise about what offence they suspect and what evidence they expect to find. By contrast, officers at the border have very little information about a traveller and little time or capacity to collect any, so we can't expect them to be quite as specific. In the government's view, it should be enough that there are objective indicators that the traveller is hiding something, even if the officer cannot pinpoint exactly what.

Finally, as the minister told the committee, the reason for using "concern" rather than "suspicion" was to establish the proposed standard as distinct, because the context is distinct. If there is a spectrum of certainty with belief, with "reasonable grounds to believe" at the high end and "suspicion" somewhere below that, "concern" would fall somewhere below suspicion. In the government's view, this would be appropriate given the lower expectation of privacy at the border and given the recognition by the Alberta Court of Appeal that it may be appropriate to have a lower standard to search someone's phone than to make them take off their clothes and examine their body.

[*Translation*]

At report stage, Senator Dalphond emphasized that the Customs Act uses the expression "reasonable grounds to suspect" in contexts other than strip searches. This is a valid argument that deserves a thoughtful response. In the government's opinion, there are certain essential differences between the examination of personal digital devices at a point of entry and other uses of the "reasonable grounds to suspect" threshold set out in the Customs Act.

• (2110)

[*English*]

For example, subsections 99(1)(b) and (c.1) say officers need reasonable grounds to suspect to open mail, but officers can do a whole lot of examining of an envelope or a package without meeting that standard. They can examine the outside of it to see where it's from and where it's going. They can weigh it. They can scan the exterior for traces of organic matter like drugs, and they can even X-ray it to get a better sense of what's inside. All of this can be done while meeting no threshold whatsoever, and these procedures help officers glean information to potentially develop reasonable grounds to suspect.

By contrast, you can't X-ray a cellphone to better understand its contents or look at its exterior to see who has been sending messages to whom. In practice, "reasonable grounds to suspect" is a higher bar to clear for digital devices than for mail.

Subsections 99(1)(d) and (d.1) require reasonable grounds to suspect to re-examine goods to verify potential errors in the determination of tariffs or place of origin, but these are re-examinations. The initial examination is done with a no-threshold authority. It's only if an officer wants to go back and double-check that they need to meet the higher standard.

Subsections 99(1)(e) and (f) impose a standard of reasonable grounds to suspect on examination of goods and conveyances, but, crucially, these subsections apply beyond the immediate context of a border crossing. For instance, if a person has gone through customs, and then an officer sees them down the hall unwrapping a package from under their shirt, the officer would need reasonable grounds to suspect to conduct an examination. Or if an officer sees a suspicious truck emerging from the woods near a border crossing, they would need reasonable grounds to suspect to search it.

At a port of entry, though, where it is well understood and accepted that there is a lower expectation of privacy, goods — as defined in section 2 of the act to include conveyances — can be examined with no threshold, pursuant to subsection 99(1)(a).

Colleagues, all of this is to say that there are important differences between the examination of personal digital devices at a port of entry and in other contexts in which reasonable grounds to suspect is used in the Customs Act. Ultimately, the government proposed the standard of "reasonable general concern" in order to require a level of certainty lower than suspicion but still based on objective indicators that can be articulated and verified.

Plus, if and when section 7 is enacted, it will be accompanied by regulations establishing the details of how digital device examinations are to be conducted. The draft regulations were shared with the National Security Committee and include elements of the existing policy, such as the requirements to disable connectivity and take notes. Nevertheless, the National Security Committee studied the matter, heard testimony and chose to replace "reasonable general concern" with "reasonable grounds to suspect." I totally understand the appeal of using a standard that already exists and, therefore, has a body of jurisprudence to back it up.

At the same time, colleagues, the government does worry that the "reasonable grounds to suspect" threshold may unduly limit the ability of border officers to interdict illegal activity and detect contraband, including material depicting the exploitation of children. This concern was voiced at committee by Monique St. Germain of the Canadian Centre for Child Protection, who said:

> I'm just not sure whether the rising of reasonable grounds of suspicion in this context is going to enable border control officers to do what they need to do to protect children at the border.

We can get a bit of an early sense of the possible implications of this standard by looking at CBSA's data from last month. The court rulings in Alberta and Ontario took effect at the end of April, and that has had the practical impact of applying the reasonable grounds to suspect threshold by default in those jurisdictions.

As Senator Boniface noted last week, in May 2021, between both provinces, CBSA processed some 600,000 travellers, examined 63 devices and found 17 contraventions. This past May, the volume of travellers quadrupled due to relaxed COVID restrictions, but the number of device examinations dropped to 18 and only 4 contraventions were found.

We can't know how many contraventions went undetected. It's a small sample size so far, and it's possible May 2022 was a light month. These numbers should give us pause. Some of the contraventions CBSA finds relate to immigration violations or undeclared goods, but many relate, as I said, to the sexual exploitation of children. There are, unfortunately, Canadians who travel abroad, abuse vulnerable children and return with macabre souvenirs in the form of photos and videos. I'm sure we all want our border officers to have the legal tools to detect and deter that kind of activity.

Now, assuming that we adopt Bill S-7 at third reading, it will be up to our colleagues in the other place to conduct further study. I expect they'll examine many of the issues that have come up during our analysis of this legislation, and they may have the benefit of a larger sample size of CBSA data to better understand how the "reasonable grounds to suspect" threshold in Alberta and Ontario impacts operations. I'm sure they will also analyze the other amendments made by the Senate. One of these incorporates the requirement to disable network connectivity in law rather than — or perhaps in addition to — in regulation.

Now, as a practical matter, this is certainly an objective the government shares, although there was a discussion at committee about the particulars of the wording and whether, given the speed of technological change, leaving this in regulation may be a nimbler approach.

The other amendment is a regulation-making authority related to the protection of solicitor-client privilege. Again, the government shares the objective, and I look forward to the committee in the other place hearing from some of the same witnesses our committee heard from, including, for instance, the Canadian Bar Association, about this amendment.

Finally, colleagues, a word on the matter of witnesses. It has been mentioned correctly that with the notable exception of the Canadian Centre for Child Protection, most testimony at committee supported the "reasonable grounds to suspect" standard. The witnesses were certainly very eminent individuals, like representatives of the Office of the Privacy Commissioner and the Canadian Civil Liberties Association, who need to be heard on legislation such as this.

At the same time, I would note that it's much easier to hear testimony in Senate committees from Canadian law professors than from young children or other individuals whose names we don't know and whose voices we will never likely hear.

I don't for a moment, colleagues, minimize the important input of witnesses from law faculties and civil society — far from it. It is worth keeping in mind that when the bulk of testimony is of a single opinion, that may sometimes be because people with different views or interests face obstacles that prevent them from sharing their thoughts with us.

[Senator Gold]

[*Translation*]

I hope that, in our analysis of this bill, we have done our best to put ourselves in the shoes of others, such as people of colour, Muslims and members of Indigenous peoples who are concerned about prejudice and unjust treatment at the border. Senator Jaffer and Senator Yussuff expressed those concerns eloquently in committee, just as Senator Ataullahjan, Senator McCallum and Senator Omidvar did here in this chamber.

I hope we have also tried to put ourselves in the shoes of the vulnerable children in brothels, alleys and hotel rooms halfway around the world who have never heard of Bill S-7 and do not know what the CBSA is but will be affected by our choices.

[*English*]

As I said at the outset, this legislation calls upon us to engage in a difficult balancing of interests and considerations with serious real-world consequences and valid competing concerns.

Colleagues, you have my thanks for the conscientious and careful study that the committee undertook on this important bill. Thank you for your kind attention.

• (2120)

Hon. Mary Jane McCallum: Senator Gold, would you take a question?

Senator Gold: Yes, of course.

Senator McCallum: Can a personal laptop be considered intellectual property, and not a good?

Senator Gold: Thank you for your question. I believe a personal laptop would be considered a good under the definition in the act. Intellectual property typically deals with something that is less tangible, so I'm not sure that it would fall within that definition.

Senator McCallum: How will intellectual property that is in the laptop be handled?

Senator Gold: Thank you for your question. Again, if I understand how the law operates in practice, if the threshold is met — whatever the threshold is that ultimately is passed into law — that would give the officers at the border the right to search. Of course, if the material that is found contravenes a law, appropriate steps will be taken. Presumably, material that is otherwise not in contravention of any law will be treated with the same and appropriate respect that personal property is and should be treated with under our laws.

Hon. Mobina S. B. Jaffer: Senator Gold, thank you very much for your presentation.

The National Security and Defence Committee has a very competent steering committee, and they chose 12 witnesses. You are saying that we didn't have children appear before our committee. These witnesses are well-known people who, I'm sure, have studied this material. I think it's a little unfair to say that they couldn't speak for the children. I can't repeat the words you said because I don't have them in front of me, but I think it's a bit unfair.

The steering committee had an opportunity to call those witnesses. They could have called children if they had deemed it necessary. As chair, I have done that a number of times. The fact that they called 12 credible people to the committee, do you not think they were able to balance the number of witnesses? Don't you think you were unfair in the way you addressed those witnesses who appeared before us and provided good testimony?

Senator Gold: Thank you for the question and for the opportunity to clarify my intention and clear up what may be my infelicitous language.

I will repeat that I was at pains to respect the work of the committee and the input of the witnesses who were called. What I was trying to say in the passage to which you referred, and I was talking about the exploitation of children, was that the victims who were exploited, whether in countries far away, don't have the opportunity to speak.

Senator Jaffer and colleagues, I chose my words carefully. I've laid out the government's reason for why it chose the standard that it did and I've made the case as best as I could — as Senator Boniface did, even more eloquently than I — so that the record reflects the government's rationale for doing this.

I respect the work of the committee and I will respect the decision of the Senate when we get to third reading. You will note that I said nothing about — my words speak for themselves. I wanted to put on the record the government's position. The government continues to believe that a lower standard is justifiable and constitutional, but it also respects contrary opinions — whether of witnesses and certainly of the committee. When we proceed to third-reading vote later this week, as I understand we will, I will be satisfied, as the Government Representative, that the Senate has done its job. Whatever the results of that third-reading vote, I expect that our work will be taken seriously in the other place, as it should be.

Senator Jaffer: May I ask you another question?

Senator Gold: Of course.

Senator Jaffer: Senator Gold, I didn't for a minute say that you had not done a good job. You have. You expressed your position. I only took issue with how you addressed the very good witnesses that appeared before the committee. I didn't want to raise this in my speech, because then you wouldn't have had an opportunity to speak on this.

I have another question for you. To my question about note taking, the minister said that whether or not the person has committed a contravention, notes will be taken about that person. The minister was very specific about this.

Then the Privacy Commissioner appeared before us and said there have been six complaints about the poor standard of note taking by officials, and that he's been very unhappy with the standard of note taking. Then the officials said that no more funds would be spent to bring in this new threshold.

Where is the protection? They indicated that they will take notes if they stop somebody, even if the contravention doesn't happen, but the Privacy Commissioner says he's not happy with the note taking.

Senator Gold: Thank you for that. I'm aware of that testimony. What we do best in the Senate, as we often say — but it is true — is the rigour of our committee work.

