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(HANSARD)

Friday, June 13, 2014

The Honourable NOËL A. KINSELLA
Speaker

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THE SENATE

Friday, June 13, 2014

The Senate met at 9 a.m., the Speaker in the chair.

Prayers.

SENATORS' STATEMENTS

PEOPLE, WORDS & CHANGE

Hon. Don Meredith: Honourable senators, I rise today to recognize People, Words & Change, an inspiring non-profit charitable organization here in the nation's capital, which is doing their bit for nation building by delivering essential literacy skills in reading and writing, as well as math and computer skills to adult learners, including new Canadians.

As I share my reflections of my time with this group in the community and here in the Senate of Canada, the powerful words and examples of an honourable citizen of Canada comes to mind. The great Nelson Mandela was right when he said:

> When people are determined they can overcome anything. Everyone can rise above their circumstances and achieve success if they are dedicated to and passionate about what they do. Education is the most powerful weapon which you can use to change the world.

These are not just the words of one of the great humanists of our time, but the exact values that not only helped build this great country, a prescription of how we as Canadians, women and men, can continue achieving even higher heights.

My friendship with People, Words & Change began last fall when I visited and met with their staff and so many of their adult learners. They had come from places like Asia, Eastern Europe, Africa and the Caribbean, and they shared personal stories of how this organization was making a difference in their lives. They spoke about the challenges of not being able to read, of stigma and difficulty in navigating everyday activities that most of us take for granted.

As one who immigrated to Canada at a very young age, and one who had to cope with social pressures while speaking with an accent, I was moved by the honesty and passion with which they told of the revolutionary impact new literacy made in their lives. And you, too, would have been moved, listening to mothers, fathers and grandparents share their appreciation and enthusiasm about their future in Canada.

Honourable senators, I told them my story and left them with a clear message: In Canada it isn't where you came from, it's where you're going that counts. That path includes finding your passion, continuous learning and giving back to community. I challenged them to be the change they want to see in this world.

Last week I was proud to host them here, in the Senate. The learners, volunteer tutors and staff sat in our seats and were inspired by the visual history of this place. I told them more about my passion for Canada and for the work we do in this upper chamber and of our own nation building efforts.

Ms. Dee Sullivan, Executive Director of PWC, wrote to me:

> . . . our conversations on the way back were charged with a heightened sense of shared responsibility for Canada.

Honourable senators, it is their Parliament, and as they continue to write their own life stories I suspect their experience here would be worthy of more than a footnote.

In conclusion, the impact of their learning is perhaps best captured in the words of one of the PWC learners who said:

> Being able to read simply made my experience visiting Parliament Hill so much better.

Thank you. God bless you and God bless Canada.

GLOBAL WIND DAY

Hon. Grant Mitchell: Honourable senators, I rise today to raise awareness of Global Wind Day, which is taking place on Sunday, June 15. My colleague, Senator Dyck, just mentioned that this is a day that reflects a fresh breeze bringing new ideas.

The international event is coordinated by the European Wind Energy Association and the Global Wind Energy Council. It is a day dedicated to promoting awareness of how wind power is fast becoming a leading source of sustainable, environmentally friendly and efficient electricity in jurisdictions throughout the world.

To date, 75 countries around the world have installed wind farms, and the cost of producing wind power has dropped significantly — up to 43 per cent in reduced costs by some measures. In 2012 alone, the global wind power market grew by more than 10 per cent. The two largest economies in the world, China and the United States, are also the two largest markets for wind energy production. In China, wind electricity is now in fact the third largest source of electricity generation, after thermal and hydropower. In the United States, wind power accounted for some 42 per cent of new electricity production capacity in 2012 alone.

Where is Canada in the development of wind power?

In 2012, our wind power market grew by over 20 per cent, generating $2 billion in investment and 10,500 person years of employment. We are the ninth largest wind market in the world,

and we have tremendous potential to produce a far greater percentage of our electricity through wind power innovation.

Ontario is this country's leading province in wind development, and by 2018 the provincial government's Long Term Energy Plan will have installed 7,000 megawatts of wind energy.

Global Wind Day encourages us to recognize that the benefits of wind power innovation also extend beyond electricity production. The 9.2 megawatt Diavik Wind Farm in the Northwest Territories has helped open up opportunities for a growing mining sector in the North, while the 4 megawatt M'Chigeeng Mother Earth Renewable Energy Project in Ontario is the first ever to be owned exclusively by First Nations.

For Global Wind Day 2014, the Canadian Wind Energy Association will be hosting its first annual golf tournament in support of Friends of Wind in Markham, Ontario. ENERCON is the fourth-largest wind turbine manufacturer in the world and will be hosting an open house in Matane, Quebec. Senvion, a global leader in producing onshore and offshore wind turbines, will be presenting an exhibit of photography featuring photos showing the construction phase of some of their wind farms contracted by Hydro-Québec.

Wind power is deserving of our attention and efforts to promote energy sustainability in Canada. I encourage each and every one of you to learn more about the admirable work being done by these organizations and by various governments around the world.

SENATE REFORM

Hon. Stephen Greene: Honourable senators, as we bring down the curtain on this sitting of the Senate, I rise today to offer a simple message to my colleagues on both sides of this house and beyond. That message is: Thank you.

Thank you to our great Prime Minister for appointing me to this wonderful and exciting place, and thank you to my illustrious leader for appointing me deputy whip. Thank you to all the many senators on both sides who have participated in discussions, motions and inquiries that seek to reform this chamber in some way or other.

Reforming how we conduct business in this chamber is important work, as noted by our Prime Minister at our party's convention in Calgary when he stated, "It is time for the Senate to show it can reform itself."

Moreover, I believe that Canadians need and want a Senate they can be proud of. Why wouldn't they want to be proud of their Senate? I believe that if we work at it, this necessary institution can become one of the most respected legislative bodies in the world. I believe this should form our mission statement for the coming year.

• (0910)

I want to express a special thank you to Senator Nolin, who since Christmas has launched no fewer than seven inquiries on behalf of reform and education about the Senate, as well as a motion to establish a committee to work on reform.

Hon. Senators: Hear, hear!

Senator Greene: The list is long among those who have expressed their views on reform or who have launched motions or inquiries of their own. Because it really doesn't matter — and it shouldn't matter — where the good ideas for reform of this chamber come from, I thank the debate participants in alphabetical order: Senator Andreychuk, Senator Chaput, Senator Cowan, Senator Dawson, Senator Eaton, Senator Fraser, Senator Hubley, Senator Mercer, Senator Nolin, Senator Ringuette, Senator Tannas, Senator Tardif and Senator Wallace.

In addition to these senators, I wish to thank all the senators on my side who participated both in special caucus meetings on reform and in the many ad hoc, somewhat clandestine, dinner meetings that have been organized by various members on both sides for both sides. These senators shall remain nameless. Your secret is safe with me.

I wish you all a great summer!

Hon. Senators: Hear, hear!

[*Translation*]

ONTARIO PROVINCIAL ELECTION

Hon. Marie-P. Charette-Poulin: Honourable senators, I join you all in congratulating Ontario's Liberal premier, who was elected yesterday, June 12, 2014.

Kathleen Wynne is the first woman to be elected Premier of Ontario. This is good news for Franco-Ontarians, who now know they can keep contributing to the economic, social and cultural success of the province. This is also good news for northern Ontario, which will continue to feel like an integral part of this huge province, despite geographic distances.

[*English*]

Honourable senators, this is also good news for the public service in Ontario, who is educating and training the next generations; who is delivering health care services; and who is protecting Ontarians in its municipalities. This is also good news for businesses, small and large; for investors; and for not-for-profit institutions, as well as financial institutions, because of the stability it ensures to the province.

I thank Ontarians for electing a strong majority government, for choosing a balanced approach to governance, and for recognizing authenticity in a leader.

Democracy has spoken. Bravo, Ms. Wynne!

Some Hon. Senators: Hear, hear!

ROUTINE PROCEEDINGS

CONFLICT OF INTEREST FOR SENATORS

FIFTH REPORT OF COMMITTEE PRESENTED

Hon. A. Raynell Andreychuk: Honourable senators, I have the honour to present, in both official languages, the fifth report of the Standing Committee on the Conflict of Interest for Senators. This report recommends the adoption of an amended *Conflict of Interest Code for Senators*.

(*For text of report, see today's* Journals of the Senate*, Appendix, p. 1023*.)

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

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

CANADA-HONDURAS ECONOMIC GROWTH AND PROSPERITY BILL

FIFTH REPORT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE COMMITTEE PRESENTED

Hon. A. Raynell Andreychuk, Chair of the Standing Senate Committee on Foreign Affairs and International Trade, presented the following report:

Friday, June 13, 2014

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

FIFTH REPORT

Your committee, to which was referred Bill C-20, An Act to implement the Free Trade Agreement between Canada and the Republic of Honduras, the Agreement on Environmental Cooperation between Canada and the Republic of Honduras and the Agreement on Labour Cooperation between Canada and the Republic of Honduras, has, in obedience to the order of reference of June 12, 2014, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

RAYNELL ANDREYCHUK
Chair

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

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

ORDERS OF THE DAY

PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

BILL TO AMEND—THIRD READING—
DEBATE CONTINUED

On the Order:

Resuming debate on the motion of the Honourable Senator Housakos, seconded by the Honourable Senator Fortin-Duplessis, for the third reading of Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, as amended.

Hon. George J. Furey: Honourable senators, I wish to thank Senator Housakos for his wise words yesterday and for his courtesy and cooperation as the sponsor of this bill.

Colleagues, I want to take this opportunity to say a few words about the importance of Bill S-4. More particularly, I want to speak to an amendment that was voted down at committee.

In 2000, Parliament passed the Personal Information Protection and Electronic Documents Act, the act that we know as PIPEDA. Clause 4 adds good things to PIPEDA. Senator Housakos outlined a number of those yesterday and I agree entirely with him. The Privacy Commissioner holds new powers such as stiff penalties that it did not have before. Safeguards are enhanced; protections are bolstered.

Bill S-4, in many regards, is good legislation. However, it does one fundamentally damaging thing to the privacy of Canadians: it opens up the disclosure of private data to non-governmental institutions. Before Bill S-4, PIPEDA was an act that dealt with how governmental organizations such as the police, CSIS and CRA might obtain private subscriber information from telecoms.

Now, with section 7(3)(*d.1*) of Bill S-4, this section extends the disclosure of data to any organization — not just to government organizations such as police and CSIS.

Any corporation can now ask for and obtain your sensitive, personal information. More specifically, Bill S-4 now gives immunity to the telecoms who disclose your private information to another corporation. Further, there is no obligation on the part of the telecom to even inform you of this disclosure.

• (0920)

The proponents of subclause (*d.1*) of Bill S-4 say there is a strict four-part test to protect against wrongful disclosure of your data. Colleagues, let us consider the test contained in (*d.1*).

The first two parts require that the disclosure is made to another private sector organization and must be reasonable. This is no test at all. No judge sits to determine if the request is reasonable. Is it likely that a telecom will resist any request, reasonable or not? They are given immunity in (*d.1*). What interest do they have in resisting delivery of data and potentially becoming embroiled in litigation themselves?

The third part of this test is that the request must relate to an actual or likely breach of an agreement. Again, this is no real test. How much proof of an agreement or of a breach must such a request make? Is it sufficient if the request simply asserts an agreement and a possible breach?

In reality, with immunity from consequences of disclosure, why would telecoms care what the request is asserting? If the request simply said, "Give me the data or we'll pull you into court," why wouldn't the telecom simply deliver the data? They have immunity for just such delivery.

The remaining factor of the test is that it must be reasonable to believe that telling the person whose data has been disclosed would compromise an "investigation." Again, it only requires that the request assert that secrecy is necessary for an "investigation." There is no objective party, such as a judge, to say that this factor has or has not been met. The self-serving and subjective nature of this process is identical to the old process where the director of competition would issue a letter under section 10 of the Combines Investigation Act and that letter was all that was required to force private companies to disclose documents about the target of the combines investigation. Yet even in this case involving the government, the Supreme Court of Canada, in *Hunter v. Southam*, struck down that procedure, saying it was too subjective and too vague. It failed to include a judicial officer and it failed to get prior judicial authorization.

Here is what Chief Justice Dickson of the Supreme Court of Canada said in *Southam* about the same type of justification we have heard for inserting subclause (*d.1*) in Bill S-4:

> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

Think about it, colleagues. Chief Justice Dickson insisted on judicial authorization before a government entity could get your private information. In Bill S-4, we are authorizing non-government entities, copyright trolls, litigation threat firms, collection agencies; any corporation can obtain your private information from an Internet company if they present a "reasonable" story to a telecom.

Senators, this takes us down the road that has been followed by our neighbours to the south, where if some child downloads a movie, their parents are unwittingly put into a shakedown by copyright holders demanding thousands of dollars lest they be sued for millions.