The point we need to remember, however, is that the CBSA has been operating for some years now with a set of policies governing how these devices would be searched. The court found that it failed the constitutional test because these policies were not prescribed in law.

The government's position is that by legislating the rules and procedures, some in law and some in regulations, they were satisfying the constitutional requirements as set out by the court.

If I may venture an explanation, I think that explains why Bill S-7 does not necessarily change on the ground the ways in which border officials will determine whether to conduct a search. That was my understanding of the response to the question about additional resources.

Hon. Salma Ataullahjan: Senator Gold, thank you for your thoughtful and insightful speech. I have a couple of questions.

Senator Gold, multiple reports, including one by the Canadian Human Rights Commission, have found that individuals who are racialized or Indigenous are at a much greater risk of being selected for so-called random screening and extra questioning. One study found that 79% of Muslims — or their friends and family — have experienced unfair treatment. We have heard many times our colleague Senator Jaffer being very vocal about how she is regularly pulled over for random screening.

Do you worry that border guards will misuse their authority to access our phones, which contain intimate details on every aspect of our lives? In fact, our phones have become an extension of our inner lives.

Senator Gold: Thank you for the question. The issues of racial profiling and bias figured in the committee's deliberations, and properly so. It would be wrong and foolish if we did not acknowledge that this happens.

Having said that, we're not talking about random searches of digital devices. In Bill S-7, there need to be objective criteria before the legal threshold, whether it's a threshold of reasonable grounds to suspect or reasonable concern. Both do not simply allow border officials to act randomly. We can disagree. Obviously, the committee was of the view that the somewhat higher standard was more appropriate. I respect that decision, but it still remains the case that even with a general concern standard, it is not simply at the whim of a border officer — while acknowledging that conscious and perhaps unconscious racial

profiling and bias occurs, as I said before. We would be foolish to deny that. There is some reassurance in the statistics that even with no legal threshold whatsoever, digital device examinations are incredibly infrequent. I cited the examples of 0.01% are searched. For example, not only are they infrequent but they uncover contraventions at a much higher rate than other types of examinations.

• (2130)

Let me give you an example. In 2021, 27% of digital device searches — again, representing a small number of incidents — resulted in the discovery of a contravention. That's 27% of the time there was a contravention as opposed to 4% for other searches at the border. That indicates that border officials are doing a reasonably good job using the objective criteria and indicators to zero in on situations where it is truly appropriate to search a digital device.

Again, let me quote from testimony of the Canada Border Services Agency official Scott Millar at the committee:

> . . . not only is racism illegal and against our values, but it's also operationally — if I may be frank — stupid. It does not help us get the kinds of results and rates that we're talking about here. . . .

I hope that answers your question.

Senator Ataullahjan: Senator Gold, I like that racism is illegal, but we have to admit it exists. I speak for a community that is regularly stopped for random searches. It's almost become a joking matter to say, "Okay, I was pulled over. This is what they wanted to know." My question is how and does the government have a plan to prevent Bill S-7 from being used explicitly to violate the privacy of groups that are already discriminated against by border guards?

Senator Gold: Again, in my response I acknowledged the reality of this, senator. The government is not burying its head in the sand. I know that concerns were expressed at the committee about the extent, or the lack of extent, of training in these matters for officials. I am also aware that the Canada Border Services Agency provided the committee some follow-up information with more detail about the nature of its training, which included two hours on diversity and race relations and an hour specifically on preventing unconscious bias, which we know is a problem. We are conscious that it is a problem. One and a half hours were spent on processing Indigenous travellers and two hours on Gender-based Analysis Plus. And more training is coming.

The fact remains, honourable senators, that the bill is addressing the criterion, the legal threshold and related issues around searching of digital devices. It is not an open invitation for random searches at a whim. That would be so whether it is "reasonable grounds to suspect," "reasonable concern" or any other legal standard. The possibility that unconscious or conscious bias will creep into that decision making is a real one, which we need to address in all respects. Strictly speaking, it is an important but separate issue from the legal threshold before which a search of a digital device can be undertaken by an officer.

Hon. Brent Cotter: Senator Gold, would you take a question from me?

Senator Gold: Of course.

Senator Cotter: I wasn't intending to enter the debate, but particularly Senator Jaffer and Senator Ataullahjan's observations about the risks of stereotyping and particularly vulnerable, marginalized or racialized communities invite me to pose this question of you. This is the only part of the bill that has given me concern.

You have spoken to the three words that we have been debating and that have been amended out of the bill. The word I'm most interested in your viewpoints on is the word "general." I accept your observations about "reasonable" requiring an objective articulation, but the fact of the matter is that people who do get stopped at the border are stopped as individuals. For the life of me, I don't understand why the choice of a word like "general" as opposed to "specific," even with the word "concern" was adopted. It seems to me the word "general" invites a border guard to use criteria that are not specific to the individual. As a result, it invites the very kind of concerns that our last two questioners posed. Could you speak to that?

Senator Gold: Thank you, senator, for your question. Of course, the government and I share the concern, as we all should, that the application of any legal standard could encourage a bias or racial profiling.

I do believe that the general concern speaks more to the fact that with digital devices, unlike other kinds of measures — and I addressed this in my speech — the officer may have no specific contravention in mind and no knowledge of what he or she may find because they are simply in the moment, although there would have been objective indicators to signal that something may be being hidden.

We had testimony before the committee as to what some of these indicators might be. I believe that it is still very much focused on the individual before the officer who has, in some way or other, in the answering of the normal questions one is asked, given some indication that there is something amiss and, therefore, is then required to go to a second stage of questioning, at which point the officer may very well have reached the conclusion that the threshold has been met.

The Hon. the Speaker: Senator Ataullahjan, do you have another question?

Senator Ataullahjan: I do. Senator Gold, biases exist. I think back to the day when my mother-in-law, who happened to be one of the first female doctors of the Indian subcontinent, came to visit and, because she was in traditional clothes, one of the guards said, "Oh, dear. I wonder if she can speak English," to which she retorted, "And how!"

An American Civil Liberties Union report showed that 96% of individuals apprehended by American border guards were identified as being of a racialized background. Three customs and border protection officials filed a lawsuit against the agency

alleging they were required to profile racialized persons. As *The Washington Post* stated, "Driving while Brown or Black is a key reason for being stopped by the Border Patrol. . . ."

Why is our government extending greater search authorities to an organization already known to indiscriminately target racialized persons? That is my last question to you, Senator Gold.

Senator Gold: Let me try to address your questions. You are raising an important issue. Please understand that nothing that I'm going to say in my answer is meant to diminish the importance of the issue that you raise.

The issue before us in Bill S-7 is simply this. Until Bill S-7 is passed, there is no restriction whatsoever on a border officer's authority or ability to search a digital device. Again, I repeat, these represent a tiny fraction of the searches of persons who cross borders. Right now, there is no limit in law. There have been limits in policy, as we know. The court said we're not saying that your policy is wrong, but it's not prescribed by law. We have a guarantee of a reasonable expectation of privacy protected by our Charter. You can only limit that reasonable expectation of privacy or, indeed, any right if it is a reasonable limit prescribed by law.

• (2140)

The government introduced the bill to put in place, for the first time, a legal threshold with which officers must comply — and make Canada only one of two countries with such a threshold. Is it the right threshold? The government thought it was; the committee thought otherwise. I have no reason to assume that the chamber as a whole will not agree with the committee. The work of the committee, which was diligent, is to be respected. I'm putting on the record the government's contrary position, which we did at committee. That's my responsibility to do and I do it proudly.

Any legal standard — it could be "reasonable grounds to know" — can be misused by someone, either consciously or unconsciously, seeking to target a racialized group or member of a religious minority. There are many things we can do through training, education and holding those individuals to account to try to address this issue, which is a real one.

Bill S-7 is introducing a legal threshold where none existed before. The issue is really to find the right threshold to impose to protect our privacy.

All the other issues that you raised are really fundamental and important. They speak to the justice of how we implement our laws in this society, not simply digital devices, but driving and in every aspect, whether it's going shopping and being trailed in stores. We've heard stories of our colleagues who have been subject to that. Nothing that I am saying is minimizing that at all.

Strictly speaking, whether the threshold is here or there is a separate question from whether or not it will be applied in a fair, reasonable and non-discriminatory manner, as it should be, and as we hope it will be.

Hon. Ratna Omidvar: Senator Gold, will you take a question, please?

Senator Gold: Of course.

Senator Omidvar: Senator Gold, I would have felt far more comfortable with this bill if it had first been preceded by the bill setting up the independent civilian oversight of the CBSA.

Do you have a comment on the timing of this?

Senator Gold: Thank you for the question. I think the institution of proper oversight on CBSA is long overdue. It's part of the mandate letter of the minister. It is something that the government has hoped to pursue.

In a minority Parliament, which has been characterized, most charitably, as a lot of horse trading and, perhaps more accurately and less charitably, a fair degree of obstruction, it has not been possible for every bill — important though they are — to make its way fast enough through the legislative process, including the government's own priority setting, to be frank.

I think and I hope — and I know it's the government's hope — that a bill establishing proper oversight of CBSA will be introduced and debated and ultimately become law, because it is a missing piece that is critically important to more fully make CBSA properly accountable. Alas, we're not there yet. I do hope that it's coming.

Senator Omidvar: Senator Gold, in other words, until that bill is called into life, for Canadians who feel they have been unfairly targeted, their only recourse is to make a complaint to the CBSA, which will be handled internally by the CBSA. Is that correct?

Senator Gold: Again, let me answer it simply this way: Until changes are made, anybody who reckons they have been treated unfairly have only recourse to the existing procedures.

Again, Bill S-7, as amended before us, sets out, for the first time, a legal threshold governing the searches of digital devices. It is a very narrowly focused law responding, as it does, to the court decisions to which I referred.

The much larger questions about oversight will have to wait until another day. When we do have the opportunity to receive such a bill, I have every confidence that we will study it with the same diligence and intensity that we did this bill as well.

Hon. David M. Wells: Honourable senators, I rise today to speak on Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016.

I want to begin by thanking Senator Gold for his speech, Senator Boniface as the sponsor and, of course, the members of the Standing Senate Committee on National Security and Defence for its work during the study of this bill. Finally, I want to thank Senator Smith for kindly giving me his seat on the committee for the duration of the study of this bill.

When I first addressed this bill at second reading last month, I noted my surprise that this bill had arrived so late for our consideration. The bill is important in that it will govern how personal digital devices are examined at our borders.

As we all know, many personal digital devices can carry the life history of any traveller, so the legal framework surrounding these examinations is very important. Canadians' digital devices contain a multitude of personal information including, but not limited to, health records, financial documents, confidential correspondence, family photos, calendars and detailed schedules, shopping lists, the individual's geolocation record and much more.

The legal framework must be carefully defined as it impacts the privacy rights of every Canadian, rights guaranteed under the Charter of Rights and Freedoms.

Digital devices contain more information about a person than we have ever seen in human history and, consequently, it is worthy of a higher constitutional protection. Therefore, colleagues, we need to be sure that the legal framework governing the examination of personal digital devices is also sufficiently robust to protect our borders and to stop criminal activity such as the importation of child pornography.

Getting this balance right was incorporated in the guidance that the Alberta Court of Appeal provided when it rendered its decision in *R. v Canfield*. In that decision, the court stated:

> We are mindful that protecting the privacy interest in an individual's personal electronic devices while recognizing the need for effective border security will involve a complex and delicate balancing process. It will be up to Parliament, should it choose to do so, to devise a new approach that imposes reasonable limits on the ability to conduct such searches at the border.

As the court confirmed, this balance is at the crux of this matter.

What concerns me is that even though the court ruled on this issue in October 2020, the government has, in the interim, completely failed to create a policy environment where the best solution could be discussed and adopted.

The government put forth the bill that we have before us just a few short weeks ago. Prior to that time, there was no active engagement by government officials with any outside parties. There was no indication of what they were contemplating. Instead, we had a bill dropped on the Senate with a demand that it be passed as quickly as possible. And you'll recall, colleagues, that it was introduced in the Senate on the day the extension expired.

The fact is the Alberta Court of Appeal rendered its decision striking down provisions in subsection 99(1)(a) of the Customs Act in October of 2020. It provided the government with 18 months to revise the law — 12 months initially, followed by a 6-month extension, as I noted.

This was the period in which the government should have actively engaged with Parliament; with outside legal experts; with civil liberties groups; with those concerned about the inflow of child pornography; with the border officers' union; with police groups — and, colleagues, with citizens, the very same citizens whose rights and freedoms may now be violated.

Legal witnesses at committee from civil liberties groups, the Canadian Bar Association and from the Office of the Privacy Commissioner confirmed that they were never consulted as to their views about how the balance between protection and privacy at our border should be established. These organizations clearly have views. Some very learned legal minds have thought about it, considered it and discussed these issues for a considerable period of time.

• (2150)

However, colleagues, the government simply never consulted with them. What the government did was take the 18 months they were given and engage in an internal process, the principal result of which was to simply try to codify the current policies and practices of CBSA into law, and we know from our deliberations that the CBSA doesn't even follow its existing policy.

While we have no explanation from the government about why it took them 18 months to get this bill before us, we are now confronted with significant implications arising from this delay. For instance, we clearly have a gap in the application of the law in the provinces of Alberta and Ontario. In those jurisdictions, the provisions of paragraph 99(1)(a) are no longer in effect, and the remedy the government seeks will, in all likelihood, drag on for years, as we were told in witness testimony. In those provinces, by the minister's own admission, examinations by border officers of personal digital devices are down 60%.

That may be a matter of significant concern. It may well be that a loophole for criminal activity has been created. It may be that criminal organizations and individual criminals are taking advantage of this gap in the law, or it may be that what the minister is suggesting is actually overstated. We know that the vast majority of illegal digital material comes in via the World Wide Web, the cloud or inaccessible attachments on remote email servers.

Do fewer examinations necessarily equate to an opportunity for criminals? We have little clarity on this point, partly because the government has provided us with no details and no in-depth evidence or analysis.

Nonetheless colleagues, despite four committee meetings on this bill, I still cannot be fully certain about the varied potential implications.

This is all the more troubling because the government is seeking to introduce a new and unproven legal concept through Bill S-7 — one that is very likely to be challenged and will result in long delays before any bill to cover it becomes law that holds.

As I noted in proposing Bill S-7, the government has essentially taken the existing CBSA policies and practices for examining personal digital devices and has simply attempted to codify those practices into law. However, in doing so, it proposed to introduce the new legal concept of "reasonable general concern." We have been provided with vague information about how that new legal threshold of "reasonable general concern" would actively function and about how it would be triggered. We have been told, for instance, that it could be triggered by several indicators, and we have been told that it could be triggered by

one specific indicator in certain circumstances. We were told it could even be triggered simply based upon the country of original departure.

Those several indicators, or one specific indicator, or no legitimate indicator at all, might easily be different for different CBSA officers, no matter how well they may be trained.

Those several indicators, or one specific indicator, might be different again for U.S. pre-clearance officers. U.S. pre-clearance officers are trained in a different organizational culture. Their last posting may have been on the Mexico-U.S. border. It is understandable that they may see the concept of "reasonable general concern" very differently from their Canadian counterparts.

When the minister appeared before our committee, he told us that were a higher threshold, such as the well-known and court-tested "reasonable grounds to suspect," imposed at the border, it would ". . . compromise border integrity. . . ." He said there was no question that this was the case, yet he gave no evidence to support this assertion.

As Michael Nesbitt of the Faculty of Law at the University of Calgary put it in committee:

> . . . border officers will rightly almost always be generally concerned, with good reason, that something, somehow, is being illegally brought into the country. But the court in *Canfield* was clear that there must be some standard, which they called a threshold requirement. . . .

Colleagues, "reasonable general concern" is no threshold.

Other witnesses who appeared before our committee, including those from the Office of the Privacy Commissioner, noted that the privacy rights impacted by the examination of a personal digital device should attract a much higher level of protection than simply an ill-defined "reasonable general concern."

Benjamin Goold, Professor at the University of British Columbia, explained that requiring "reasonable grounds to suspect" as opposed to "reasonable general concern" before a search is undertaken strikes an appropriate balance between the competing interests identified in the report and subsequently by the courts in *Canfield* and *Townsend*.

The concept of "reasonable grounds for concern" is untested in our courts as a legal threshold, and introducing this concept would, without a doubt, introduce prolonged legal uncertainty at the border. This was echoed by a number of our expert witnesses, including various civil liberties associations and the Canadian Bar Association.

Brenda McPhail, Director, Privacy, Technology and Surveillance Program of the Canadian Civil Liberties Association, was very clear in noting that her association would strongly support any legal challenge to this proposed provision in the bill.

Similarly, David Fraser, Member, National Privacy and Access Law Section of the Canadian Bar Association, told our committee that the introduction of "reasonable general concern" would increase legal uncertainty. He noted that within five years, Parliament would inevitably revisit this matter given the likelihood of a successful legal challenge.

While the mere fact that legal challenges are possible does not mean the government cannot propose a particular measure for enactment into law, if it chooses to do so it must then provide clear explanations and supporting information about why it chooses to do that. There is little evidence that the government has taken any of these issues seriously. In testimony, the CBSA became a star witness against themselves. Bill S-7 is their policy document, which they don't even follow fully, that they'd like turned into law. Colleagues, it took the government 18 months to develop that strategy.

Witness after witness told us they were not consulted on either the bill or on the legal concepts contained within it. David Fraser of the Canadian Bar Association confirmed that nobody from within government approached them, despite the considerable legal work they have done on this very issue. Mr. Fraser fully acknowledged that perhaps a new legal concept below the threshold of "reasonable grounds to suspect" might be justified in the border context. He stated that the courts might very well be open to new concepts. However, those concepts then require a better explanation as well as a fulsome discussion. None of that happened.

For the most part, we heard that the concept of "reasonable general concern" would not stand up to a Charter challenge. Benjamin Goold stated about the current standard:

> I think if it ends up in the Supreme Court, based on everything we've seen around the jurisprudence on section 7, it would fail, because I don't think it's sufficiently onerous in terms of protecting the rights of individuals.

The concept of "reasonable general concern," without that broader discussion and explanation, has completely undermined the government's efforts. This approach left the Senate committee with no choice but to try to improve the bill based on witness testimony. That is why the Standing Senate Committee on National Security and Defence chose to accept Senator Jaffer's amendment to substitute the phrase "reasonable general concern" for "reasonable grounds to suspect" when it comes to the examination of personal digital devices.

As numerous senators pointed out in their comments at committee, not a single independent expert witness came before the committee to express support for the government's proposal to institute a standard of "reasonable general concern" for the examination of personal digital devices.

Our colleague Senator Dalphond provided very eloquent support for Senator Jaffer's amendment and was, in fact, ready to move the same amendment had Senator Jaffer not moved hers. Senator Dalphond noted that the standard of "reasonable grounds to suspect" was a very well understood legal concept and was one that is necessary to protect the scope of privacy rights that are impacted as a result of the examination of personal digital devices.

Our colleague Senator Dalphond also put forth another important amendment that underlines a critical question with regard to solicitor-client relationships that should extend to other professional relationships. The question of protected professional communications is legitimate and should be dealt with by a stronger mechanism than the internal policy that CBSA currently has and was written into the original bill — or, more correctly, not addressed in the original bill at all, indicating no restriction whatsoever.

This amendment correctly highlighted the significance of ensuring CBSA officers clearly know how they must conduct searches at the border when the protection of privileged information, which could be in the context of solicitor-client privilege or any professional privacy for any professionals, comes into play.

The concerns of senators related to the protection of privacy rights is also why the National Security and Defence Committee looked favourably upon my amendment that requires CBSA officers examining personal digital devices to ensure that such devices are only examined in non-connectivity mode if referred for secondary screening.

Senators, the amendment I proposed at committee sought to further protect Canadians by ensuring that the CBSA officer, or pre-clearance officer, prior to examining a personal digital device, informs a traveller subject to such an examination that the traveller has the right to ensure that the device in question is examined only in non-connectivity mode.

• (2200)

Colleagues, you will remember from my speech at second reading that this happened to me, and I was given no such advice, and my bank records were comfortably searched by the CBSA officer.

This amendment is to protect Canadians by ensuring they are informed of that right. The amendment does not change the CBSA current policy or their ability to search a device.

Therefore, my amendment makes disabling a stated precondition to any search. Colleagues, the necessity of Canadians to know their rights is embodied in my amendment.

I believe that the bill we now have before us — as amended — is at least better structured to provide the appropriate balance required by our legal system. That said, I do remain concerned that gaps in our border security will still exist.

Other important factors that were brought to light at committee were the concerns over racial profiling. As Lex Gill, Research Fellow, Citizen Lab at the Munk School of Global Affairs, said in committee:

> My colleagues' concerns about racial and religious profiling also bear repeating. The border is a high-stress, low-information, low-visibility environment. It is a perfect storm for the combination of implicit bias and abuse of discretion that gives rise to discriminatory effects. . . . People crossing the border have the right to not suffer invasive and unconstitutional treatment in the first place.

Colleagues, Bill S-7 is potentially generating a situation whereby indicators that fall short of reasonable suspicion will be used to essentially intrude on an individual's Charter rights. That is akin to racial profiling.

I am in agreement with our colleague Senator Yussuff, who said in committee that the low threshold means that any factors such as skin colour, name, the fact that they are nervous or sweaty can be considered, and that this will undoubtedly lead to abuses.

The fact is that in a situation where there are highly discretionary and loosely defined powers combined with the existence of implicit racial and unconscious biases, abuse and discriminatory effects are sure to occur.

Ms. Gill continued this thread by saying:

> The border is a context where the situation is often rapidly evolving, where people are acting with low information in a high-stress context. That's exactly the kind of scenario that brings out those kinds of implicit assumptions, stereotypes and prejudices that people may not even know they have.

Colleagues, we have learned, and the courts have told us, that entrenching operational matters into CBSA policy is simply not good enough and does not have the force of law. I believe that we should not address these operational considerations in the regulations, as there are concrete reasons as to why this should not be the path we take.

Essentially, colleagues, the prudent and correct way to proceed would be to have the framework set out in law, debated and democratically approved. To do otherwise would be leaving every Canadian's constitutional right to privacy to a discretionary approach that we find in the regulatory-making system.