This type of behaviour is becoming an industry south of the border.

I am not suggesting, colleagues, that we turn a blind eye to copyright infringement; quite the opposite. This amendment would make the content providers apply through a judicial body for release of private information. This is how it should be.

With (*d.1*) there is no judge to determine the truth or fallacy or reasonableness of the story that content providers present to the Internet provider. With immunity, the telecom will not get into expensive verification of these stories. Why would they? An amendment to (*d.1*) will protect Canadians' privacy against all of the damage that will flow from the unauthorized disclosure to non-governmental third parties, whose interests are most certainly opposed to the interests of the average Canadian user of the Internet.

Today, without Bill S-4, if a private company or a non-governmental organization wants your private information from a telecom, there is an existing legal way to get it. In the *TekSavvy* case, an American company went to the Superior Court of Ontario and made application under Rule 30.11 of the *Ontario Rules of Civil Practice*. The rule states:

> The Court may, on motion by a party, order production for inspection of a document that is in the possession of a person not a party.

— meaning not a party to the litigation. Judicial supervision of disclosure of private information has always been and should continue to be the Canadian way.

I ask colleagues to support an amendment that at least maintains the status quo, where immunity for data disclosures only covers government organizations and does not cover private companies.

The second part of the amendment proposed at committee was the addition of section 7(3.1). At Bill S-4 hearings, we heard from law professor Michael Geist, who told us about requests made to the telecoms for the number of times they delivered data to government organizations pursuant to section 7(3). In one year, it was over a million requests, and almost that same number were delivered. Professor Geist explained that there is no way of knowing this unless the telecoms volunteer this information.

One of the things that the Liberal government of 2000 gave the Internet companies was immunity for disclosing the private information of subscribers to any government organization that asked for it. There is no requirement to notify individuals regarding the disclosure of this private information. That is what is in section 7(3) of PIPEDA.

The amendment introduced at committee did not remove section 7(3) from the legislation. The telecoms can still release your private information to government organizations without your consent or knowledge.

The proposed amendment merely requires the Internet provider to notify the individuals whose personal information had been disclosed without their knowledge. We were asking that they be notified. The amendment was voted down. There was no reason to vote it down. It did nothing to change PIPEDA. It merely allowed Canadians to wake up and see what the government and the Internet companies are doing with their private information without their knowledge. This amendment merely allows light to shine on an otherwise dark process. It is an amendment that would allow Canadians to have the right tools to protect their private information.

This amendment also asked that the Internet companies inform the Privacy Commissioner of the number of times they had delivered data to government institutions. This would allow for Canadians to know the extent to which telecoms were delivering millions of private data to government organizations without their knowledge.

Such an amendment is an unambiguously good thing for Parliament. It is a good thing for subscribers and, colleagues, it is a good thing for democracy.

Some Hon. Senators: Hear, hear.

Senator Furey: Canadians will learn what is happening with our private information and the commissioner will be told what the telecoms are doing.

It is a technically sound amendment; there are no inherent contradictions in the act if this notification to the commissioner and notification to the individual is passed. Such an amendment will improve this legislation for all Canadians. That is what we do here in this chamber, colleagues — we improve legislation.

Think, senators — just think — of all the warrant provisions we have in Canadian law. Every last one of them requires that the target of the warrant be notified — sometimes sooner, sometimes later, but always notified. There is no such requirement in this bill.

• (0930)

But in Bill S-4, if we do not put in this amendment, law-abiding Canadians who use the Internet are not going to be told that the government has enlisted the telecoms for quasi-government surveillance. They are not going to tell the Privacy Commissioner.

Colleagues, this proves to me that PIPEDA is not as well written as it should be — and I say this about a Liberal piece of legislation; I must, indeed, be independent.

Colleagues, I ask that you support the following proposed amendment. I ask that you support making what is already a good bill a better bill for Canadians.

Some Hon. Senators: Hear, hear.

MOTION IN AMENDMENT

Hon. George J. Furey: Therefore, honourable senators, I propose that Bill S-4 be amended as follows:

That Bill S-4 be amended in clause 6,

(*a*) on page 5,

(i) by deleting lines 14 to 21, and

(ii) by relettering paragraphs 7(3)(*d.2*) and (*d.3*) as paragraphs 7(3)(*d.1*) and (*d.2*) respectively;

(*b*) on page 6, by relettering paragraph 7(3)(*d.4*) as paragraph 7(3)(*d.3*); and

(*c*) on page 7, by adding after line 6 the following:

"(14.1) Section 7 of the Act is amended by adding the following after subsection (3):

(3.1) Except where otherwise expressly provided by law and subject to subsection (3.2), an organization shall notify the individual of any disclosure of his or her personal information made by it under subsection (3), and the purposes for which that disclosure was made, within 60 days of the disclosure.

(3.2) On the application of a government institution, the Court may grant an order that notification under subsection (3.1) be delayed if the Court is satisfied that it is in the public interest to do so.

(3.3) An organization that discloses personal information under subsection (3) during a fiscal quarter of a fiscal year shall, as soon as feasible after the end of that fiscal quarter, submit to the Commissioner a report on the number of disclosures of personal information made by it under subsection (3) during that fiscal quarter, indicating

(*a*) the total number of disclosures made;

(*b*) the number of disclosures made in respect of each of the applicable circumstances set out in paragraphs (3)(*a*) to (*h.1*); and

(*c*) the number of disclosures that included each of the following classes of personal information:

(i) name,

(ii) address,

(iii) electronic mail address,

(iv) telephone number,

(v) electronic message content,

(vi) computer data,

(vii) Internet Protocol address,

(viii) Uniform Resource Locator, and

(ix) any other class of personal information specified by the Commissioner.

(3.4) The Commissioner shall make public the name of any organization that submits a report under subsection (3.3), together with the information referred to in paragraphs (3.3)(*a*) to (*c*) that is contained in the report.".

Thank you for your attention, colleagues.

Some Hon. Senators: Hear, hear.

The Hon. the Speaker: Honourable senators, it has been moved in amendment by the Honourable Senator Furey, seconded by the Honourable Senator Eggleton, that Bill S-4 be amended in clause 6(*a*) on page — shall I dispense?

Hon. Senators: Agreed.

The Hon. the Speaker: Could I ask the table whether copies of this are being circulated? Perhaps that could be circulated.

Are honourable senators ready for the question?

Hon. Pierrette Ringuette: I have a question.

Senator Furey, thank you very much for enlightening us on Bill S-4, as many of us are not part of the committee that studied the bill. I am somewhat disturbed by your statement that over 1 million disclosures from telecoms were provided to government agencies.

Can you give us more information as to which government agencies those were and if there was a certain purpose for that disclosure of 1 million pieces of personal data of Canadians?

Senator Furey: Thank you for the question.

To begin with, there were a little over 1 million requests for information, and somewhere in the vicinity of 800,000 were delivered. The only way this information came to light was when Professor Geist fortuitously got it through an ATIP arrangement, otherwise we never would have known.

What I'm asking to do in this legislation is to at least have the commissioner tell Canadians what the quantity is of the deliveries that telecoms are giving to government organizations and, if we do not pass this amendment, to private companies. We're looking at just the amount so that Canadians can sit back, take stock and say, "Tele-company *A* hands out nothing, tele-company *B* hands out 1 million a year, and tele-company *C* hands out 2 million a year. Guess what company I'm going to go to."

Senator Ringuette: During your study of the bill were there any questions around whether the bill was constitutionally sound and if it respected the Canadian Charter of Rights and Freedoms?

Senator Furey: Thank you again for that question. That did not come into the debate. On a periphery there was some discussion about it.

Today, I understand the Supreme Court of Canada is coming down with a decision with respect to the receipt of warrantless information from telecoms based on what I would call "forced agreements" that are signed if you want to use the Internet.

In the *Telus* case the Supreme Court did not mention the agreements. What they talked about was the general warrant that the police used to try to get information. They said, "No, no, that's not good enough. If you want that type of personal information about Canadians there should be a specific warrant." Whether they speak to that today or just speak to the agreements, we have to wait and see.

Hon. Donald Neil Plett: Thank you, Mr. Speaker. I'd like to make just a few comments, if I could.

Senator Furey, as he always is, was reasonable in his comments and remarks. He certainly was at committee. He suggested these amendments at committee and, as he says, they were turned down.

Some of the reasons that they were turned down are that the first proposed amendment, deleting lines 14 to 21, to eliminate the ability of private sector organizations to share in the context of a private investigation, in our opinion, is too broad. It would completely eliminate the ability of organizations, like self-regulating organizations — and I mentioned this at committee — to investigate and discipline their members for professional misconduct or malpractice which could put Canadians at a greater risk.

Of course, Senator Furey in his comments did talk about the rigorous four-part test that must be met. The bill would be subject to a rigorous four-part test that must be made to another private-sector organization — not government — be reasonable for the purpose of investigating a breach of agreement of contravention of law; the breach or contravention must have occurred, is

occurring or about to occur; and must be reasonable to believe that obtaining the individual's consent would compromise the investigation.

In regard to the second amendment changing the lines on page 7, again this amendment is too broad and impractical, in our opinion. In my opinion, it would require organizations to flood individuals with an avalanche of notifications and undermine accepted practices of confidentiality. For example, it would require organizations to notify individuals of disclosures made to a lawyer, forcing the organization to violate solicitor-client privilege, of personal information that is publicly available — for example, telephone directories — or be made 20 years after the death of an individual, or 100 years after the record containing the information was created.

• (0940)

PIPEDA already requires organizations to be transparent about their data management practices and gives individuals the right to ask companies who they have shared their personal information with and why. These were the arguments that I made at committee. I think in the house, when the minister was questioned about the amendments, he made it quite clear that these amendments could again be raised by the opposition party in the house. This bill was started in this chamber and will go over to the other place, so voting against these amendments here does not mean they don't have another chance.

I suggested at committee that maybe we append observations to this rather than pass the amendments. Senator Furey did not want to do that at that point, but I do not believe that Senator Furey is an unreasonable person ever, and I don't believe he is an unreasonable person here with the amendments, and I would sincerely hope that these amendments and others will be very seriously considered in the other place, and if they deem these amendments to be proper, they will accept them there. If they deem them not to be proper, they won't.

We determine — Senator Eggleton, if you have a comment, right after I'm done you can make those comments. Thank you.

However, not everybody in our committee clearly is as reasonable as Senator Furey is on the other side, but Senator Furey certainly was. Senator Furey, with all due respect, I still wish the observations had been made, but they weren't. That, of course, is behind us, and we now have to take other measures. For today, I certainly cannot support these or any other amendments to, as you suggest, an already very good bill.

The Hon. the Speaker: Would Senator Plett take a question or comment?

Senator Ringuette: Senator Plett, will you take a question?

Senator Plett: I will take a question. I will probably not give you the answer you want, but let's try.

Senator Ringuette: Well, I guess I'm somewhat surprised, but my question was merely, when you started to make your comments, you indicated that corporations should have the right to have access to information via this bill. Could you give us a few examples?

Senator Plett: Would you repeat that please?

Senator Ringuette: In your statement, you said that corporations should have the right to have information from these telecoms in regard to employees or other kinds of litigation issues. Could you give us some examples?

Senator Plett: Well, I think the best example would be in large law firms, professional organizations.

Senator Ringuette: How?

Hon. Art Eggleton: If I may ask, in your praise of Senator Furey, you indicated that he was being reasonable and that you felt the amendments had some merit. That is what I was hearing from you, but you thought they could be considered over in the other place. What's the matter with this place? Why wouldn't we consider these amendments right here?

Senator Plett: The fact of the matter, Senator Eggleton, is that they were considered. They were considered at committee, and we are considering them here. They were voted down at committee. We did consider them.

Senator Eggleton: Well, I hope you'll support it now.

Hon. Leo Housakos: Your Honour, I do want to underline that we had great cooperation in our committee. We did have in-depth discussion on the issue. I want to be clear that digital privacy issues really will be the challenging question of our time as a Parliament as the decades go on. Technology is changing at a rapid pace on a daily basis, and all governments — previous governments and this government — are trying to grapple with the challenges we have in making sure that businesses can function while making sure, of course, that privacy issues are respected.

We're learning as we go along. PIPEDA was installed by a previous government in 2000, and it's one of those bills that will be reviewed on an ongoing basis. It will evolve as technology evolves. As a result, we saw that in the discussions and debates we had. The amendments were considered. For some of the reasons my colleague highlighted earlier, they were defeated.

We keep bringing up the example of these million plus requests made by government agencies to the private sector, but we have to keep in mind that some of those requests are inconsequential requests, simple requests like confirming a name and address of an individual, confirming information that you would find in a telephone book in 2014.