Worth noting is that the government included in this bill a section that lowers fines associated with interfering with a border officer. There is no explanation for this provision, which seems to run completely at cross-purposes with the government's supposed objective of ensuring that border officers are able to carry out their mandates effectively.

The government clearly did not make any effort to construct a holistic approach on this issue. I think it is vital that the government at least try to do that now as this bill makes its way through to the other place.

We require a legal regime at the border that empowers border officers to tackle a very specific problem without infringing unnecessarily on the broader privacy rights of citizens. It is up to us as legislators to closely monitor whether the government actually does the work that they have been asked by the court to do.

Colleagues, as we heard many times, especially at committee, all levels of courts have been unambiguous that when it comes to searches of digital devices, it can be a significant intrusion of privacy. It does not make any sense to create a low standard — or, as I have stated, no standard — at the border, which will undoubtedly lead to Charter challenges.

How can the government justify a more invasive search on a lower standard?

Senators on the National Security and Defence Committee asked the right questions. Witnesses told us through their testimony that critical flaws reside in this bill if passed in its original version.

I hope and trust that all senators in this chamber will sustain the work undertaken by the members of the committee and those who have spoken in this chamber and convey a strong message to the government that it must do better. This bill, as amended at committee, is a strong step in that direction. Thank you.

Senator Jaffer: Honourable senators, I rise today to speak to Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016.

First, I want to thank Senator Boniface for her work in sponsoring Bill S-7 and the critic for his work as well, and also Senator Dean for doing an excellent job in chairing the committee.

Honourable senators, up until recently, there was no threshold on how officers should carry out the test to search personal digital devices.

In 2020, the Court of Appeal of Alberta released the *Canfield* decision, which stated that the government needs to amend the Customs Act to include a test for the search of personal digital devices at the border.

Let me give you examples of what is currently enshrined in the Customs Act:

To search a person, border security officers apply the reasonable grounds to suspect test.

To search a good when there might be a mistake in the good's classification, value or quantity, border security officers apply the reasonable grounds to suspect test.

To search a good when there might be a mistake with respect to its origin, border security officers apply the reasonable grounds to suspect test.

To examine goods when an offence might be perpetrated, border security officers apply the reasonable grounds to suspect test.

To search a conveyance, whether a truck or train or other, when an offence might be perpetrated, border security officers apply the reasonable grounds to suspect test.

And to search mail, honourable senators, border security officers apply the reasonable grounds to suspect test.

Bill S-7 was written to incorporate the new threshold in the Customs Act. The Minister of Public Safety and two CBSA officials came to committee to present this new novel threshold, which requires a border security officer to have a "reasonable general concern."

Senators, many times Senator Boehm asked the question how the American border security officers will be trained for pre-clearance purposes. How will they learn this "reasonable general concern"? By this novel "reasonable general concern" standard, border security officers would use indicators that are identified in regulations to search travellers' personal digital devices.

We were told the indicators ranged from a traveller acting nervous or agitated, avoiding eye contact, shifting back and forth, stuttering and sweating, to finding devices in a traveller's luggage. Another indicator revolves around whether the country of origin of the traveller is a country where child pornography is an issue.

Yet not all indicators were shared with the committee. We were told that it wouldn't be safe to share these indicators with a Senate committee. But, honourable senators, as a Muslim woman of colour, I am concerned with the way in which these indicators will be used. And I have an idea of what those other unrevealed indicators might look like.

Many CBSA officials, since I have asked this question, have spoken to me privately and told me that my concerns are very legitimate. The concerns that were not mentioned at committee are often the concerns that border security officers carry out.

Senator Boniface restated that the "reasonable general concern" test will put into law what border officers have already been doing. However, we have gathered in committee numerous testimonies that tell us that this threshold will not properly strike the balance between national security concerns and travellers' privacy rights.

In fact, 11 of the very reputable witnesses supported the higher test. Ms. St. Germain from the Canadian Centre for Child Protection said that the "reasonable grounds to suspect" threshold is adequate. I'm going to repeat this, senators. Even she said that the "reasonable grounds to suspect" threshold is adequate for border examination of personal digital devices.

• (2210)

She went on to say, and I quote:

> . . . the reasonable suspicion standard is something that is known and understood in criminal law. We understand that it's also been used in the border context.

Later, she said of the offenders crossing with child pornography on their personal digital devices that:

> . . . "The reasonable suspicion standard is something that is known and understood in criminal law" will likely be able to catch many individuals who are potentially doing this.

Senators, last week in the chamber, Senator Dean and I had different interpretations of Ms. St. Germain's responses in committee. After looking at her transcript, I admit that her responses were ambiguous. She didn't seem to be overtly claiming that the "reasonable general concern" threshold was the one she was supporting, but she did say that the "reasonable grounds to suspect" was something that would work.

I accept that what she said was ambiguous. But except for her, the other 11 witnesses were very firm in what they said.

As I said to Senator Gold earlier on, the steering committee always brings a balance of witnesses to bring both points of view. We have a very hard-working steering committee. If they had found anyone who was supporting the "reasonable general concern" test, they would have brought them to committee.

Honourable senators, one thing is certain, all 11 witnesses were adamant about supporting an amendment replacing the "reasonable general concern" test with the "reasonable grounds to suspect" test.

These witnesses have extensive experience on these issues and have done extensive research. As such, though the government wanted to enshrine into law the novel "reasonable general concern" test, witnesses prefer the "reasonable grounds to suspect" test, except for the Minister of Public Safety and his Canada Border Services Agency officials.

The "reasonable general concern" threshold is entirely novel in Canadian national law, and we cannot find anything in foreign national law that uses that test either.

Ms. Lex Gill, a research fellow from the Munk School of Global Affairs explained the "reasonable general concern" test, and I quote:

> . . . not only does this kind of broad-based standard open the door to group-based discrimination and the use of group-based characteristics as a pretext to stop, question someone and search their devices, but these are also powers that are very difficult to review after the fact. . . .

Michael Nesbitt, Associate Professor at the Faculty of Law of the University of Calgary, said:

> . . . Better to set a clear standard now. That clear standard could certainly be, and in my mind should probably be, "reasonable grounds to suspect." It is a flexible standard and it allows for much nuance, including a different sort of nuance at the border. As Supreme Court said recently in *Stairs*, it requires but "a constellation of objectively discernible facts assessed against the totality of the circumstances."

[*Translation*]

Regan Morris, senior legal counsel at the Office of the Privacy Commissioner of Canada, stated the following:

> I understand that the intention is to have a lower standard than reasonable grounds to suspect. We don't think it will strike the right balance between privacy and other government interests.

[*English*]

Mr. Regan Morris later added:

> We would highlight, again, the Supreme Court's decision in R. v. Stairs, which was issued a few weeks ago, highlighting the flexible nature of the standard. It is a standard that is based on the totality of the circumstances and is meant to be flexible. It's meant to be a lower standard than reasonable grounds to believe. It's fact-based, flexible and grounded in common sense.

Mr. David Fraser, former Chair of National Privacy and Access Law Section of the Canadian Bar Association explained:

> . . . reasonable general concern is not a standard for any sort of search in Canadian law. Your guess is as good as mine, but it seems pretty close to whether the officer's spidey sense is tingling.

Pantea Jafari from the Canadian Muslim Lawyers Association said:

> . . . The [reasonable general concern] standard is not only legally unfounded, but also unreasonably broad and low, as testified to in more detail by other witnesses, including today's. The overly broad nature of the proposed standard will invite arbitrary application. It will undoubtedly result in unjustified searches of a wide swath of people and will disproportionately be felt by minority and equity-seeking communities.

Tim McSorley from the International Civil Liberties Monitoring Group said that the "reasonable grounds to suspect" test:

> . . . is a known standard. It is a clear standard. It is a standard that is already applied to mail, which, as we pointed out, should more than clearly be viewed as a parallel to the digital devices that people are bringing across the border.

In response to *Canfield* leaving the door open, Mr. McSorley explained:

> . . . the courts did leave it open to the possibility of a lower threshold. However . . . that does not mean a lower threshold is appropriate. The courts were not deciding on that.

Meghan McDermott from the British Columbia Civil Liberties Association explained:

> . . . that we don't support the novel general reasonable concern threshold that's being proposed in Bill S-7. We join the other witness here today, as well as many others,

> including Canada's Privacy Commissioner, in recommending that the law reflect the higher and familiar threshold of reasonable grounds to suspect.

Ms. Brenda McPhail from the Canadian Civil Liberties Association also had the same opinion.

Honourable senators, upon hearing the testimony of witnesses, your committee determined that implementing the "reasonable grounds to suspect" threshold for search of personal digital devices is coherent with the Customs Act and strikes the right balance between border security and privacy rights.

As Senator Simons explained in her second reading speech, the decisions of *R. v. Plant*, *R. v. Cole* and *R. v. Fearon*, among others, remind us that the closer information touches an individual's biographical core of information, the more protections section 8 of the Charter will require from the government.

In the same vein, the Supreme Court wrote in *R v. Morelli* that it is difficult to imagine a search more invasive of one's privacy than searching a personal computer.

Honourable senators, I hope you will agree with me that personal devices need just as big a protection as a piece of mail does, and "reasonable grounds to suspect" is the proper test.

Honourable senators, I am very proud to be a member of the National Defence Committee that amended this test because I truly believe they heard from the different witnesses and had the courage to make the amendment.

Just today, the Executive Director of the Canadian Race Relations Foundation told us in the Human Rights Committee that he always got pulled out at the borders whenever he arrived in Canada, and was just petrified of what would happen to him because he's a Muslim man until he got a NEXUS card.

Senators, the Senate's job is to protect minorities. If we don't look after the rights of minorities, who will? Thank you very much.

Hon. Peter Harder: I rise today in support Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016.

I do so, however, with reluctance given the substantial amendment regarding threshold of search made to the bill at committee stage and endorsed in this chamber at report stage.

• (2220)

In my view, this amendment will create an unnecessary risk for the importation of obscene and dangerous material to our nation, the victimization and revictimization of children depicted in such material and an added burden on border security officials at protecting those children as well as Canadian society.

Moreover, I believe this amendment runs counter to the specific and clear intentions of a duly elected government. It is, in a sense, an overreach on our part.

As you are all aware, the bill before us creates a new and higher standard that must be met before border officials can lawfully examine personal digital devices, or PDDs, of travellers that may contain prohibited material. The need for a standard is required, given the decisions, as we've heard, from the Alberta and Ontario courts. The issue before us is what the proper balance should be and, in my view, who is most entitled to set it.

The case for the original unamended bill was ably made by its sponsor, Senator Boniface, in her second reading speech this past April, and further in her report stage speech last week. I agree with her that the original bill struck the right balance between safeguarding travellers' privacy while providing border officers the needed enforcement capability to interdict prohibited goods that include child pornography and other obscene material.

Like Senator Boniface, I was also against the amendment made in committee, which raises the threshold from the original bill prescribing under what conditions a PDD can be examined. Simply put, the government believes that the new ceiling for examination which is being put forward in this amendment — which provides for a PDD examination on "reasonable grounds to suspect" rather than on a "reasonable general concern" — is too high. I share that fear.