We cannot put in place legislation that creates a cumbersome environment in the business sector where businesses can't function, are not able to provide us services that we demand of some of these companies, simple services that we demand from our Interac companies, credit card companies and insurance companies, et cetera.

PIPEDA has a clause which I think is the most outstanding and beneficial in trying to overlap some of the problems we have, and that's in section 8 where PIPEDA gives every Canadian the right to go to any company in this country that has access to our data information and within 30 days force them to provide the information of where they have disclosed your information and to whom and why. There is nothing more all-encompassing in terms of protection to Canadian individuals than that particular section.

Senator Ringuette: Senator, will you take a question? It's very simple and the most basic one. Has your committee looked into the constitutionality of this bill in regard to the Canadian Charter of Rights and Freedoms?

Senator Housakos: Quite honestly, I don't think it's upon our committee to do that. The Charter of Rights and Freedoms applies to all Canadians, and any Canadian that wants to exercise the Charter of Rights and Freedoms has the courts and the ability to do so. I don't think our committee has that responsibility, quite frankly.

Senator Ringuette: That's quite shocking, because this chamber and its committees have always prided themselves on testing the legislation in regard to its constitutionality and respect of the Canadian Charter of Rights and Freedoms. This specific legislation probably has some implication in regard to Canadian freedom.

If the committee has not done so, I think that before we take a vote on any kind of amendment, or specifically the bill, we should go into Committee of the Whole and ask some experts to come and answer questions in regard to the constitutionality of the bill and the rights that Canadians have under the Charter, to make sure that this chamber of sober second thought does its due process to the bill.

Senator Housakos: Senator Ringuette, our committee had a large number of witnesses come before it, including the Canadian Bar Association, a number of lawyers. I think they are well situated to determine whether this in any way, shape or form contravenes the Charter of Rights and Freedoms, and not on one occasion did a single witness bring that argument to the table. By and large, the vast majority of witnesses found this bill to be a very good bill. They had some minor questions and issues regarding the bill, which we debated, but by and large, overwhelmingly, the vast majority of witnesses, including the Canadian Bar Association, thought this was a good bill.

Senator Ringuette: Maybe the honourable senator would be able to summarize for us the comments of the Canadian Bar Association at committee?

Senator Housakos: I don't have the details of the elements of their discussion, but we tabled the report. It's on record, and I welcome you to peruse it. I assumed we all did so before we came to the discussion table today to pass this bill and to vote on amendments. I can't give you the specific elements of their testimony, but I can tell you that by and large it was positive.

Hon. Denise Batters: Wouldn't it be the case, as with every single government bill brought forward, that the Department of Justice would review it to make sure it is Charter-compliant?

An Hon. Senator: No.

• (0950)

Senator Housakos: Again, I can't tell you if that's the case or not. All I can tell you is that a large number of witnesses came before the committee, including the Canadian Bar Association, and I would think, given the nature of the work that lawyers do in this country, if they thought there was any issue regarding the constitutionality of it, they would have brought it to the table, which they did not.

[*Translation*]

Hon. Marie-P. Charette-Poulin: My question is for the deputy chair of the committee, Senator Housakos. I would like to continue in the same vein, since you cited the testimony of the Canadian Bar Association.

I cannot understand why, with such great cooperation in the committee, as you say, the committee did not accept Senator Furey's amendment, which seems perfectly reasonable to me and makes an improvement to a law that, as Senator Ringuette was saying, has to do with a fundamental Canadian value.

[*English*]

Senator Housakos: Again I will outline, as my colleague Senator Plett did in detail — and I'll be repetitive because the question you're asking is similar to a question I was asked earlier — that this amendment removes the proposed paragraph 7(3)(*d.1*), which permits an organization to disclose personal information to another organization without consent in limited circumstances related to private sector investigations.

Bill S-4 proposes to repeal the existing provisions in PIPEDA that permit the disclosure of personal information without consent to investigative bodies. The bill proposes to replace these provisions with an exception allowing organizations to disclose personal information in the context of a private sector investigation, and my colleague highlighted the four exemptions in regard to this.

Senator Ringuette earlier asked for specific examples. If Engineers Canada conducts an internal investigation regarding fraudulent activities of one of their members, they have to have the right in a reasonable fashion to request certain information. If the Canadian Bar Association is investigating a member of their association and they require certain pertinent information in the course of that investigation, they must have the liberty in a reasonable manner to acquire certain data. When the Canadian Bankers Association or the Canadian Life and Health Insurance Association conduct investigations in regard to fraudulent

activities, they as well must have some reasonable flexibility in carrying out those investigations in order to protect the rights of citizens from the other side of the equation.

[*Translation*]

Senator Charette-Poulin: I find it rather worrisome to hear you say that, honourable senator. You are right that certain professional associations have a responsibility to investigate suspicions of irregularities. It is a very important right. Let me be clear: when there are suspicions of irregularities.

However, given that in law firms everything is based on attorney-client privilege, it would be absolutely unacceptable to open this door just because of a lack of reasonable precision in the law.

[*English*]

Senator Housakos: I think there is a misunderstanding regarding what we're saying. If the Canadian Bar Association is investigating one of their members, they're not investigating anything that has to do with solicitor-client privilege; they're investigating their behaviour in regard to their practice as lawyers under the bar association rules. So I think the bar association, as you've used that example, would be cognizant enough to make sure what legal lines they can and can't cross.

Above and beyond the rules in PIPEDA, there are fundamental laws in this country that supersede PIPEDA, and they would do so in this particular case as well.

Senator Furey: Senator Housakos, since you raised this issue of organizations such as law societies, there are many regulations governing self-regulating organizations. They cover a whole host of associations, and they have numerous ways of investigating their own membership.

All I'm saying is that this amendment will not roll back any of that. What it will do is stop private companies from getting warrantless information that they do not have to disclose to the average Canadian, and that was the concern with the amendment, not to roll back in any way, shape or form the present ability of those organizations to do the things they need to do.

Senator Housakos: Senator Furey, I understand the purpose of the amendment, and I was not entirely closed to the idea, as you know. We had discussions back and forth, and I had discussions with the ministry.

But we also have to keep in mind that whatever amendments and recommendations we make, they can't be so broad as to be impractical and to create needless bureaucracy within the private sector.

We have to appreciate and understand that sometimes in the course of work — take two insurance companies, for example, that are communicating back and forth because they are compelled to do so, because they have two individual clients who are making claims and requests, and they will simply request from one insurance company to another confirmation of a name, an address or simply that they're insured by the company in question.

Can you imagine if we made it incumbent upon every single data transaction in this country that they notify the citizens of that transaction or of that exchange of information? We would boggle down Canadian companies doing nothing more than just back and forth informing people that "we got a call today and we confirmed you are who you are and you're a client of ours."

We also have to be careful to ensure we allow the private sector to function in a reasonable fashion while protecting our data, and I think if we look in detail at PIPEDA, it does that in a reasonable fashion. That's why we thought that adding that amendment to this bill would have made it a little too broad and too impractical to function.

Senator Furey: While you agree, Senator Housakos, that we can't be so wide open that we allow patent trolls to start harassing Canadian families, I think you're saying that the amendment, had it been a little narrower, would have been satisfactory to you. Is that what I'm hearing?

Senator Housakos: I think it might have gotten a little further than it did, absolutely.

Senator Ringuette: Maybe Senator Housakos could clarify his answer to one of the questions. He said, "We can't impose needless bureaucracy on the private sector to notify Canadians that their private information is being disclosed."

Are you saying that you and some of your colleagues are willing to sacrifice the privacy of Canadian citizens in regard to creating some bureaucracy in the private sector?

Senator Housakos: Clearly, that's not at all what we're advocating. If you carefully read the elements of this bill, this bill has gone further than any previous bill when it comes to data breaches and protecting Canadian citizens. That's why we're currently compelling companies to notify on reasonable grounds when there is a data breach.

As you can see, the penalties we've imposed in this particular amendment of PIPEDA are harsher than ever before, up to $100,000 per data breach. I don't want to mention particular companies, but with companies that carry hundreds of millions of data information files about tens of millions of people, can you imagine if they were found to have a data breach of one million customers at $100,000 each?

I think we are also underestimating the corporate responsibility of some of the great companies in this country, be it in the banking or telecommunications industries. They themselves have gone far out ahead and into far more detail when it comes to disclosing data information. Right now, there are a number of examples of Canadian companies that are being proactive when it comes to data breach notifications to their clients and go far further than what PIPEDA requires.

So I think it's very irresponsible to give the impression that this bill does nothing to protect the data of Canadian citizens. It goes a lot further than other legislation ever has, and we're very proud of this piece of legislation.

• (1000)

Hon. Joan Fraser (Deputy Leader of the Opposition): Colleagues, I've been greatly distressed by some of the things that have been said in this debate. I am no expert on PIPEDA. I've sat on committees that have looked at aspects of it, but I have always thought it could use a bit of strengthening.

I think Senator Furey made a truly compelling case for his amendments, but I was really taken aback to hear Senator Housakos say that it is not his committee's job to assess the constitutionality of legislation that comes before it. I was almost as taken aback to hear Senator Plett's suggestion — because this is the way it came across, Senator Plett, even if it's not what you intended — that it's not for us to amend legislation; it's for the Commons.

This is a Senate bill, originating in the Senate. It is the most fundamental element of our duty to assess the constitutionality of any legislation that comes before us. We all know that any government is supposed to have the Justice Department assess the constitutionality, in particular the compliance with the Charter of Rights and Freedoms, of any bill it presents. We also know that the threshold that the Justice Department uses is, shall we say, not very high.

There have been very persuasive indications that the Justice Department merely has to say that if this were taken to court an argument could be mounted that the legislation is constitutional. Whether that argument would have any likelihood of holding in the face of judicial examination doesn't seem to be the issue. It's just, could we make an argument?

Perhaps that's useful for governments of the day, but what are we here for? Why are we here, if not to think hard about whether every bill we pass meets the necessary constitutional tests? Sometimes we make mistakes; sometimes we pass bills that the courts inform us later — sometimes to our great embarrassment — are not constitutional, but we should at least try. Where, if not in committee, should we try?

Colleagues, we really need to think very seriously about these assertions, because if that's not our job, I don't know what is.

Hon. George Baker: Honourable senators, I don't want to make a speech on this, but Senator Furey's reasons are well-founded, and his recollection of case law is absolutely correct; and his observation that today the Supreme Court of Canada will make a decision relevant to this question is also correct.

It's important to note that to date what the Supreme Court of Canada has said, in the matter of, as Senator Furey pointed out, TELUS, which involved a case where a general warrant had been used. A general warrant is pursuant to section 47.01 of the Criminal Code. It's an extraordinary warrant in that you can do under that warrant what you can't do under any other warrant in the code.

The warrant sought to have the text messages of the object of the investigation recorded by TELUS into the future copied and delivered to the police. The Supreme Court of Canada said that to use any other warrant in the Criminal Code, apart from the interception of private communications warrant, pursuant to section 186 of the Criminal Code, would be unlawful.

The jury is out as to what the requirements are for material that's already in possession of TELUS. Every time you text message, as the evidence showed in that case — and I've read it very carefully, because I don't know very much about text messaging; I never use it — but what TELUS does is they hold on for quality control purposes to all text messages in their master computer in Toronto for a minimum period of 30 days, for quality control.

When you look at section 186 of the Criminal Code, it says that as far as these companies are concerned, they can intercept private communications and hold it for quality control purposes. So, the jury is out as to what type of a warrant you would need to get the text messages that are held for quality control purposes. All text messages with TELUS are held for quality control purposes. If they get a production order for documents, as was used in the case of senators recently here on the Hill, a production order, then they will hold on to the records that are held for quality control purposes until the court gives the order on the production of papers, a production order.

The matter to be decided today is of great importance to the matter before us. Senator Furey is simply saying he'd like to have the provision that exists in the Criminal Code under section 186, interception of private communications, that you must notify the object of the warrant three months — well, he's saying 60 days, but the provision stands at three months — which can be extended by a judge extending that period of time in certain matters.

So for interception of private communications, you must inform the object of the tap that that person has been tapped. I've read the wording of those notifications, and it's very general. Somebody who gets it says, "My goodness, what does this mean?" They go to a lawyer and have to pay a fee to find out that the lawyer will tell them, "No, we don't know what it means."

Then under recent changes we made to the Criminal Code in this chamber under the terrorism provisions, we extended the notification period to one year for everybody who had their private communications intercepted.

What I'm trying to say is that Senator Furey makes a reasonable request in that he is saying that since you have to do it under the general warrant provisions of interception of private communications, and under the terrorism provisions, there's a notification requirement and a certain period of time. He's saying why not institute it in this case, if it involves the use of private information?

The Hon. the Speaker: Are honourable senators ready for the question?

Some Hon. Senators: Question.