In my view, the amendment will risk making it more difficult to interdict the importation of dangerous material, which includes child pornography, images of sexual abuse, hate literature or evidence of drug smuggling. If the government agreed with this amendment, it would have adopted it in the legislation in the first place.

A good part of the debate over this bill has centred around the need for striking a balance between the rights of privacy and the protection of Canadian society. That's as it should be. I would add, however, that the issue of balance also needs to be considered in the context of harm done to victims. Their right to safety and not to be exploited by the recurrent circulation of harmful images ought to be part of this balance.

In her appearance before the committee, the general counsel for the Canadian Centre for Child Protection, Monique St. Germain, noted that between the years 2010 and 2020, Statistics Canada reported a 488% increase in the number of images and videos of child sexual exploitation. This is a number of deep concern. To quote Ms. St. Germain:

> In the study of this bill so far, there is a lot of focus on the privacy interests of individual travellers. What has not yet been discussed is the safety, privacy and security interests of the children who are depicted in child sexual abuse material. We live in a world where this horrific material can be easily stored and hidden on a device you keep in your pocket and share to a worldwide audience via websites, encrypted apps and the dark web.

The children who are exploited in these images rely on us to protect them. When the material such as this is smuggled across the border, the children in the images have no power to stop it.

The surfeit of this type of material demands that border officials be given the maximum amount of flexibility that the law will allow. As an example, one of the individuals whose case has prompted the need for the creation of a threshold was found to have had a total of 4,411 pictures and 53 videos of child pornography on his devices. As it happens, his conviction and that of another man at the centre of this case was upheld, even though the Charter rights had been infringed.

Let me offer a couple of examples of how CBSA officers operate.

In one case conveyed to our office, a Canadian male citizen returned to Canada after a one-day trip to the Philippines, where he had been denied entry after having been placed on a sex offender registry due to a prior incident in the U.S. An examination ensued and an image of child pornography was found. The RCMP was called.

In another case, an individual arrived home from Thailand and was referred to a secondary officer due to his lengthy stay in a country known for sex tourism. The individual exhibited nervous behaviour that included stuttering, perspiration and swaying as his bag was searched. When he refused to answer questions about the contents of his digital devices, officers searched the PDDs and found images and videos depicting child pornography. Would these examinations still have been made under the amendment? If the answer is no, then it needs to be reconsidered.

It is instructive to know that, while CBSA may examine PDDs for a large variety of contraband ranging from an undervaluation of goods to messages on human trafficking, narcotics and money laundering, a full 40% of found contraband involves seizures of child pornography.

Somewhat overlooked in the debate we've had over this bill is its role in furthering the overall objectives of the CBSA. According to the mandate page of Public Safety Canada, one of the chief roles of the CBSA is — among others — to stop people and goods at the border that pose a potential threat to Canada. I fear that adopting a higher threshold will make it more difficult to achieve this mandate which, after all, is what this bill was intended to accomplish.

Indeed, as the CBSA is forced to use the higher threshold in Alberta and Ontario while it awaits the new law, enforcement has been affected. Both Minister Mendicino and departmental public servants testified to this at committee. It is early days, but according to CBSA vice-president Scott Millar, examinations in those two provinces have dropped approximately 60%. One could conclude from these numbers that, had the higher threshold been in place before the court cases were decided, at least some of the individuals who were previously caught would have passed through customs unexamined with their contraband intact.

The passage of the summer will give us a better understanding of whether these lower numbers reflect a pattern and whether a reduction in examination equals a corresponding reduction in the interdiction of contraband.

I would like to turn briefly now to privacy issues raised by some of our colleagues, who have argued for the amendment by saying the original bill will not pass constitutional muster, dooming it to a constitutional challenge in very short order that could take years to adjudicate. With due respect, my learned colleagues, an opinion even from our august body isn't necessarily indicative of how the Supreme Court of Canada would rule, and we shouldn't assume we know what the courts will say. I'm not comfortable when we put our views against the opinions of government, which relies on its own battery of constitutional expertise. I'm not a constitutional expert, so it seems wiser to me to let the courts decide while the legislators defer to the very clear intent of the government.

We may disagree with the balance that the government has struck and prefer to use a threshold that errs more on the side of privacy, but the government has overtly rejected that option by adopting a threshold that is not as stringent as the one the Senate committee wants, albeit stronger than what was in place.

The Alberta court itself said there appeared to be room for this middle approach:

> . . . in our view the threshold for the search of electronic devices may be something less than the reasonable grounds to suspect required for a strip search under the *Customs Act*.

Colleagues, this at the very least indicates that the courts will consider something less than "reasonable suspicion" when they themselves hear arguments in the future.

I might also want to add that other amendments put forward by Senators Dalphond and Wells on solicitor-client privilege and network connectivity, as well as the government's regulatory proposal, will in and of themselves make decisions about border interventions more rigorous. Perhaps changes such as these are what the court had in mind when leaving open the possibility that something less than "reasonable suspicion" would be acceptable.

I would also note that the original bar in this bill is higher than the level which exists in many jurisdictions with similar legal systems to our own, including the United States, Australia and the United Kingdom. The fact that the bill will almost certainly be challenged should provide some succour to those who believe it goes too far in either direction.

Nonetheless, I acknowledge our role here is made somewhat more difficult by the fact that the bill started in the Senate rather than the other place. As a chamber of sober second thought, I would prefer that bills of this import come to us after colleagues in the other place have dealt with them and made their own changes if need be. This could have guided us.

Despite my concerns, I do believe this bill needs to pass, for no less a reason than we have two competing enforcement processes being administered in our country today. This creates an inequality in law that needs to be rectified as soon as possible.

• (2230)

Furthermore, the issue is one of significant concern for our relationship with the United States. It has long been a goal of our nation to pursue policies that enhance and streamline cross-border traffic. The thickening of the Canada-U.S. border is an issue that should be top of mind for all legislators. That becomes more difficult if we are seen as unable to get our act together.

I would also add that our border security is challenged daily by new digital technologies that require significant dexterity on the part of the CBSA. This bill underscores the challenges we face. It may well be time for a new and wider policy discussion on an updated security plan. The tragedy of 9/11 was a long time ago, and we haven't had a comprehensive discussion of these issues since then.

Allow me to conclude by saying that, despite the understandable concerns expressed for privacy and the threats posed by criminal activity, like the importation of child porn, I believe our border officials conduct themselves for the most part with restraint and will continue to effectively do their jobs while we await what will hopefully be a prompt and well-considered passage of this bill. Thank you.

Hon. Pierrette Ringuette: Honourable senators, I rise today to speak on Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016, regarding the examination of personal digital devices at the border.

Let me say from the start that I agree with the original version of Bill S-7, not the amended one that we have before us. We may agree to disagree, but I need to put forth my perspective and, later in my comments, my personal experience.

[*Translation*]

I am not a lawyer, but I am a good student of the school of common sense, as they say where I come from.

[*English*]

And that must prevail in everything. This bill is necessary in response to a court decision. In *R. v. Canfield* and *R. v. Townsend*, the Court of Appeal of Alberta ruled that currently the lack of legislation/threshold allowing the examination of personal digital devices, such as when searching one's suitcase by the CBSA, is unconstitutional under the Charter of Rights and Freedoms.

This is because paragraph 99(1)(a) of the Customs Act imposed no limits on searching these devices. The courts did not set out a threshold for searching digital devices, but instead recognized that a lower threshold is more reasonable than what is currently in the law for goods in these circumstances, and they left it to the government to create the threshold.

Contrary to certain statements in this chamber last week, the courts did not prescribe that Parliament enact the same consistent provisions as in 99(1)(a) of the Customs Act, i.e. for goods and mail, et cetera.

I repeat that the court specified that a lower threshold would be reasonable and should be put in place by Parliament. The courts even specified that digital devices were not considered goods" as per the Customs Act. In essence, the argument that was put forth in the Senate last week contradicted the decision of the courts.

As a side note, I would also like to argue that, to some degree, there is inconsistency in our own deliberations. We agreed, not so long ago, to random, roadside alcohol testing without any threshold to protect our citizens.

In amending the original Bill S-7 from "reasonable general concern" to the threshold of "reasonable grounds to suspect," we are not in fact meeting the intent of the court decision. We are bringing a higher threshold — in fact, a threshold that is required for a strip search. The search of your digital device is certainly not akin to a strip search.

I will also note that the threshold of "reasonable grounds to suspect" is the high threshold needed to grant a warrant to search a residence, sometimes requiring our police forces to put in weeks of data- and fact-gathering.

So with "reasonable grounds to suspect" in the amended bill, we can expect our borders to be either at a standstill — long and very long lineups — or an open border by identified criminals. To me, both options are unacceptable.

I will also stress that the courts did not identify racial profiling in the matter of searching digital devices, probably because no evidence was put forth in those two court challenges. Furthermore, the current amended Bill S-7 does absolutely nothing to address the issue of potential racism. Racism is best dealt with by education, wherever it is. And the amendment of the threshold does not address the issue of racism in this particular organization. Honestly, they are two different issues.

I will agree that it is not pleasant to be asked questions and to be referred to secondary screening. However, when one wants to leave or enter a country, whether it is yours or a foreign one, you do so voluntarily and have to respect the mandate of border officers enforcing the law of the land. Securing our borders is an important and necessary part of keeping our country and Canadians safe. The need for border security to be able to assess and, at times, inspect personal digital devices at the border is a key part of that.

I agree that there is also a need for balance between security and privacy rights. However, the security of Canadians would trump my privacy any day.

It should be noted that these searches are extremely limited, even with the lack of limitations previously set out in paragraph 99(1)(a) of the Customs Act.

According to CBSA data, from November 20, 2017, until December 31, 2021, almost four years, 0.013% of all travellers processed at the border had their devices examined. We're making such a big fuss over 0.013%. And 37.3% resulted in the detection of a contravention, including money laundering, child pornography and undeclared goods. That's 253,509,912 travellers, 33,373 examinations of digital devices and 12,457 contraventions detected.

The framework originally set out in this bill was reasonable, given the limited access and time agents have with travellers. There is a well-established lower expectation of privacy at the borders, whether it is ours or any other.

• (2240)

The novel threshold of "reasonable general concern" does not mean carte blanche to search everyone's phones. It is limited to the specific context of border security and cannot be used outside that context. There needs to be grounds for the search and for those grounds being subject to review. Agents need to identify specific, individualized reasons with regard to the person and the device.

There are three aspects to this novel threshold: reasonable, general and concern. "Reasonable" I think we can all agree with. The indicators need to be factual and objective. This is a well-established term in law. "General" is the main point of contention, but the courts themselves have acknowledged that a lower threshold is needed. There is not the same ability to generate specific suspicions as there is in other circumstances. "General" is a reasonable response to that fact. "Concern," as above, is an acknowledgement of the fact that the threshold of suspicion is too high a bar for the circumstances, as it is the bar for a strip search or house search warrants.

Higher thresholds used in other circumstances would not work in this context. The agents have a very limited amount of time to interact with individuals. They are required to make quick decisions, ones that greatly affect our national security. They need tools designed for their demanding job, and the novel threshold of reasonable general concern does that. It did that. It was changed.

Overall, onerous requirements would weaken our borders and prevent our agents from doing their jobs. We were told in this chamber that border officers need to do a better job of controlling our borders. Is this amended Bill S-7 giving them better tools to do their job? I personally do not think so. CBSA agents are trained to observe and identify factors that lead to a reasonable general concern. These policies already exist internally in CBSA and would have been legislated into law by the original bill. There is also a requirement that CBSA agents take extensive notes that can be reviewed later. There was a lot of debate on this at committee, and I am personally surprised that the committee was not open to a new concept.

Before the court decision, searches were limited, as noted in the statistics from CBSA. That was with a lack of legislated threshold. This new threshold would have put existing practices into law. We are not talking about lowering a standard here; we are talking about placing practice into law.

Also, in terms of reviewing the actions of CBSA agents, the government has recently introduced legislation, Bill C-20, to create a new public complaints and review commission, replacing the Civilian Review and Complaints Commission for the RCMP, and grant it new powers to handle CBSA complaints. The bill proposes $112 million over five years and more than $19 million a year ongoing. In addition, the agencies covered by the new commission will be required to respond to interim reports within six months.

Honourable senators, I am at the point in my comments where I will reveal to you that as a student, I worked in 1982 and 1983 as a border officer. Yes, 40 years ago, when there were no digital devices. People had physical wallets, handbags and briefcases with them and on them. At secondary inspection, we would ask them to empty their wallets, handbags and briefcases. You would be amazed, truly amazed, at the real infraction events I could tell from these three containers — wallets, handbags and briefcases.

However, today, 40 years later, most of us carry digital devices.

Colleagues, may I have five more minutes?

The Hon. the Speaker: Honourable senators, Senator Ringuette's time has expired. She is asking for five more minutes. If you are opposed to leave, please say "no."

Senator Ringuette: Thank you. However, today, most of us carry digital devices that we, and only we, choose to gather the content of our wallets, our handbags and our briefcases. It is one's choice. You choose this device. You choose what you put on this device knowing that these devices are subject to hacking, among other things.

The only difference today is that all that information is contained in one device. I repeat, what you put on that device is your choice. But, honourable senators, a purchase receipt on your electronic device is no different than a paper receipt you carried in 1982 in your wallet. It is then and now the same information, different container. You have to realize that.

Now let me, without naming anyone, give you two different scenarios at a small border crossing in northern New Brunswick and the State of Maine. You can judge for yourself.

The first scenario: A senior gentleman arrives at that border in a big black truck, wearing military garb, shows his U.S. passport and says he is a former U.S. general — he says that to the officer. The officer asks, "Where are you from and where are you going to in Canada?" The answer is, "I'm from New York and I'm going to Montreal." To which the officer asks, "Are you visiting family or friends in this area?" "No," he replies. So, instantly — it's a fraction of a second that you have to react — in the officer's head is the question: Why would he travel all of those additional miles to go to Montreal via Maine and New

Brunswick? To secondary inspection he goes and is found to have hidden in his truck a load of illegal guns that he was smuggling for the Montreal gangs.

Second scenario: A Canadian priest from northern New Brunswick arrives at that same border, re-entering Canada from a convention in the States. He had a briefcase on the passenger seat and nothing to declare, with an air of "How dare you ask me this question twice?" He was sent for secondary screening, where they found a briefcase of child porn. He was prosecuted, found guilty and jailed.

• (2250)

Honourable senators, in these two scenarios, being sent for secondary screening was based on a "reasonable general concern" on behalf of the officer, and I highlight that these two persons emphasized their position of authority. The law has to be applied equally to everyone, even if we carry a green passport.

In conclusion, honourable senators, I believe that this amended version of Bill S-7 will be a detriment to our border security, that it will impair border agents from doing their jobs effectively and that it will allow for more contraventions of our customs law.

The Hon. the Speaker: I regret to inform the honourable senator that her time has expired again. Are you asking for more time?

Senator Ringuette: Could I have 10 seconds?

The Hon. the Speaker: Is leave granted?

An Hon. Senator: No.

The Hon. the Speaker: I'm sorry, Senator Ringuette. Leave is not granted.

Senator McCallum: Honourable senators, I rise today to speak at third reading of Bill S-7, An Act to amend the Customs Act and the Preclearance Act, 2016, so as to register the serious misgivings that I have about this bill.

I would first applaud the Standing Senate Committee on National Security and Defence for their work on this legislation. Specifically, I would like to acknowledge their amendment to remove the arbitrary and vague threshold of "reasonable general concern" to the current iteration "reasonable grounds to suspect." This prudent amendment was made in light of the overwhelming witness testimony cautioning against the carte blanche that would result from the original terminology. As our colleague Senator Dean said last week in reporting back from the committee on Bill S-7, the implementation of that initial and unclear threshold:

> . . . could have the following results: arbitrary treatment at the border; the violation of privacy rights of individuals; an increased risk of discrimination; a lack of clarity about the proposed standard's meaning; and, indeed, a further challenge before the courts.

Despite this amendment, colleagues, I still have grave concern about this legislation. I would like to go on record as saying that I attempted, with the assistance of the Government Liaison in the Senate's office, to establish a meeting with CBSA officials so that I could raise my concerns and inquiries directly with those who would action this legislation. I was quickly informed that the CBSA had denied my request, as they have apparently made it a practice not to meet one-on-one with parliamentarians. I had then countered with the suggestion of setting up a meeting with a small collective of senators who had similar issues on Bill S-7 in the hopes that CBSA officials could alleviate some of our concerns in an efficient but effective manner. That offer, too, was rebuffed by CBSA. I am disappointed that I was met with an unwillingness to have meaningful dialogue with the individuals who would be tasked with carrying out the weighty duties that would be established with the passage of this legislation.

Honourable senators, having said that, I would like to speak to the major concern that I still have with Bill S-7. Specifically, I am concerned about the insidious practice of racial profiling when it comes to the determination of secondary examinations. This is an issue that is familiar in theory to all in this chamber, but the fear and anxiety of actually being subjected to this kind of malice and targeted behaviour is only known to a much smaller collective.

As a First Nations woman, I can tell you that racial profiling is real and that I am still a victim of it to this day. I am sure this same truth is reflected by other senators in this chamber who are also part of racialized minority groups, whether they be Indigenous, Black, Asian and so on.

This issue is deep-rooted and ingrained in many different areas that make up the fabric of our society. I fear that the wording and content of this legislation remains dangerously close to enabling this kind of attitude for people in a position of authority, which already highlights the power imbalance that exists wherein racialized travellers are subordinate and submissive to border officials — individuals who may carry with them unfounded biases or prejudices.

Honourable senators, this issue was first raised at the May 30 meeting of the Standing Senate Committee on National Security and Defence by our colleague Senator Jaffer. I would like to extend my thanks to Senator Jaffer for her unwavering resolve in ensuring that this matter, which is critical for so many people across this country, was not easily dismissed. In response to this line of questioning, Minister Mendicino acknowledged the validity of the concern. In his words, Minister Mendicino stated:

> First and foremost, I want to assure you that we take systemic racism and racial profiling extremely seriously, not only at the CBSA but right across every branch of law enforcement. Indeed, officials in every branch of law enforcement, to their credit, acknowledge that it exists and that we must root it out. This is a challenge around which we must all be united.

The Minister went on to state:

> I also want to assure you as well . . . the mandate that was given to me by the Prime Minister [does] require, in very express language, that all agencies continue to do the important work of rooting out systemic racism in all of its forms. What does that mean? It means better training, being culturally sensitive and being aware of the biases that have infiltrated the way the work has been done.

I appreciate the fact that the minister and his officials spoke about the rigorous training that would be required of CBSA officials prior to taking on the job. However, I admit I was shocked when Mr. Scott Millar, Vice President, Strategic Policy, Canada Border Services Agency was asked specifically about the nature of the diversity training these officers would undergo. In his words, Mr. Millar responded:

> There are multiple courses that are mandatory training for CBSA, and there are some courses around unconscious bias as it relates more specifically to this type of authority. Our diversity and race relations course is, I believe, an hour in duration.

Colleagues, this bears repeating. As part of the CBSA training in relation to Bill S-7, the course on diversity and race relations is one hour in duration. To me, this length of time is merely a pretense: negligible in terms of actually combatting the deep-rooted and systemic issues that underpin racial profiling.

Despite the minister's nice words on the commitment of this government to root out systemic racism with better training, the action behind those words is underwhelming and insufficient. As such, we must not be blind to the fact that this level of training — if we can justify calling it that — will not translate into a better understanding of race relations. It will certainly not accomplish the lofty goal of eradicating over 150 years of racist and prejudiced thoughts-turned-actions that have constantly marred our authorities' relations with First Nations people in Canada.

• (2300)

When asked about the sufficiency of one hour's worth of training on this matter at the June 6 meeting of the National Security and Defence Committee, Ms. Pantea Jafari, member, founder and lead counsel of Jafari Law and a board member of the Canadian Muslim Lawyers Association, said the following:

> I do not think that an hour of sensitivity training for officers is sufficient by any standards. The stereotypic beliefs that permeate border officials and the national security context are deeply ingrained. . . . They are systemically entrenched. . . . which is why racial profiling and the stereotypic assumptions they are based upon are so predominant in the national security context and so significantly felt by racialized and minority individuals.

Later that meeting, Ms. Jafari continued:

> . . . the issue is so significantly felt by racialized individuals, but there doesn't seem to be a genuine interest in correcting the problem. When you see that the minister is proposing a one-hour diversity training to rectify this overwhelming and extremely well-documented issue of significant racial profiling at the border, that speaks to how seriously they take this issue, which is really not at all.

As you can see, colleagues, even legal experts are lodging serious concern about the impact that racial profiling will continue to have on this process. This is due, in part, to the lacking diligence that the government and their authorities are delegating to address an issue that is centuries-old in this country.

Honourable senators, I would now like to acknowledge the fact that the minister highlighted a new agency that is being established to monitor the CBSA and the RCMP in regard to their behaviours, as well as to collect data therein. However, I note this agency is only now in the process of being established by Bill C-20, which is currently before the House, having only received first reading at this point. In other words, it is in its infancy with uncertainty surrounding what this agency would accomplish in real-world terms — if and when it receives Royal Assent at some undetermined time in the future. What we can be certain of, colleagues, is that this proposed agency would essentially operate in hindsight. While it would theoretically serve as a post-mortem to determine issues and shortcomings in the conduct and level of service of the CBSA and RCMP, it would offer no practical, real-world protections or aids to travellers at the border. This is especially true of racialized travellers, who most need an elevated level of consideration and protection.

Honourable senators, while I recognize these aforementioned steps as important and necessary, I harbour profound concern that they are insufficient and will have no tangible impact on alleviating racial profiling and thereby diminishing the dread — because, make no mistake, that is what is felt — that First Nations and other travellers of colour feel when they reach the authorities at the border.

Colleagues, a final concern I would like to raise is surrounding data. As it has been an ongoing struggle to obtain gender-based analyses that may or may not be done by the government, I have since requested these analyses from the Library of Parliament for all government legislation. The gender-based analysis done on Bill S-7 was emphatic on the issue of data, stating:

> In the absence of hard data, it is not possible to measure the extent of discrimination or racism at the border and determine whether or not Bill S-7 will exacerbate these problems.