Some Hon. Senators: No.

The Hon. the Speaker: The question is on the amendment moved by the Honourable Senator Furey, seconded by the Honourable Senator Eggleton. Copies of it have been circulated.

All those in favour of the motion will please say "yea."

Some Hon. Senators: Yea.

The Hon. the Speaker: All those opposed to the motion will please say "nay."

Some Hon. Senators: Nay.

The Hon. the Speaker: In my opinion, the "nays" have it.

And two honourable senators having risen:

The Hon. the Speaker: Call in the senators. There will be a 30-minute bell; the vote will take place at 10:40 a.m.

• (1040)

Motion in amendment negatived on the following division:

YEAS
THE HONOURABLE SENATORS

Baker
Campbell
Chaput
Charette-Poulin
Cools
Cordy
Cowan
Dawson
Day
Dyck
Eggleton
Fraser
Furey
Hervieux-Payette
Hubley
Kenny
Massicotte
Mitchell
Munson
Ringuette
Robichaud
Smith (*Cobourg*)
Watt—23

NAYS
THE HONOURABLE SENATORS

Andreychuk
Ataullahjan
Batters
Bellemare
Beyak
Black
Boisvenu
Buth
Carignan
Champagne
Dagenais
Martin
McInnis
McIntyre
Meredith
Mockler
Nancy Ruth
Neufeld
Ngo
Oh
Patterson
Plett
Demers
Doyle
Eaton
Enverga
Fortin-Duplessis
Frum
Gerstein
Greene
Housakos
Lang
LeBreton
Maltais
Marshall
Poirier
Rivard
Runciman
Seidman
Seth
Smith (*Saurel*)
Stewart Olsen
Tannas
Tkachuk
Unger
Verner
Wallace
Wells—48

ABSTENTIONS
THE HONOURABLE SENATORS

Nolin—1

The Hon. the Speaker: Honourable senators, the question now before the house is third reading of Bill S-4.

Are honourable senators ready for the question?

Some Hon. Senators: Question.

The Hon. the Speaker: Senator Cowan, on debate.

Hon. James S. Cowan (Leader of the Opposition): Shortly before the bells rang at the conclusion of the debate on Senator Furey's amendment, the Supreme Court of Canada handed down its decision in *Spencer*. Some of us have had an opportunity to glance through it but certainly not to study it. It appears to impact the subject matter we're discussing here today.

It would be in the tradition of sober second thought that we take the weekend to have an opportunity to look at this and to then continue our third reading debate on Monday. There have been discussions between the leadership on both sides, and my friend Senator Martin will describe those shortly.

(On motion of Senator Cowan, debate adjourned.)

ALLOTMENT OF TIME—MOTION ADOPTED

Hon. Yonah Martin (Deputy Leader of the Government): Honourable senators, I wish to advise the Senate that I was able to reach an agreement with the Deputy Leader of the Opposition to allocate time on Bill S-4. Therefore, I move:

> That, pursuant to rule 7-1, debate on third reading of Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, as amended, will continue on Monday, June 16, 2014, and all questions necessary to dispose of third reading of the bill will be put and any requested standing vote shall take place before the Senate rises on that day.

The Hon. the Speaker: Honourable senators, under these circumstances, the rules provide that the motion is to be put to the house immediately. That is pursuant to rule 7-1 (3), so I will put the question.

• (1050)

It was moved by the Honourable Senator Martin, seconded by the Honourable Senator Fraser:

> That, pursuant to rule 7-1, debate on third reading of Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, as amended, will continue on Monday, June 16, 2014, and all questions necessary to dispose of third reading of the bill will be put and any requested standing vote shall take place before the Senate rises on that day.

Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Agreed.

An Hon. Senator: On division.

The Hon. the Speaker: So ordered, on division.

[*Translation*]

Hon. Claude Carignan (Leader of the Government): Honourable senators, I would like to clarify our position following the statement made by the Leader of the Opposition.

We agreed to adjourn this item on the Orders of the Day until Monday because of this decision. The opposition should not interpret this gesture on our part to mean that this decision has an impact on the bill. On the contrary, the pre-study shows that the decision has no impact and confirms our view on the matter. We agreed to this compromise in the interest of good relations and to allow opposition senators to study the decision more thoroughly. We are not doing this because we think this changes the bill — quite the contrary.

(Motion agreed to, on division.)

[*English*]

CANADA-NEWFOUNDLAND ATLANTIC ACCORD IMPLEMENTATION ACT CANADA-NOVA SCOTIA OFFSHORE PETROLEUM RESOURCES ACCORD IMPLEMENTATION ACT

BILL TO AMEND—THIRD READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Wells, seconded by the Honourable Senator Beyak, for the third reading of Bill C-5, An Act to amend the Canada-Newfoundland Atlantic Accord Implementation Act, the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and other Acts and to provide for certain other measures.

Hon. George Baker: Honourable senators, I have just a couple of remarks. I won't be very long on this.

With interest, Senator Carignan's statement a moment ago would be what any good Crown Attorney would say after being confronted with a decision of the Supreme Court of Canada, but it will give members of the Senate an opportunity and the government an opportunity to examine totally what the Supreme Court of Canada said.

Honourable senators, this is third reading of a very important piece of government legislation that everybody should support.

Before making just a couple of general comments, which I probably won't make, let me say that Senator Wells, who introduced this legislation in the Senate, is perhaps the most fitting person on Parliament Hill to introduce this legislation. Senator Wells has a past history associated with the Canada-Newfoundland and Labrador Offshore Petroleum Board. He was the deputy CEO. He was always Canada's representative, Canada's delegate, to the Northwest Atlantic Fisheries Organization that covered international waters off the East Coast of Canada in negotiations that took place all over the world. He has an extensive background in the subject matter of what is being dealt with in this bill at third reading.

There is only one other person I know of in this country who has more knowledge than Senator Wells does on the subject of keeping our offshore workers safe. That person is one of Newfoundland and Labrador's greatest jurists. He was a Supreme Court judge for 22 years, I believe, or 23 years; a Rhodes Scholar; member of the bar of England; attended Oxford University; and he is outstanding in his representation of the Canadian bar on international human rights organizations.

He was the commissioner who looked into the facts concerning the death of 17 people when a helicopter crashed on its way to an offshore rig. That inquiry came after another inquiry in which 84 Canadians lost their lives when an offshore rig sank. The person who is the only person I know of who has more knowledge than Senator Wells headed that commission of inquiry and came out with 29 recommendations, and I think they are all embedded in this gigantic bill we have before us today. Maybe one or two are not, but the vast majority are embedded in the legislation.

That one person who has more knowledge than Senator Wells is a gentleman by the name of Robert Wells. Now, you might ask if there is some family connection in our great jurist from Newfoundland and Labrador and Senator Wells. Well, the person who has the most knowledge of this subject is none other than Senator Wells' father.

You have the commissioner who examined all of the safety requirements that should be in place for Canadians working on offshore drilling rigs, transportation to and fro, and you have a

person who has been intimately involved in the offshore industry introducing the bill to implement that in the Parliament of Canada.

That's the first credit I want to make. Senator Wells was the right person in the right place to institute the safety requirements that were specified in a commission of inquiries report headed by Justice Robert Wells. That's the first point.

The second point I want to make, senators, is about the Standing Senate Committee on Energy, the Environment and Natural Resources, the committee that dealt with this bill in the Senate. I want to give credit to Senator Neufeld, the chair; Senator Mitchell, the deputy chair; Senator Boisvenu; Senator Massicotte; Senator Patterson; Senator Sibbeston; Senator MacDonald; Senator Ringuette; Senator Wallace; Senator Black and Senator Seidman. All of these people are outstanding people. Each of them has made a great contribution to Canada and the Canadian people in their past lives prior to becoming senators.

I know the chair, Senator Neufeld, was formerly the Minister of Energy for British Columbia for years and years. He instituted a scientific review of offshore oil and gas while he was the Minister of Energy for the Province of British Columbia. Senator Neufeld is an outstanding individual in his own right, a former politician. Who would believe that you would have a politician who got elected under three different party names, as Senator Neufeld did? That says something about British Columbian politics. He first got elected, I recall, as a Social Credit, and then came his great movement, which he headed, practically, of the B.C. Reform Party. I think my memory is fairly good on this. Then, of course, when there was no Conservative Party that could possibly be elected, he went Liberal —

Some Hon. Senators: Hear, hear!

Senator Baker: — with Premier Campbell and served for years as the Minister of Energy. Of course, his Reform associations, I suppose, were remarkable up to this point, but the one remarkable thing about him that I always remember, when you look at the statistics of Canadian politicians, is that no matter which party he ran for, he got over 50 per cent of the vote. Now, can you imagine running in subsequent elections with five, six or seven people running against you and you get over 50 per cent of the vote all the time, and you don't represent the party you represented the last time you got elected? It says something about the man.

• (1100)

Senator Mitchell, the deputy chair of the committee, has a political history that is almost as remarkable. Can you imagine being the leader of the Liberal Party elected in the Legislative Assembly of Alberta for a dozen years?

An Hon. Senator: They still want a recount.

Senator Baker: He's like Senator Wells. He's an incredible athlete. He's what they call an Ironman. Senator Mitchell is in terrific physical condition just like Senator Wells, who is a mountain climber. He has climbed all the great mountains in the world.

Among the rest of the members of the committee, we have two former premiers: Senator Patterson and Senator Sibbeston. I could cite each one of those names and offer something about their remarkable history and the reason they stand out in Canadian politics.

I'm doing that because this is a committee report and, as we know, the Supreme Court of Canada recently gave a judgment on the Senate. The Supreme Court of Canada spoke of sober second thought and representing regional interests, but they had a qualifying sentence in paragraph 15:

> This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada:

In other words, the Supreme Court of Canada said sober second thought on the legislative process on bills. Of interest in my listening to the recent speeches given here on the changes that are needed and why we don't adopt amendments to certain bills, I want to put on the record paragraph 58, the "emphasis added" by the Supreme Court of Canada as to the role of the Senate.

When you put "emphasis added" in a judgment, or in some declaration you're making, it's for a reason. You put "emphasis added" because it highlights something extraordinarily important. The Supreme Court of Canada added "emphasis added" at the end of paragraph 58. They were quoting Sir John A. Macdonald, and here is what the "emphasis added" was:

> An appointed Senate would be a body "calmly considering the legislation initiated by the popular branch . . . .

The popular branch is the House of Commons.

> . . .and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people":

The words that in "emphasis added" are:

> . . .but it will never set itself in opposition against the deliberate and understood wishes of the people":

One would interpret that to mean that the wishes of the people are expressed on voting day.

Honourable senators, I think that's an important point. We have a function in the Senate that's performed very well. We amend legislation. I can provide several examples. Look at the Elections Act. When we did the pre-study on the Elections Act the major amendments came from Senator Plett and Senator Frum. And it was great to hear, when the news got out on the weekend, that the Senate was proposing amendments to the legislation. The government had initially said no, that they would not consider

amendments to the legislation, and the minister spoke about that publicly. I enjoyed this because he was correct when he said that senators are intelligent people, of great backgrounds, and he would need to have a good hard look at any recommendations they make.

All of a sudden you had the Leader of the Opposition in the other place saying, "What, the Senate? How come the Senate is being considered for those amendments when they won't consider our amendments?" So the major amendments to the legislation came from the Senate after careful consideration. The senators didn't just blindly write out amendments. No, they had the matters checked and they did it properly.

As an illustration of the great role the Senate performs, we've heard recent speeches in this chamber talking about how the Senate should be changed — the Senate has got to change this or the Senate has got to change that. Every day when I read case law of our courts in this country, of our quasi-judicial bodies, of disciplinary boards, of labour reviews, all of the administration of law in Canada, which you can read on the electronic provisions of Westlaw, Carswell or Quicklaw, you see the value of the Senate and how the Senate performs a vital function.

I looked at it in the last two weeks. Let me give a couple of examples from just two weeks that refer to senators who are sitting here today, and their committees. This is why I mentioned the great job that the committees of the Senate do. Let me read in three sentences from three different cases a couple of weeks ago.

Starting with Nova Scotia Supreme Court, Justice Chipman, 2014, Carswell, NS380, as an introduction to the other two, at paragraph 103 he pointed out that he looked at the reports that are admitted as evidence in court for the truth of their contents and those that require further evidence. He summarized the decision of the Supreme Court and here is his quote from paragraph 103, and it's interesting:

> The *Robb* decision has been repeatedly followed. Canadian courts have been emphatic that documents such . . .

And then he lists the documents that are frequently considered by the courts.

> . . . as Royal Commission reports, public inquiry reports, R.C.M.P. public complaint commission reports, Senate Committee reports and ombudsman reports . . . .

Then he goes on to declare whether or not they would be admitted for the truth of their contents as evidence.