This is a large concern and is one, I feel, that merits serious attention, as it will be difficult to verify whether Bill S-7 is actually helping or hindering a critical issue for many in Canada.

Honourable senators, the reality of the issue of racial profiling is best summed up in a response given by Ms. Pantea Jafari during the June 6 meeting of the National Security and Defence Committee. Following her testimony, our colleague Senator Yussuff asked if she felt this legislation would result in an increase in racial profiling at the border. Ms. Jafari responded:

> In my personal opinion, I would say absolutely, because these ingrained and entrenched biases and stereotypical assumptions being exercised at the border will only become more entrenched with increased power to exercise them in that way. Without the proper safeguards, I would highly venture that things will get disproportionately and significantly worse for racialized individuals at the border.

It is for this reason, colleagues, and the fact that I do not believe Bill S-7 presents the proper safeguards as alluded to by Ms. Jafari that I will not be voting in support of this legislation.

Thank you.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Agreed.

An Hon. Senator: On division.

(Motion agreed to and bill, as amended, read third time and passed, on division.)

THE SENATE

MOTION TO EXTEND WEDNESDAY, JUNE 22, 2022, SITTING ADOPTED

Hon. Raymonde Gagné (Legislative Deputy to the Government Representative in the Senate), pursuant to notice of June 16, 2022, moved:

> That, notwithstanding any provision of the Rules, previous order or usual practice, the sitting of Wednesday, June 22, 2022, continue beyond 4 p.m., and the Senate adjourn at the earlier of the end of Government Business or midnight, unless earlier adjourned by motion.

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

(Motion agreed to.)

BILL TO AMEND THE CRIMINAL CODE AND THE IDENTIFICATION OF CRIMINALS ACT AND TO MAKE RELATED AMENDMENTS TO OTHER ACTS (COVID-19 RESPONSE AND OTHER MEASURES)

THIRD READING—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Dalphond, seconded by the Honourable Senator Bovey, for the third reading of Bill S-4, An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures), as amended.

Hon. Kim Pate: Honourable senators, I agree that lack of expediency and more challenging access to justice are important issues exacerbated by COVID-19. I do not agree, however, with expediency of court proceedings if it, even inadvertently, interferes with the Charter-protected rights of accused individuals to due process and fair trials.

We should be deeply concerned about the provisions of Bill S-4 because they expand access to audio- and videoconferencing hearings for incarcerated accused. In Canada, the standards that criminal courts have in-person proceedings and that the accused be heard are central to ensuring a fair trial and should not be changed lightly.

Video proceedings raise due process concerns. Courts are less able to gauge such matters as an accused individual's credibility and competence, physical and psychological well-being, ability to understand the proceedings and the voluntariness of any waivers of rights that the defendant may be called upon to make. For the accused in prisons, video proceedings result in breaches of privacy and confidentiality and often threats to safety. During visits to prisons in recent years, senators have witnessed first-hand video hearings taking place within the hearing of correctional officers and often other accused. This can and does discourage the accused from speaking freely for fear of harm that could come to them or others should particularly sensitive information be overheard, shared or spread to the wrong people.

• (2310)

Video proceedings also affect the lawyer-client relationship and crucial communication between a lawyer and client. Communication between lawyers and imprisoned clients during a hearing may not be private. As many of us have observed directly, correctional authorities routinely claim to sweep away the Charter rights of accused persons to confidential communications with their lawyers by posting waiver notices stating that all phone calls are subject to monitoring.

Even when a client held in jail is given a more secure phone for private lawyer-client communication, it can be difficult to fully engage in order to provide relevant information. This is particularly troubling given that 1 in 3 men and 1 in 2 women in federal custody are Indigenous, and 1 in 10 are of African descent. More video and audio hearings would likely also exacerbate linguistic and cultural issues.

As Canada examines developing or expanding such approaches, we can learn from the experiences of other jurisdictions. For instance, a study of bail hearings in Illinois illustrates the importance of in-person proceedings. There, the average bail bond for a person whose hearing was conducted remotely was anywhere from 51% to 90% higher than for the accused who appeared in person.

Bill S-4 implies that courts will monitor the ongoing appropriateness of remote appearances without any accountability framework or an explanation of how judges will do so. Furthermore, the Canadian judiciary has already largely acknowledged the inappropriateness of remote access proceedings in criminal matters. In a 2020 study, despite the very real challenges of the pandemic, Canadian judges only favoured using this technology in urgent and emergent matters. Bill S-4 frames increased reliance on these technologies as a response to COVID-19 but provides no end date for their use.

As we have seen throughout this pandemic and during our visits to prisons, the substantive outcome of a trial can rest on issues that arise from the use of video proceedings alone. Canadians have the right to fair trials with the effective assistance of and access to counsel. Bill S-4 does not ensure either.

As we know from various Senate studies and reports, there is virtually no reliable oversight of correctional and detention authorities and virtually no means for prisoners to effectively air — much less correct — grievances, let alone breaches of the law. This leaves the accused to assume all the risks of video proceedings without any clear, reliable means to ensure their safety or remedy violations of their rights.

Let me be clear: By supporting these provisions for the sake of expediency, we perpetuate a legacy of ignoring underlying issues which contribute to mass criminalization and incarceration in Canada. We must ensure clear, transparent and accountable approaches that uphold the due process and fair trial rights of Canadians.

Dear colleagues, liberty is a fundamental right that all Canadians hold dear. That fundamental right should not be diminished for the sake of expediency.

Meegwetch. Thank you.

(On motion of Senator Martin, debate adjourned.)

BILL RESPECTING REGULATORY MODERNIZATION

THIRD READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Woo, seconded by the Honourable Senator Omidvar, for the third reading of Bill S-6, An Act respecting regulatory modernization, as amended.

Hon. Colin Deacon: Honourable senators, regulatory modernization is critical. More accurately, regulatory modernization is critical if Canada wants to encourage businesses large and small to innovate and achieve productivity improvements, become a globally competitive market for innovators and deliver affordability to consumers. It's important if we want to reduce the administrative burden for both business and government and if we want to minimize government spending.

You understand that I think it's important, and I want to thank the government for creating the annual regulatory modernization process. I wholeheartedly support Bill S-6 and the motivation behind it. However, I want to be clear that it's not a full-throttle regulatory modernization act. I still think it's closer to being the legislative irritant-reduction act that I mentioned at second reading.

Canada desperately needs a major whole-of-government approach that will meaningfully address our own OECD-leading legacy of regulatory burden. We've got to create the regulatory agility — and a culture of regulatory agility — that will protect Canadians and spur innovation and productivity growth.

More than anything, I hope that's what you take away from my speech. There's an urgent need for ongoing agile regulatory reform across our economy, reform that protects Canadians and spurs innovation and productivity growth. It shouldn't be one or the other.

In my remarks, I first want to provide three examples illustrating our substantial regulatory modernization challenges, and they're just the tip of the iceberg. Second, I want to provide two places where government is currently excelling at consultation and reform, and third, I want to provide a few humble suggestions for moving ahead in a faster and broader way.

Here are a few glaring examples where regulation creates administrative burden, prevents innovation and is not serving consumers or market forces.

First, in the Banking Committee, we heard testimony from Electricity Canada regarding the incremental changes in Part 1 of Bill S-6, sections 4 through 8. In short, these changes were welcome but didn't even come close to meeting the regulatory barriers currently blocking innovation, market forces and the achievement of our climate objectives.

For example, Canada's electric metering legislation is now 40 years old. I'd say it's in a mid-life crisis. Narrowly designed to regulate vertically integrated power utilities, it has not kept up with market developments like the advent of electric vehicles, also known as EVs, or decentralized grids. As a result, in Canada, EV charging stations can only charge for the amount of time used and not the actual amount of electricity delivered. Consequently, owners with cheaper, slower-charging EVs are subsidizing those with fast-charging EVs because they're charged for time, not energy.

Consequently, condo and rental property managers are disincentivized from providing charging stations in their buildings. Regulatory inaction means that they cannot afford to install revenue-grade metering in their parking garages. But that actually doesn't matter because these highly accurate revenue-grade meters, used worldwide, do not meet Measurement Canada's strict historical regulations.

Meanwhile, the federal government is investing heavily in the increased adoption of EVs. Budget 2022 alone included another $1.7 billion in EV subsidies and $900 million to build an additional 50,000 charging stations. Yet, the hard work of modernizing the underlying regulations so market forces could support their adoption continues to be ignored.

Why does this matter? Last week, the United Kingdom ended EV subsidies because it had successfully created a mature, stand-alone market. Canada's multi-billion-dollar investments continue. The lesson learned there, for me, is to align regulation and procurement practices to catalyze market activity and minimize the need for government investment.

Second, I want to point out a lack of effective engagement with stakeholders. The fact that it was an issue is evidenced widely but specifically in Part 8 of Bill S-6. Our colleagues on the Social Affairs Committee were told that Immigration, Refugees and Citizenship Canada officials only consulted with officials in related federal departments. Immigration lawyers, privacy lawyers and provincial governments were not consulted, although each were affected by the changes or had opinions. That's for sure. Senator Woo spoke to the resulting information-sharing amendments that occurred in the Banking Committee.

Canadians can no longer afford for our deputy ministers to allow their officials to view their respective roles and responsibilities through the narrow lens that assumes that the customers they serve are only within government. As a result of the failure of these officials, the minister had to intervene with amendments in committee.

Canadians are counting on our professional public service to do a much better job. As Senator Smith pointed out last week, it is the stakeholders in regulated sectors who are best positioned to provide feedback on how regulation affects their organizations and the lives of Canadians.

• (2320)

What is the lesson learned here? Let's require public officials to engage transparently with stakeholders in meetings where technical standards and regulations can be discussed with all affected parties in the same room, be it virtual or physical, rather than making decisions in a black box hidden away in some corner of Ottawa and then announcing the result in *Canada Gazette*. This process fails Canadians and only enriches lobbyists.

Lastly, the Canadian Food Inspection Agency, or CFIA, was responsible for parts 4 and 5 of Bill S-6. The lack of or limited extent of consultation was, again, an issue. But it's not like they aren't conducting a lot of consultations at the CFIA.

On January 21, 2022, at the high point of the potato wart crisis, the CFIA launched a 30-day consultation with Canadians on their proposed change to the size of diced white potatoes sold in cans. I didn't realize that potatoes were sold in cans. Regardless, why on earth is the CFIA involved in regulating their cube size?

Astonishingly, as Senator Downe pointed out in his Twitter post, this occurred in the midst of the P.E.I. potato wart crisis that cost P.E.I. farmers an estimated $50 million in lost revenues. What is the lesson learned? We must become ruthless in limiting the extent of regulatory capture in Canada.

I hope these three examples give you some sense of how legacy laws, regulations and practices need to be updated to become much more agile if we want to harness innovation to create opportunities, jobs and prosperity. Simply, inaction undermines that future prosperity.