You see the "Senate Committee reports" repeated over and over again when you're summarizing the important reports considered by our courts.

Let me now go to the case of *Ross v. Ross*. This is a divorce proceeding; 2014 Carswell Ontario, 5284, but it involves this committee here considering the changes to the Bankruptcy Act. That would be the Standing Senate Committee on Banking, Trade and Commerce. Justice Cornell of the Ontario Superior Court gave a decision in this divorce proceeding, *Ross v. Ross*. Apparently Mr. Ross had declared bankruptcy. They were talking about his discharge from bankruptcy; in other words, a discharge or an absolute discharge and what conditions would follow an absolute discharge and how that plays into spousal support in a divorce proceeding.

This is what Justice Cornell said at paragraph 39. He's quoting from a recent decision of the Supreme Court of Canada in which he says:

> . . . division of matrimonial property have also been considered by the Standing Senate Committee on Banking, Trade and Commerce.

This is one of these five-year reviews we do. Every committee at some time has to do a five-year review of legislation, or a 10-year in some cases and in some cases a 2-year, but it was during these reviews.

• (1110)

It says "A Review of the Bankruptcy and Insolvency Act and the Company Creditors Arrangement Act." To this end, the committee recommended that the BIA, the Bankruptcy and Insolvency Act, be amended to provide:

> . . . that bankruptcy does not stay or release any claim for equalization or division against exempt assets under provincial/territorial legislation regarding equalization and/or the division of matrimonial property.

In the next paragraph, he's quoting the Supreme Court of Canada. He says:

> It seems to me that this matter is ripe for legislative attention so as to ensure that the principles of bankruptcy law and family law are compatible rather than being at cross-purposes.

That is the Supreme Court of Canada and the Ontario Superior Court taking a report from this Banking Committee on a review of legislation and referring to a recommendation of that committee. You would never see that from a Commons committee because that's not their function.

Let me give you one that's more interesting. This is from two weeks ago and is found at 2014 Carswell Ontario, 5568. Again, it refers to another committee here where John Baird appeared as a witness. The case is called *Chowdhury v. Canada,* and it was a reference to the Corruption of Foreign Public Officials Act. Some members of the committee who are here would know what I'm talking about. The court reviews what was said in the Senate committee. This is the Crown's position in the case, at paragraph 47:

> The Crown also points to evidence from the Standing Senate Committee on Foreign Affairs and International Trade when that committee considered the amending legislation that added s. 5 to the *CFPOA*.

That is the Corruption of Foreign Public Officials Act, I believe. It continues:

> The legal advisor from Foreign Affairs and International Trade told the Committee . . .

Here you have the legal authority from the department saying to the committee in one paragraph:

> This bill applies to Canadians, to residences, to companies and to Canadian members of those companies."

He goes on, but I won't repeat it all. That's the official from the Justice Department. He then mentioned the principle of "a substantial link to Canada."

The court says:

> If the reference to "a substantial link to Canada" was intended to refer to the test from *Libman*, then, with respect, that comment confuses jurisdiction over the offence with jurisdiction over the person, as I have already explained.

Then the court says:

> The issue here appears to have been more directly addressed by the Minister of Foreign Affairs when he told the Committee:
>
> > Mr. Baird: At the same time, if they are not a Canadian resident, they are not a Canadian citizen, and so it is very difficult for us to capture them.

He continues, and then the court says:

> It appears that it was the Minister's view that foreign nationals were not caught by the *CFPOA*, that Canada would not have jurisdiction over them and that it would be up to their host country to decide on any prosecution of them.

In the next paragraph, however, the judge talks about our Department of Justice when he says:

> The Crown submits that such an interpretation would allow the applicant to get away with his activities "with impunity".

So you have a case where you had two witnesses before our committee here in the Senate, legal authorities and the minister. The minister was clearer than the legal authorities, but now you've got the Crown making the opposite argument in order to prosecute their case. That all happened before that particular Senate committee.

The examples go on and on that Senate committees are the place where a lot of the great work of the Senate exists. Some people suggest that changes have to be made in the Senate, but the principal function finds its place in the adjudication of all our laws in this country, whether it's before the courts, quasi-judicial bodies or any other form of adjudication as it relates to law, the Criminal Code and the foreign acts. It is the Senate they go to, consistently now. We see it even more now than it was 10 years ago because the House of Commons has become solidly political. The role of examining legislation with sober second thought here is such that now the courts and all our judicial bodies in Canada go to the Senate for the true meaning of sections of every law that we pass. I think that should be kept in mind.

One of the recommendations on change of procedure in this place that I would like to see, Your Honour, is that we have a procedure here in the Senate whereby committees can consistently report on their witnesses and on the subject matter that's before the committees. I don't know what the subject matter is before other committees that I don't take part in, yet they are fascinating proceedings. It should be part of the Senate proceedings given the parameters of the decision of the Supreme Court of Canada.

Yes, we can fix the procedures here so that if we're televised we won't appear to be as political as the House of Commons. In other words, remove the politics from what appears to be the politics if somebody were to watch the proceedings of the Senate. But if you were to add "committee period" instead of "Question Period," I think we would fulfill our role far better. I think it would be great to have televised proceedings because then Canadians would see what all of our adjudicators see in enforcing the laws and in applying the laws of Canada. They would see that the Senate is fulfilling its function. It is doing its function well and we should not forget that.

Some Hon. Senators: Hear, hear!

The Hon. the Speaker *pro tempore***:** Are honourable senators ready for the question?

Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

(Motion agreed to and bill read the third time and passed.)

APPROPRIATION BILL NO. 2, 2014-15

SECOND READING

Hon. JoAnne L. Buth moved second reading of Bill C-38, An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2015.

She said: Honourable senators, the bill before you today, Appropriation Bill No. 2, 2014-15, provides for the release of the remainder of the supply for the 2014-15 Main Estimates that were referred to the Senate on March 4, 2014.

The government submits estimates to Parliament in support of its requests for authority to spend public funds. Main Estimates include information on both budgetary and non-budgetary spending authorities, and Parliament subsequently considers appropriation bills to authorize the spending.

The 2014-15 Main Estimates include $235.33 billion in budgetary expenditures and a decrease of $10.02 billion in non-budgetary expenditures.

• (1120)

The $235.33 billion in budgetary expenditures include the cost of servicing the public debt; operating and capital expenditures; transfer payments to other levels of government, organizations or individuals; and payments to Crown corporations.

These Main Estimates support the government's request for Parliament's authority to spend $86.28 billion under program authorities that require Parliament's annual approval of their spending limits. The remaining $149.05 billion is for statutory items previously approved by Parliament and the detailed forecasts are provided for information purposes only.

The decrease of $10.02 billion in non-budgetary expenditures consists of an increase of $0.03 billion in voted spending authorities and a decrease of $10.05 billion in statutory spending that was previously approved by Parliament.

Non-budgetary expenditures — loans, investments and advances — are outlays that represent changes in the composition of the financial assets of the Government of Canada.

Part I of the 2014-15 Main Estimates includes a detailed comparison against the 2013-14 Main Estimates.

The total of voted or appropriated items in the 2014-15 Main Estimates is $86.31 billion. Of this amount, Appropriation Act No. 1, 2014-15, sought authority to spend $24.82 billion. The balance of $61.49 billion is now being sought through Appropriation Act No. 2, 2014-15.

Honourable senators, I ask that you support this bill.

Hon. Joseph A. Day: Honourable senators, I have a few comments with respect to Bill C-38. I congratulate the Honourable Senator Buth for presenting the background on the bill in a very succinct manner. I accept all of the figures that she has given to you.

Honourable senators will recall, talking in terms of process, that this is the final step with respect to main supply. We do interim supply in March, and then we continue to study the Main Estimates; in fact, we continue to study these Main Estimates throughout the year. At each step we do an interim report. We did an interim report in March so we could have interim supply. Then a second interim report was filed, which I presented in this chamber a few days ago, and I explained the different departments that were looking for funds, or more of them, the ones we had studied.

What it comes down to is we've filed the second interim report and now we have the supply bill, Bill C-38, which is full supply. Interim supply was for three months, honourable senators will recall. This is the balance of nine months of supply, leading us right to the end of the fiscal year 2015, the end of March.

I do want to point out that in this full supply of $61.5 billion that you're about to be asked to authorize, there are two schedules. This is authorizing the expenditure, if necessary, so that cheques can be written on this money by virtue of Treasury Board rules. Treasury Board writes the cheques over to the departments. We're giving the overall authorization based on the information that we have now.

There are two schedules. The first schedule deals with the full supply for a number of departments in the amount of $57.8 billion, and that's for this fiscal year. If it's going to be spent with this authority, it must be spent this fiscal year.

There are certain departments that get a two-year appropriation. They have over a two-year period to spend the funds. They are departments that, because of the type of activity, need a longer time to spend the funds.

At page 62 of this bill, you'll see those departments. One of the agencies, Canada Border Services Agency, is given two years to spend the funds that you're authorizing, as well as Canada Revenue Agency and Parks Canada. These are three agencies that will have two years to spend the funds we're authorizing here. It is $1.24 billion for them to spend.

That's the background of this particular document, honourable senators. Because of the sensitivity, because of the difference of this bill from a normal bill, in the sense of pre-study of where the money is going so that when the bill comes — and it is in very short form, as you can see from looking at Bill C-38 — we are already aware in more detail because of the study we've done and the report we've given to you. We're in a better position to say "yes" or "no" to the supply bill, the appropriation bill, when it comes.

We also don't send the bill, as is our normal practice after second reading, from the chamber to committee. There are only two or three sections of this bill, in any event. It all deals with the schedule that's attached to it. It will go right to third reading. Once you vote on this at second reading, we will go to third reading and presumably deal with it at third reading at the next sitting.

That's a bit of a peculiar aspect of these two supply bills. I say "two" because we'll be dealing with the other one as soon as we deal with this one.

It's a matter of confidence. It's a matter of importance to the government. The government — being the executive, the cabinet — is asking Parliament to consider authorizing the expenditure of $61.5 billion for the rest of this year.

The Hon. the Speaker *pro tempore***:** Are honourable senators ready for the question?

Hon. Senators: Question.

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

Some Hon. Senators: Agreed.

Some Hon. Senators: On division.

(Motion agreed to and bill read second time, on division.)

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

Senator Buth: Honourable senators, with leave of the Senate, and notwithstanding rule 5-5(b), I move that the bill be placed on the Orders of the Day for third reading now.

Hon. Anne C. Cools: Can you tell us why we need leave to proceed today?

Senator Buth: We're moving to third reading now because second reading is done. We don't need the bill to go to committee. We've already received the report on Main Estimates.

Senator Cools: I know that.

Senator Buth: We can go to third reading now. If someone wishes to take adjournment of the debate, they can take adjournment of the debate. I'm not prepared to speak any more on third reading.

Senator Cools: You cannot decline to answer the question. You're asking for leave to move immediately to third reading. If you're asked why, what the urgency is, you must tell us.

Senator Buth: I did.

Senator Cools: There is no urgency. She has just said that it has had second reading. I will take the adjournment of the debate.

The Hon. the Speaker *pro tempore*: We don't have consent. Leave was not granted; it is as simple as that.

It is moved by the Honourable Senator Buth, seconded by the Honourable Senator Unger, that this bill be placed on the Orders of the Day for third reading at the next sitting of the Senate.

Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

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

APPROPRIATION BILL NO. 3, 2014-15

SECOND READING

Hon. JoAnne L. Buth moved second reading of Bill C-39, An Act for granting to Her Majesty certain sums of money for the federal public administration for the financial year ending March 31, 2015.

She said: Honourable senators, the bill before you today, Appropriation Act No. 3, 2014-15, provides for the release of supply for Supplementary Estimates (A), 2014-15 and now seeks Parliament's approval to spend $2.4 billion in voted expenditures.

These expenditures were provided for within the planned spending set out by the Minister of Finance in his February 2014 Budget.

• (1130)

Supplementary Estimates (A), 2014-15, were tabled in the Senate on May 15, 2014, and referred to the Standing Senate Committee on National Finance. These are the first supplementary estimates for the fiscal year that ends on March 31, 2015.

These supplementary estimates reflect an increase of $2.4 billion in budgetary spending, which consists of $2.4 billion in voted appropriations and $11.4 million in statutory spending.

The $2.4 billion in voted appropriations requires the approval of Parliament and includes such budgetary items such as $499.2 million for the Canada Job Fund, including the Canada Job Grant, Budget 2013; $253.7 million for the operation and repairs and maintenance of federal structures in Montreal, Budget 2014, The Jacques Cartier and Champlain Bridges Incorporated; $200 million for the operations of PPP Canada and the delivery of the P3 Canada fund investments, Budget 2013; $195 million to meet the operational requirements in order to fulfill the government's commitment to supply medical isotopes and facilitate the transition of nuclear laboratories, Budget 2014, Atomic Energy of Canada Limited; $195 million for the extension of the Nuclear Legacy Liabilities Program to continue to control and reduce risks and liabilities at Atomic Energy of Canada Limited sites; $142.2 million for the New Building Canada Fund, Budget 2013; $136.3 million for renewal of the First Nations Water and Wastewater Action Plan, Budget 2014; $133.6 million for the consolidation of the Canadian High Commission at Trafalgar Square, London; $127.7 million related to the assessment, management and remediation of federal contaminated sites, Indian Affairs and Northern Development; $119.8 million for the construction of a new bridge for the St. Lawrence, Budget 2014.

New: $101.6 million for incremental pension requirements, VIA Rail Canada Inc.; $95 million for financial assistance to the Province of Quebec for decontamination costs following the train derailment and explosion in Lac-Mégantic, Quebec.

These supplementary estimates also include an increase of $11.4 million in budgetary statutory spending that has been previously authorized by Parliament. Adjustments to projected statutory spending are provided for information purposes only and are attributable to the employee benefit plans.

Appropriation Act No. 3, 2014-15, seeks Parliament's approval to spend a total of $2.4 billion in voted expenditures.

Honourable senators, I ask that you support this bill.

Hon. Joseph A. Day: Honourable senators, first of all, let me thank the Honourable Senator Buth for her presentation in relation to Bill C-39, Supplementary Estimates (A) supply.

The figures that the Honourable Senator Buth just went through are the same ones I talked about yesterday with respect to the report that our committee did, resulting from the study of the Supplementary Estimates (A) that we received. We do the study and a report, and all of the expenditures requested are outlined in that particular report, or all those that we studied and had a chance to delve into.

One point I didn't make yesterday, and I think is an interesting innovation that Senator Buth has added — and we have that information — is to relate the expenditure that appears in the supplementary estimates to when it appeared in the budget. Two or three of the items include the one I wrote down here rather quickly. I can't read my own writing, but one of the items was the 2013 Budget. I understand that the 2014 Budget is coming up in the supplementary estimates, and I explained that yesterday. That's because the Main Estimates are being developed at the same time as the budget, the budget being a secret document. The initiatives that the government may or may not wish to go forward with that are in the budget can't be reflected in the estimates until that decision is made, and they come out at the same time.

So we understand why there are Main Estimates, and then there are supplementary estimates, three of them, that pick up those items that hadn't been fully developed at the time the Main Estimates were made. We understand that.

I was going to ask Senator Buth this question, but I think probably the better approach would be to ask Treasury Board on the next occasion. Why could an initiative from a year and a half ago in Budget 2013 not have been in the Main Estimates for 2014 as opposed to coming in supplementary estimates? My view is that supplementary estimates should be as small as possible. We shouldn't be putting a lot into supplementary estimates. The Main Estimates should give a very good picture of what is planned for the year.

When we start to see a number of items in the supplementary estimates that were in the budgets of more than a year ago, I begin to wonder what the difficulty is, but we'll follow up on that, honourable senators.

This particular matter, as you'll recall from the report that was filed yesterday, I have rounded off to $2.5 billion and Senator Buth rounded it off to $2.4. When we're up in those figures, rounding off one tenth of 1 per cent of $1 billion is a lot of money, notwithstanding.

I would suggest to you that you should be thinking in terms of $2.5 billion as the amount that you are approving. As you have seen, $61.5 billion and then $2.5 billion, they are the two together that we're now looking forward to giving authorization to the government to spend for the rest of this fiscal year.

There may well be two more supplementary estimates: Supplementary Estimates (B) for those things that haven't been developed yet and Supplementary Estimates (C) just to clean up the year at the end. (C) tends to be very small, and should be; (B) might be larger, depending on the initiatives from this year's budget the government decides it may wish to proceed with.

Like the other supply bill that we've just looked at, Supplementary Estimates (A) is a matter of confidence for the government, and these bills should be dealt with from that point of view.

Hon. Joan Fraser (Deputy Leader of the Opposition): I wanted to explain for the record and Senator Buth why our side denied leave and would deny leave were it sought again on this bill for immediate movement to third reading. It has nothing to do with the merits of the bill. It is simply that where there is no urgency, it seems advisable not to suspend rules.

I want her to understand that we are in no way disputing her work. I have heard nothing but excellent comments on the quality of your work, and when I listen to you in the chamber, Senator Buth, I can understand why. I know there is great regret that you have decided to move on from this place. You were doing so well here.

Hon. Senators: Hear, hear!

The Hon. the Speaker *pro tempore***:** Are we ready for the question?

Some Hon. Senators: Question.

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

Some Hon. Senators: Agreed.

Senator Fraser: On division.

(Motion agreed to and bill read second time, on division.)

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

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

• (1140)

INTERNAL ECONOMY, BUDGETS AND ADMINISTRATION

SIXTH REPORT OF COMMITTEE ADOPTED

The Senate proceeded to consideration of the sixth report of the Standing Committee on Internal Economy, Budgets and Administration (appointment of the Law Clerk and Parliamentary Counsel of the Senate), presented in the Senate on June 12, 2014.

Hon. George J. Furey moved the adoption of the report.

He said: Honourable senators, just a few words. I want to congratulate Michel Patrice on becoming our new law clerk.

Hon. Senators: Hear, hear!

Senator Furey: His predecessor, Mr. Mark Audcent, has left a huge footprint around this institution. He has been an outstanding servant to senators and to the institution, an ideal employee when one wants to think about an ideal employee for the Senate.

I assure you, Mark, that Michel is a hard-working individual, as you know having spent some time with him over the past few years, and he will do his very best to reach that extremely high standard that you leave behind.

Congratulations, Michel.

Hon. Senators: Hear, hear!

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

Hon. Senators: Agreed.

(Motion agreed to and report adopted.)

[*Translation*]

VISITORS IN THE GALLERY

The Hon. the Speaker *pro tempore***:** Honourable senators, I wish to draw to your attention the presence in the gallery of the former Law Clerk of the Senate, Mark Audcent. He is joined by our new Law Clerk, Michel Patrice.

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

Hon. Senators: Hear, hear!

[*English*]

THE SENATE

MOTION TO AWARD HONOURARY CITIZENSHIP TO MS. ASIA BIBI—DEBATE CONTINUED

On the Order:

Resuming debate on the motion of the Honourable Senator Hervieux-Payette, P.C., seconded by the Honourable Senator Joyal, P.C.:

That, the Senate of Canada calls on the Government of Pakistan to immediately release Ms. Asia Bibi, a Christian woman who is being arbitrarily detained due to her religious beliefs;

That, the Senate of Canada declare its intention to request that Ms. Asia Bibi be granted Honourary Canadian Citizenship, and declare its intention to request that Canada grant her and her family asylum, if she so requests; and

That a message be sent to the House of Commons requesting that House to unite with the Senate for the above purpose.

Hon. Stephen Greene: Honourable senators, I request the adjournment of the debate in my name.

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

Hon. Senators: Agreed.

(On motion of Senator Greene, debate adjourned.)

BANKING, TRADE AND COMMERCE

MOTION TO AUTHORIZE COMMITTEE TO STUDY TRADE BETWEEN THE UNITED STATES AND CANADA AND ADHERENCE TO LAWS AND PRINCIPLES OF ALL TRADE AGREEMENTS—DEBATE CONTINUED

On the Order:

Resuming debate on the motion of the Honourable Senator Ringuette, seconded by the Honourable Senator Tardif:

That the Senate Standing Committee on Banking, Trade and Commerce be authorized to examine and report on trade between the United States and Canada and the

adherence to the laws and principles of all trade agreements, with particular focus on spent fowl and chicken imports, including:

(*a*) the application of tariffs and quotas on classifications that include blends, food preparation, kits, and sets, as well as the potential for these products to circumvent the law and principle of trade agreements, in particular import quotas;

(*b*) the regulations regarding import tariffs and quotas as established by the Department of Finance;

(*c*) the interpretation and application of those rules and regulations by the Canadian Border Services Agency;

(*d*) the monitoring of products defined as blends, food preparation, kits, and sets; and

(*e*) The reciprocity of US regulations regarding similar Canadian imports;

That the committee provide recommendations for regulatory and legislative actions to ensure fairness for Canadians in the system; and

That the committee submit its final report to the Senate no later than June 27, 2014, and retain all powers necessary to publicize its findings for 180 days after the tabling of the final report.

Hon. Stephen Greene: I request the adjournment in the name of Senator Maltais.

The Hon. the Speaker *pro tempore***:** It cannot be Senator Maltais. It was already adjourned by him, but now it can be you, Senator Greene. You may take the adjournment in your name.

Senator Greene: I would gladly take the adjournment.

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

Hon. Senators: Agreed.

(On motion of Senator Greene, debate adjourned.)

SUPREME COURT OF CANADA

INQUIRY—DEBATE ADJOURNED

Hon. Anne C. Cools rose pursuant to notice of June 3, 2014:

That she will call the attention of the Senate to:

(*a*) the constitutional code and practices called judicial independence, the legal and political concepts, enshrined in our constitution, most particularly in the *British North America Act 1867* sections 96-101, which prescribe the constitutional position of the superior court judges of Canada, and the duty of our houses of parliament to protect them, and to superintend judicial independence, and, justice itself, and;

(*b*) to the unsettling public circumstances in which the vice regal of Her Majesty, who is also the distinguished Supreme Court of Canada's Chief Justice, the Right Honourable Beverley McLachlin, P.C., was placed, consequent to unfair and unjustified insinuations by some in the Prime Minister's Office, which insinuations distorted the Chief Judge's proper actions in a telephone communication with the well-respected Attorney General Peter Mackay, which communication was about her proper and dutiful purpose of compliance with the law on the selection and eligibility of the three judges from Quebec, pursuant to the *Supreme Court of Canada Act* section 6, and;

(*c*) to the clearly drafted section 6 of the *Supreme Court Act* which dictates that,

> At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province,

and;

(*d*) to the undesirable insinuations and distortions, which had the consequence of exposing Madame Chief Justice to potentially ugly controversy and turmoil, which potential compelled the Court, in the person of its Executive Legal Officer, Mr. Owen Rees, to issue a statement to clarify the facts and the propriety of the Chief Justice's most dutiful actions, which statement was well received by the public, and;

(*e*) to Madame Justice McLachlin's diligence in her dutiful endeavours as Chief Justice, and the well-established principle that all judicial officers and lawyers have a duty, if having the knowledge, to take action to prevent breaches of the law and legal wrongs and sins.

She said: Honourable senators, I rise to speak to my inquiry on the Right Honourable Beverley McLachlin, P.C., Chief Justice of the Supreme Court of Canada, and this court's proper response to some improper acts. In May, there were copious media reports that some in the Prime Minister's office had insinuated that Chief Justice McLachlin had improperly sought a meeting with the Prime Minister about Federal Court Justice Marc Nadon, wrongly appointed as one of Quebec's three judges to the Supreme Court, her court.

• (1150)

These insinuations were attended by such clamour that they jolted the public sensibilities. This compelled the court on May 1 to issue a short and welcome statement to clarify the facts. I shall read Executive Legal Officer Owen Rees' statement about the Chief Justice's proper actions:

> FOR IMMEDIATE RELEASE
>
> In response to recent media reports, the Office of the Chief Justice of Canada, the Right Honourable Beverley McLachlin, P.C., is releasing the following statement.

At no time was there any communication between Chief Justice McLachlin and the government regarding any case before the courts. The facts are as follows:

On April 22, 2013, as a courtesy, the Chief Justice met with the Prime Minister to give him Justice Fish's retirement letter. As is customary, they briefly discussed the needs of the Supreme Court of Canada.

On July 29, 2013, as part of the usual process, the Chief Justice met with the parliamentary committee regarding the appointment of Justice Fish's successor. She provided the committee with her views on the needs of the Supreme Court.

On July 31, 2013, the Chief Justice's office called the Minister of Justice's office and the Prime Minister's Chief of Staff, Mr. Novak, to flag a potential issue regarding the eligibility of a judge of the Federal Court to fill a Quebec seat on the Supreme Court. Later that day, the Chief Justice spoke with the Minister of Justice, Mr. MacKay, to flag the potential issue. The Chief Justice's office also made preliminary inquiries to set up a call or meeting with the Prime Minister, but ultimately the Chief Justice decided not to pursue a call or meeting.

The Chief Justice had no other contact with the government on this issue.

The Chief Justice provided the following statement: "Given the potential impact on the court, I wished to ensure that the government was aware of the eligibility issue. At no time did I express any opinion as to the merits of the eligibility issue. It is customary for Chief Justices to be consulted during the appointment process, and there is nothing inappropriate in raising a potential issue affecting a future appointment."