Much of what we heard in the Banking Committee was reflected in our observations, notably:

> While the committee supports the intent of Bill S-6, it believes that regulatory modernization of legislation must occur more quickly and on a much wider scale than what was proposed in the bill.

The committee also suggested:

> introducing an economic and competitive lens for regulations;
>
> measuring the quantity and overall cost of regulations;
>
> setting targets for regulatory reduction that apply to all federal legislation, regulations and policies; and
>
> examining whether certain streamlined measures that were introduced during the COVID-19 pandemic should be continued.

I'd also like to reinforce the need for Canada's regulations to be, first, pro-competitive, meaning that the playing fields are levelled, giving innovative new entrants a reasonable chance of challenging established incumbents; and second, that they are technology agnostic, so that changes are not needed to address accelerating forms of innovation.

Now, what about those examples of effective consultation that I alluded to? Senator Woo, in his third reading speech, asked whether the Senate might consider conducting a special study on how we can improve regulatory modernization in Canada. I, for one, wholeheartedly support this idea.

We have some recent examples of work that the federal government has already established that are setting a whole new standard for regulatory modernization. It's not Bill S-6 that is setting the standard, but it is the consultation process that's currently guiding the implementation of open banking and the Retail Payment Activities Act.

Both of these regulatory modernization processes have diligently involved highly effective consultations among players in an open forum alongside government officials. The groups involved are from the smallest innovative company to the largest incumbents and involve true consultation and not communication. These are models that I dream might be replicated across the whole of government.

Let me give you one small peek into the importance of the payments modernization process to give you an idea of the complexities being managed and the importance of it to Canadians. It's currently under way as a result of implementing Budget 2021's Retail Payment Activities Act. For context, Canadians made roughly 20 billion individual transactions in 2021, totalling nearly $10 trillion in value.

The Canadian Federation of Independent Business estimates that interchange rates for cards average at about 2%. In Europe, these rates are 0.3%, or about one seventh as much as we're paying in Canada, due in good part to how the EU manages competition and regulation. In effect, Canada's system is an excess tax on every single transaction made by every consumer every day, paid to the financial sector, all because our regulations haven't kept up. Fortunately, that situation is changing, and very quickly.

The Bank of Canada has been running a consultation process to create the regulations needed to implement the Retail Payment Activities Act that will be a much more inclusive approach to how payments are managed. As evidence of how it's going, I will quote one of the leading critics of the status quo. Laurence Cooke, Founder and CEO of nanopay:

> Ten years after starting to create a safer, fairer and more competitive payments ecosystem, we finally have real traction. The Bank of Canada and the Retail Payments Supervision team set up a transparent and agile consultation process that included all stakeholders, and have set a new standard for how regulations should be created.

When Laurence said this, I had to check his health and his identity because he does not compliment regulators. The same sorts of responses were regularly heard 18 months ago during Finance Canada's consultation process on opening banking, which is moving closer and closer to its implementation phase.

What is the lesson learned? Great examples of effective consultation exist within government. A failed consultation process can no longer be tolerated by our most senior government officials and ministers.

Lastly, let me widen the path forward. By design, regulations must protect the public from the harm created by unsafe products, underperforming services and hazardous conditions while enabling an innovative marketplace. Too often, regulatory stagnation prevents these objectives from being achieved. This happens because the world is changing around us at an accelerating pace, and our current approach to updating regulations is not keeping up.

Similar jurisdictions, including the United States, the European Union and the United Kingdom, have implemented changes to address these challenges — and they did it decades ago — by prioritizing a strategic approach to standard setting and mandating the effective use of standards in legislative instruments.

These countries have been using steadily evolving industry-led standards to complement and focus but, most importantly, not replace required regulatory efforts. Industry-led standards involve extensive and broad consultation amongst stakeholders, but through an independent expert standards body rather than a government department.

Standards establish accepted practices, eliminate unnecessary complexity and needless duplication, like the duplication we see across Canada and the regular conflict across this country because of competing jurisdictional authorities in here.

Governments around the world have turned to combining legislation, regulation, standards and certification programs as the go-to compliance mechanism for managing traditional sectors as well as high-risk emerging technology. Canada does not as yet.

Here are three very specific things that Canada could do to accelerate the intention of Bill S-6 based on the advice that I've received from standards-setting organizations.

First, enact Governor-in-Council powers to list recognized standards, codes of practice and certification programs for the regulations it administers to provide sufficient, up to date and relevant safeguards.

Second, establish a national secretariat to facilitate cooperation amongst federal, provincial and territorial authorities with jurisdiction in the establishment, harmonization and maintenance of recognized standards across jurisdictions.

Last, update the Cabinet Directive on Regulation to limit regulations to essential requirements and require regulations to be technology agnostic.

We're seeing evidence of the government moving in this direction. It just incorporated language in new legislation supporting the use of standards necessary to secure critical infrastructure. That's in section 15.2(2)(l) of Bill C-26, recently introduced and called the "Critical Cyber Systems Protection Act." This inclusion helps de-risk regulatory policy and ensures that relevant, up-to-date safeguards are implemented to reflect contemporary realities.

It also fits with expert testimony provided at the Standing Senate Committee on Legal and Constitutional Affairs in March 2022 when studying Senator Miville-Dechêne's Bill S-210. The recommendation was to enact Governor-in-Council powers to recognize standards, codes of practice and certification programs as a way to provide sufficient safeguards.

Colleagues, I want to conclude by reminding you that an acceleration of our ability to update critical standards and regulations protects our future prosperity, our sovereignty and our security, consumers and accelerates our ability to address the challenges and opportunities of our ever-changing world.

• (2330)

At a time when the federal government is making so many major strategic investments in digital infrastructure and modernization and in fighting climate change, understanding both past design failures and emerging models for success is critical. The Senate can help, as Senator Woo suggested. There is

much more evidence out there to guide us in broadening Canada's regulatory modernization efforts well beyond Bill S-6. Thank you, colleagues.

An Hon. Senator: Bravo!

Hon. Tony Loffreda: Honourable senators, I rise today at third reading to speak to Bill S-6, an Act respecting regulatory modernization. I want to thank Senators Woo, Smith and Deacon for their excellent speeches. I intend to be brief and complementary. It is getting late. This must be the latest I've spoken on a bill, so I will be brief.

My gratitude goes to all senators from the seven standing committees who studied the subject matter of certain parts of the bill, as well as my colleagues on the Banking Committee for their review of the bill.

As you know, the bill makes common-sense changes to 29 different acts of Parliament that will modernize Canada's regulatory system.

Senators may remember that the government's commitment to regulatory modernization was first announced in the Fall Economic Statement 2018. At the time, the government acknowledged — as Senator Deacon expressed so eloquently — that:

> Many federal regulations have been developed and built up over decades. Over time, some regulations can become obsolete and present a real barrier to innovation.

The government committed to introducing an Annual Regulatory Modernization Bill to remove outdated and duplicative regulatory requirements. This is an important step forward and one that is certainly appreciated by the business community.

As Senator Woo pointed out last week:

> The modern regulatory system must . . . promote business investment and innovation; second, it must ensure the health, safety and security of Canadians and the protection of the environment. . . .

I agree completely with him. It's no secret that Canada's regulatory system is complex, often outdated and a red-tape nightmare for many businesses — which has the chilling effect of slowing down innovation, stalling growth and hindering productivity. The changes proposed in Bill S-6 are meant to eliminate irritants and reduce the overall administrative burden.

For instance, the bill accelerates the coming into force of amendments to the Trademarks Act that were introduced as part of Canada's Intellectual Property Strategy. I asked Ms. Miller from Innovation, Science and Economic Development Canada about this provision when she appeared before the Banking Committee. I argued that having a strong intellectual property and trademarks system is key to attracting foreign investment and to Canada's overall global competitiveness. Indeed, Ms. Miller confirmed how important it is. She said:

> The importance of intellectual property in making sure that Canada is an attractive place to do business, an attractive place for Canadian companies to grow and scale up and be able to compete globally, cannot really be overstated. It's an incredibly important asset for businesses to be able to understand and then use and deploy strategically.

She went on to say:

> By permitting the entry into force of the amendment, that will really underline the importance of using that intellectual property, that trademark, in Canada; that not only reinforces your brand in Canada, it reinforces it as well globally. . . .

Colleagues, this amendment, like most others in the bill, although minor in scope, has the combined effect of making our regulatory system more efficient and less burdensome.

As Mona Fortier, President of the Treasury Board, said, "We're modernizing rules to make it easier for Canadians to get things done."

Allow me to say a few words about results and consultations.

In its *Regulatory Policy Outlook 2021*, the OECD reminds us that governments "spend far too little time checking whether rules work in practice, not just on paper" and they need to "move past the traditional "set and forget" rule-making mindset and develop "adapt and learn" approaches."

But for the government's annual regulatory modernization exercise to be successful, the government must engage early with all relevant stakeholders. As the OECD suggests:

> People —

— and I would suggest businesses too —

> — are more likely to view regulations as fair if they are engaged in the deliberative process and the outcomes of consultations are clearly explained.

And as early as possible. Even in business, when we did budgets and looked at projections and strategies, we obtained the best results when we involved stakeholders — the bottom-up approach. You then take the decision on top, but you need the engagement. To get the engagement, you have to get them involved, and it's important to involve stakeholders early in the process. We've heard Senators Woo, Smith and Deacon make the same point, and it's an important point.

As we described in our Banking Committee report:

> . . . a number of witnesses expressed their dissatisfaction —

— and I'm stressing the point —

> — with the limited or, in some cases, the lack of government consultations on the regulatory changes proposed in Bill S-6. Since extensive and inclusive consultations lead to better regulations by allowing the government to gather valuable expertise and feedback, the committee urges the government to improve its consultation process for the regulatory modernization by including more diverse stakeholders —

— diversity is very important —

> — using online consultations more frequently and reaching out to stakeholders sooner in its regulatory development process.

The government's Let's Talk Federal Regulations pilot project is a good start and will help address some of the concerns raised by industry when it comes to consultations. This new platform has a lot of potential and I hope it will be able to enhance the government's engagement practices — engagement, engagement, engagement. You need engagement from the business community. There is a lot of talk that the government must improve those links to the business community, and I think it's a fine place to start.

It is also extremely important for the government to monitor and assess the impact of any new regulatory changes. In my view, our Joint Committee for the Scrutiny of Regulations is an important part of that review.

Honourable senators, although we may have felt rushed in pre-studying and studying Bill S-6, we did some great work, and we should feel confident in adopting this bill at third reading today.

The government's commitment to reviewing regulations yearly, through legislation, is a great decision. I certainly look forward to participating in the legislative review of any such bill in the future. The Senate can contribute much value and expertise to this exercise. Thank you.

Some Hon. Senators: Hear, hear.

The Hon. the Speaker pro tempore: Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Agreed.

An Hon. Senator: On division.

(Motion agreed to and bill, as amended, read third time and passed, on division.)

(*At 11:39 p.m., the Senate was continued until tomorrow at 2 p.m.*)

CONTENTS

Monday, June 20, 2022

PAGE

SENATORS' STATEMENTS

ROUTINE PROCEEDINGS

QUESTION PERIOD

ORDERS OF THE DAY

CONTENTS

Monday, June 20, 2022