For further information contact:

Owen M. Rees

Executive Legal Officer

Phone: (613) 996-9296

Honourable senators, third in precedence, the Chief Justice is well respected as judge, vice regal and Deputy Governor General. By the 1947 Governor General's Letters Patent, our Sovereign King George VI decreed that she is Our Administrator, who, in the Governor General's incapacity or absence from Canada, is Her Majesty's representative. Clause VIII states:

> And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our Governor General out of Canada, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in Our Chief Justice . . . or, in the case of the death, incapacity, removal or absence out of Canada of Our Chief Justice, then in the Senior Judge . . . of the Supreme Court of Canada . . . such Chief Justice or Senior Judge . . . while the said powers and authorities are vested in him, to be known as Our Administrator . . . .

Our Administrator has full constitutional powers to dismiss prime ministers and governments; likewise, in the provinces, the chief judges act in the stead of their lieutenants general.

Honourable senators, offence to a Chief Justice offends the administration of justice and the Queen, the supreme magistrate and the fount of justice, mercy and honour. The Commander-in-Chief of the Canadian Forces, she is head of government, head of state and head of Parliament.

William Blackstone's *Commentaries on the Laws of England*, Book I at page 149, states that the monarch and the houses of parliament:

> . . . together form the great corporation or body politic of the kingdom, of which the king is said to be *caput*, *principium*, *et finis*.

The Queen is the head, the beginning, and the end. Our Constitution Act, 1867, Part III, Executive Power, section 9, states:

> The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Honourable senators, the Queen is the actuating power in our constitution. All law is by her consent. The notion that the Governor General is an automaton is a great mischief. In the Governor General's stead, the Chief Justice exercises the monarch's full and absolute powers.

The Senate, the upper and royal house of the Parliaments, has a duty in allegiance and judicial independence to uphold and protect the Chief Justice. Justice McLachlin acted properly in her duty to advise the Governor General and his ministers on legal questions on judicial appointments to her court. She has a duty and right to timely meetings with the ministry on the administration of justice and the court's needs. She has a sworn duty to advise the Prime Minister on the law selecting persons for Governor General's commissions to her court. Sometimes she can appoint them herself.

It is a principle of law that all judicial officers and lawyers, when informed, have a duty to prevent legal and judicial wrong. The Chief Justice was noble and calm facing unfair and unprecedented offence to hers and the court's integrity by some who acted poorly. Cordial relations in constitutional comity between Crown ministers, Attorneys General and the Chief Justice is the pillar of our social order. The Attorney General is the *attornatus rex*, the king's attorney, and the senior of the three law officers of the Crown.

Canada's first Attorney General, also first Prime Minister, Sir John A. Macdonald, drafted the 1868 Department of Justice Act. This act united, in one single person, the two offices of Attorney General and Minister of Justice. Its section 2.(2) read:

> The Minister is ex officio Her Majesty's Attorney General of Canada, who holds office during pleasure and has the management and direction of the Department.

I have great respect and esteem for our Justice Minister and Attorney General, Peter MacKay. Senators owe a duty in judicial independence to protect and uphold our judges and Chief Justice. The legal community has done so in public statements from the bar association's presidents, the law school deans and advocate societies.

Honourable senators, the law of judicial independence and judges, liberty's cornerstone, did not apply in early Canada when judges served in politics, in legislatures and executive councils. The Reformers fought hard for responsible government with judicial independence. With Lord Durham's support, it made great progress.

Top of mind at the 1864 Quebec Conference, the Federating Fathers agreed on it and on the need for a court of general appeal and other courts, which are now the Supreme Court and the Federal Court. The Quebec Conference adopted 72 resolutions, of which Attorney General West John A. Macdonald drafted most. Amended and perfected, these became the British North America Act, 1867.

Joseph Pope recorded them in his 1895 book, *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act*. Quebec Resolutions 31 to 37 and 29. (34) were the Fathers' judicial items. These became sections 96 to 101 of the B.N.A. Act, 1867, Part VII, headed "Judicature." These are the law on judicial independence. They replicate the political impulse of the 1689 and 1701 post civil war settlement statutes, which defined the relationship between king, parliament and the judges, the coordinate institutions of the Constitution.

In 1875, our new Parliament passed An Act to establish a Supreme Court and a Court of Exchequer, for the Dominion of Canada, pursuant to section 101, which said, in part:

> The Parliament of Canada may . . . provide for . . . a General Court of Appeal for Canada, and for . . . additional Courts . . . .

Honourable senators, these "Judicature" sections were born in the federation agreement, the Quebec Resolutions. The Fathers were careful about Quebec's French civil law, French language and full partnership in the new Canada. For this, the Fathers shaped the administration of justice in their new constitution. They intended that the Dominion's section 101 courts would be superior courts, whose judges would be superior court judges and who, like section 96 superior court judges, would be appointed by the Governor General. They intended that the dominion courts' judges, like the continuing superior courts' judges, would be selected from the bars of the respective provinces. Very important.

Canada's B.N.A. Act, 1867 enacted that the federation agreement with Quebec's unique civil law, customs and French language would be embodied in the bench in the selection of its judges. Note their verb "select" in the act's section 98. Headed "Selection of Judges in Quebec," it says:

> The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Colleagues, that was Quebec Resolution 35, which said:

> The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.

Likewise, section 97, headed "Selection of Judges in Ontario etc.," said, partly:

> . . . the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

There is a consistent theme of the selection of judges.

• (1200)

Honourable senators, the Fathers formed and shaped two distinct powers: The appointing power and the selecting power, if you read carefully you see these words develop and recur through the law and the system. Their plan was that the judges, in their physical bodies, their persons, and in their civil law caste of mind would personify the federation on the bench.

Colleagues, our Fathers achieved our federal union and its masterpiece statute, the British North America Act, at a time when a failed constitution, with its civil war carnage and American annexationist intent, were pressing at their door. This is the genius of the British North America Act and the men who made it. I would love to share more of this, theirs was the most fantastic piece of constitutional work we know.

Their constitution plan was that Quebec and its people, like my friend over there, Senator Nolin, its peoples, civil law and language would be entrenched forever in our federal institutions. They did the same for the senators.

Quebec Resolution 14 said:

> The first selection of the Members of the Legislative Council shall be made . . . from the Legislative Councils of the various Provinces . . .

The word "select" is also found in the Constitution Act, 1982, section 42.(1)(*b*), that requires the general amending formula to alter:

> (*b*) the powers of the Senate and the method of selecting Senators;

Honourable senators, Canada's constitution is a single cohesive conceptual framework from 1759 to now. This is seen in the unity of its sections that select persons for life tenure appointment, mostly judges and senators, who serve during good behaviour, and during life.

Quebec Resolution 11 said:

> The Members of the Legislative Council shall be appointed . . . and shall hold Office during Life;

Colleagues, the federating Fathers were selective about selecting persons who hold life estate in office, that unique constitutional independence granted by the Queen's ancient letters patent, now to age 75. This appointment form was reserved for those in the administration of justice, whose distinct feature is that they cannot delegate their work.

No judge may delegate giving judgment, no senator can delegate voting. Life estate in office, or life tenure, treats the office as a parcel of land in freehold. Its origin is the feudal common law of property, tenure and tenancy in land and in offices held for a time, like land, but are not the land.

The 1573 judgment in the King's Bench Division, in Walsingham's case, is clear, at page 9:

> the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time . . .

That was a most brilliant statement, hundreds of years old.

Honourable senators, Sir William Blackstone records these tenures in his Commentaries on the Laws of England in Four Books. In his 1766 Book II at page 20, he treats of tenancy in property and offices, and life estate in office. He wrote of hereditaments, from the Latin hereditas for inheritance, meaning types of property that could be inherited.

There are two kinds of hereditaments: Corporeal and incorporeal. Corporeal is the tangible land itself. The incorporeal are those intangible rights issuing from the land, and annexed to, but are not the land. They include offices and dignities.

Blackstone said at page 21:

> Incorporeal hereditaments are . . . of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

Honourable senators, holding office is the fifth sort of incorporeal hereditament and dignities the sixth.

Blackstone wrote at page 36:

> V. Offices, which are a right to exercise a public or private employment . . . are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice.

I would love a few more minutes.

Hon. Senators: Agreed.

Senator Cools: Thank you, honourable senators. I will continue:

> Especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. . . . but ministerial offices may be so granted; for those may be executed by deputy.

The terms "hold office" and "officeholder" reveal their ancient property roots. On judges' life tenure, the B.N.A. Act, section 99. (1), headed "Tenure of Office" states:

> . . . the Judges of the Superior Courts shall hold office during good behaviour . . .

Similarly, section 29, headed "Tenure of Place in Senate" states:

> . . . A Senator shall . . . hold his place in the Senate for life.

Honourable senators, "during good behaviour" means life tenure, now 75 years, for mental health reasons. This phrase is from the 1701 Act of Settlement, which, with the 1689 Bill of Rights, found the modern British constitution. It is important to understand that the phrase "during good behaviour" relies on the 1692 U.K. Court of Kings Bench judgment in Harcourt v Fox. This ruled that during good behaviour is "absolutely an estate for life in his office," subject to forfeiture for misbehaviour.

Chief Justice Holt noted the great push for judicial independence, at page 734:

> . . . I knew the temper and inclination of the Parliament, at the time when this Act was made; their design was, that men should have places not to hold precariously or determinable upon will and pleasure, but have a certain durable estate, that they might act in them without fear of losing them; we all know it, and our places as Judges are so settled, only determinable upon misbehaviour. . . .

Honourable senators, my intention today was not to accuse or point fingers, but merely to record the duties that the houses of Parliament and this Senate owe to the judges, which I shall continue in my next speech.

Our Constitution prescribes that we must pursue to destruction corrupt judges who should meet their just desserts in our High Court of Parliament, but our first duty is to protect judges from executive displeasure or abuse. The distinguished Chief Justice McLachlin has acted well, and consistent with her office. This is clear to the legal practitioners, legal scholars, journalists, to us senators and the public. We must uphold her and her offices as Chief Justice and vice regal of the Queen. The Senate's watchful eye must be vigilant about justice and injustice in our land. The

problem is that too many no longer know of the duties they hold in respect of the judges and the treatment of the judges. This is the pillar and the cornerstone of our system of governance in the name of the public good and peace, order and good government.

I thank you so much.

(On motion of Senator Cools, for Senator McCoy, debate adjourned.)

• (1210)

JUDICIAL APPOINTMENT PROCESS

INQUIRY—DEBATE ADJOURNED

Hon. Anne C. Cools rose pursuant to notice of June 3, 2014:

That she will call the attention of the Senate to:

(*a*) the constitutional code and practices called judicial independence, the legal and political concepts, enshrined in our constitution, most particularly in the *British North America Act 1867* sections 96-101, which prescribe the constitutional position of the superior court judges of Canada, and the duty of our houses of parliament to protect them, and to superintend judicial independence, and, justice itself, and;

(*b*) to the disturbing media accounts respecting the failed appointment process to the Supreme Court of Canada of a Federal Court Judge, the Honourable Justice Marc Nadon, and;

(*c*) to the spoiled selection process that has so afflicted Justice Nadon, by which he had been selected for appointment to the Supreme Court, pursuant to the ancient section 6 of the *Supreme Court of Canada Act,* which section, jealously held by the people and province of Quebec, prescribes that the three Supreme Court judges appointed from Quebec must possess current mastery of the civil law, and be selected from among the current judges of Quebec's superior courts, or, from among the current members and practitioners of the Quebec bar, of which Justice Nadon is not, and;

(*d*) to the clearly drafted section 6 of the *Supreme Court Act* which dictates that,

> At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province,

and;

(*e*) to the constitutional constancy of section 6 of the *Supreme Court of Canada Act,* which section has remained the same in text and substance as originally enacted in *1875* in section 4 of *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, which prescribed the eligibility requirements for judicial appointment to the Supreme Court, being current membership of the Quebec bar, which is a law that was well known to many, resulting in unfair and tragic consequences to Justice Nadon, both professionally and personally

She said: Honourable senators, I just spoke about Chief Justice McLachlin. I speak now about the government's failed selection process in Federal Court Justice, the Honourable Marc Nadon's case. I speak to the mischief and excess, so hurtful to him, and so inconsistent with judicial independence, owed to him as a superior court judge, by the two houses of Parliament and the Supreme Court Act, section 6.

The Senate had a duty to protect him from this public ordeal of executive bungling. It is incredible that this act's well-known and restrictive section 6 could be so misunderstood and misused in the selection process that had him appointed and sworn in to the Supreme Court, as one of its three Quebec judges. It is incredible that some thought they could defeat section 6, which had been section 4 in the original 1875 act, An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada. Section 4 restated the 1864 Quebec Conference federating agreement, the 72 Quebec Resolutions, mainly those on the selection of judges from the provinces. The key word "selection" is distinct from "appointment." The Constitution Act, 1867, section 98, had been Quebec Resolution 35, that:

> The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.

This notion was restated in the 1875 act creating the Supreme Court, and the Exchequer Court, now the Federal Court.

Honourable senators, currency in Quebec's French civil law, and currency in practice and membership of the Quebec bar, have been, for a long time, the quid pro quo for selecting persons for appointment, as Quebec's three judges pursuant to section 6, once section 4 of the 1875 act. Both had granted a proprietary interest to the lawyers, people and government of Quebec, in the selection of persons for appointment as their three judges on the Supreme Court, the appellate court to which Quebec civil law decisions would be appealed. These are just concerns. The 1875 Commons House debates reveal Quebec members' just concern about bijuralism, and the administration of justice by Quebec's own French civil law. Quebec concerns caused amendments to the 1875 act, expressly in section 4, that of the six judges:

> . . . two of whom at least shall be taken from among the Judges of the Superior Court or Court of Queen's Bench or the Barristers or Advocates of the Province of Quebec.

There are now three of nine. Currency in the civil law is ever present. This same selection idea for Quebec is found in the current Tax Court of Canada Act and in the current Federal Courts Act, section 5.4. The Fathers of Confederation enshrined that Quebec's biculturalism, bilingualism and bijuralism would be embodied and personified in the selection of persons to serve as judges from Quebec. This was also true for the selection of senators.

Honourable senators, on December 12 last, to validate Justice Nadon's appointment, the Senate adopted a retrospective amendment to the Supreme Court Act, adding new eligibility sections 5.1 and 6.1. This too failed, raising more and new doubts. This change was the final clauses of the large and unrelated budget bill, Bill C-4, Economic Action Plan 2013 Act, No. 2. Many senators objected but, like Chief Justice McLachlin, were not heard. The government, doomed to failure, persisted in their goal to overcome section 6. They desired change in the Supreme Court's composition, but the Constitution Act, 1982, amending section 41(*d*) is clear. It states that unanimous provincial agreement is required to change matters in relation to:

(*d*) the composition of the Supreme Court of Canada.

Honourable senators, many government bills have been moved here to validate judicial appointments, but nothing as serious as this. Formerly inferior court judicial officers, such as provincial and family court judges, were ineligible for selection for both the Supreme Court and the Federal Courts.

On June 19, 1996, here, we adopted a government retrospective bill to correct disqualifying errors in two judges' appointments, both fine men. One had been a family court judge and the other a provincial court judge. This was Bill C-48, An Act to Amend the Federal Court Act, the Judges Act and the Tax Court of Canada Act. It amended the above named acts' eligibility sections to validate those judges retroactively, but they were not hurt as Justice Nadon was. Good government and governance dictate that changes to the law on selecting persons for bench appointment should proceed by open debate, not as afterthoughts.

Court composition and selection from the provinces is vital to our federal administration of justice. It would be far better if the government had simply accepted our Constitution. Their first duty is to uphold the Constitution and abide by the Supreme Court Act.

Honourable senators, I note Sean Fine's able *Globe and Mail* article last May 23 titled "The secret short list that provoked the rift between Chief Justice and PMO." This piece records the government's troubled selection process to place Justice Nadon in the vacant Quebec seat. I add — and this is important, colleagues — that the ad hoc committee of members of Parliament, before which Justice Nadon appeared last October 2, is a fiction. It is not a House of Commons committee. It is not a delegated authority from the House of Commons. It is not authorized by its privileges, immunities and powers of the house; it is an outlaw, or it is outside of the law. To question or examine a superior court judge in such circumstances is unfair and exposes him to grave dangers, absent the protection of privileges.

[Senator Cools]

Honourable senators, our two houses were constituted by the BNA Act 1867, sections 17 and 18. Queen Victoria's May 22 proclamation of this act contained the first senators' names. Our houses have constitutional duties in judicial independence to protect the judges from executive excess. They received the full powers of the *lex et consuetudo parliamenti* of Britain's ancient High Court of Parliament, with its full curial and judicial powers, to create courts and judgeships.

The Senate also received high powers in "the control of the public purse," limited only by the "financial initiatives of the crown" that appropriation and tax bills begin in the House of Commons. "Control of the public purse" commands that no judgeship may be created, nor judge appointed, without the houses' agreement, and also their agreement to pay their salaries. Alpheus Todd, in his 1889 book *On Parliamentary Government in England*, second edition, volume II, wrote, at page 856:

> . . . the commissions of the judges shall remain in force, during their good behaviour, notwithstanding the demise of the crown: . . .

Honourable senators, you can see the Constitution developing over the years to protect the judges. Our Constitution commands that we fix and provide the judges salaries, create courts, create judges, and adjudicate all house actions to remove them from office for misbehaviour, named forfeiture. Judicial independence is enforced by the Senate and House of Commons judicial and curial powers. The judges have no means to protect themselves, save their contempt of court power. The Senate's curial powers are great, limited only to Britain's House of Commons.

The 1864 Quebec Resolutions had intended that the Senate limit would be the House of Lords' powers. This was changed in the 1866 London Conference to be clear that the House of Lords' Judicial Committee of the Privy Council, the appeal to the foot of the throne, was the final court of appeal for the dominions and colonies. They did not want any mistakes. Canada chose not to establish a permanent Senate appellate court, headed by our speaker in his judicial capacity, and created its own Supreme Court. Ever mindful not to wound or antagonize American sensibilities, Canada chose to forego the Senate privy council judicial committee in the same way that we chose the term "Dominion of Canada" over the term "Kingdom of Canada." These were all changed in London.

• (1220)

This government invoked our houses' judicial and curial powers to validate their flawed judicial appointment of Justice Nadon. The real problem before us is our Constitution's prohibition that Crown ministers express no public criticism or scorn towards our judges nor put judges into unwarranted public controversy or shame. Constitutional independence and comity apply to the relations between the monarch's Crown servants and ministers who govern, and her judges who administer justice in her mercy and who adjudicate the subject's causes in civil and criminal cases as against *pacem domini regis*, the peace of the lord King, now Lady Queen. Independence and comity order the exchanges between the ministers and the judges. To violate judicial independence is a sin that provokes irreparable constitutional crisis.

Honourable senators, judicial independence entered the British constitution in the 1701 Act of Settlement, being An Act for further Limitation of Crown, and better securing the Rights and Liberties of the Subject. This act established both security of tenure and security of judges' salaries, and it took effect in 1714. This era — one of the greatest, most important in human history and liberation — was bent on judicial independence. In the Quebec Resolutions, these notions are the BNA Act, Part VII, Judicature, sections 99 and 100. Section 100 states:

> The Salaries, Allowances, Pensions of the Judges of the Superior . . . Courts . . . shall be fixed and provided by the Parliament of Canada.

Honourable senators, we fulfill this by our "control of the public purse" powers, by which we charge the judges' salaries directly by bill to our consolidated revenue fund, which is what Senator Day was dealing with earlier. This single fund was Adam Smith's idea and was established in 1787 in Britain and later in Canada.

This direct charge to the consolidated revenue fund takes the payments for judges' salaries out of the annual supply process. Done as an integral part of responsible government, this avoided annual debate and votes on the judges' salaries during the annual supply process, with its large political problems. This was to avert ministerial defeats on confidence votes and the fall of governments on the fragile question of judges' salaries.

First achieved by individual judge's bills, after 1906 in Canada, it was by a single Judges Act with an enabling clause ordering the payment of judges' salaries. In his 1869 *Parliamentary Government in England, Vol. II*, Alpheus Todd wrote at page 726 that:

> . . ., the judges' salaries are now made payable out of the Consolidated Fund, which removes them still more effectually from the uncertainty attendant upon an annual vote in Committee of Supply.

Honourable senators, I speak now to our houses' role in removing judges and the protection offered to judges. The British North America Act, 1867, section 99(1) states:

> . . . the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and the House of Commons.

This section enacts the Senate's duty to protect and secure the judges from executive displeasure and to superintend justice itself. This vests us with the profound duty to protect them from the mischiefs that arise if they engage the disfavour or favour of those with executive power, whose powers are large to remove them by the Governor General's royal writ to vacate their commission — the writ of *scire facias*.

Section 99 gives a curial power to the two houses in judicial mode to adjudicate charges against a judge, by a private member or a minister. Such charges must be proved in each house. Section 99 is an appeal to the houses for the afflicted judge as against the ministers or the Crown itself. It deters judges' removal by executive writ alone and puts such charges to the independent judgment of each house. Each house proceeds with its own separate judicial inquiry, with full opportunity for the affected judge to answer the charges and to make full defense with counsel, at the bar or in committee.

In his 1935 fourth edition of *The Law and Custom of the Constitution, Volume II*, Sir William Anson wrote on the removal of office-holders with life tenure. At page 234:

> The Judges, . . ., hold office during good behaviour, *'but upon the address of both Houses of Parliament it may be lawful to remove them'* . . . . if, in consequence of misbehaviour in respect of his office, or from any other cause, an officer of state holding on this tenure has forfeited the confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him. Such officers hold, as regards the Crown, *during good behaviour*; as regards Parliament, also during good behaviour, though the two Houses may extend the term so as to cover any form of misconduct which would destroy public confidence in the holder of the office.

Honourable senators, the Governor General's role in addresses of the houses to remove judges is absolute, final and telling.

May I have a few more minutes, please?

The Hon. the Speaker: It is agreed.

Senator Cools: In his 1946 sixth edition of *Chalmers and Hood Phillips' Constitutional Laws of Great Britain, The British Empire and Commonwealth*, Owen Hood Phillips wrote at page 392 that:

> The King would be bound by convention to act on such an address.

If it's in a statute, the king is already predisposed.

The two houses may proceed by bill, resolution or impeachment to remove judges with tenure during good behaviour. Removal by the houses is most rare for the good reason that such removals are confidence votes. A government minister's failure to obtain agreement in one or both houses is a government defeat, subject to the government's retirement. This loss of confidence is the inevitable result that attends failure in their exercise of the royal prerogative in judicial appointments and the administration of justice. This is why governments sometimes unduly and unfairly pressure certain judges to resign.

Honourable senators, on May 4, 1933, in the House of Commons, Prime Minister Richard Bedford Bennett spoke on this consequence of government failures in addresses to remove

high officers pursuant to the power of a statute's clause. At page 4586 of the *Commons Debates*, he said:

> The question must be submitted to the high court of parliament, and the government of the day having submitted its cause, not to this house alone but also to the other branch of parliament which may not conceivably support the government, and that has very often happened, if it is unable to secure the approval of that other branch of parliament, as well as the approval of the commons, it fails and the government must go.

And at page 4587 that:

> When a joint address is to be agreed upon, if one party does not agree to it, there is no joint address, and the government which initiates it must accept the responsibility for it. That is the difference between that and a statute. A government's measure may be defeated in the Senate, and that is the end of it. But that is not this case. The government has risked its fate by dismissing a man from his job. It has risked its all on that dismissal, and it has made that dismissal subject to the joint approval of two branches of parliament.

That is why it is rarely used. The last one was in the U.K. and it was Sir Jonah Barrington for a malversation. A government risks all to unseat a judge. Prime Minister Bennett was clear in the exchange with William Daum Euler, the former Minister of National Revenue, at page 4587 as follows:

> Mr. Euler: I cannot conceive that the life of the government, for any reason, can be dependent upon the action of the Senate of Canada. The Prime Minister laughs at that, as he so often does.
>
> Mr. Bennett: The Senate put the Macdonald government out.

It's a beautiful exchange and very instructive.

In any event, colleagues, I just wanted to put some of the rich constitutional history of our country in respect of these large questions that seem not only now unknown but not even thought about. As I read the massive press coverage on these two incidents, I thought, "What a sad thing that had happened to Justice Nadon."

• (1230)

What's more important, too few people seem to have a handle on the fact that the two houses have a role in these matters.

I invite colleagues to take a closer look at these very grievous matters that have transpired and the consequences for the persons and for the Government of Canada. It was a very embarrassing thing for the government. These matters are Senate business. It may not be well understood, but this place truly is a high court. I thank you all for your attention. It was quite a mouthful. This has been a lot of work.

Honourable senators, I love the system that we live in. I worship at the altar of Sir John A. Macdonald and the great thinkers who fashioned a document because they felt strongly that their unity was the only way they could overcome American expansion. They set aside personal differences and came to agreement.

Our Constitution has lasted 150 years, which is unusual. I add that all future constitutional amendments should endeavour to last another 150 years. Thank you, colleagues.

(On motion of Senator Cools, for Senator McCoy, debate adjourned.)

ADJOURNMENT

MOTION ADOPTED

Hon. Yonah Martin (Deputy Leader of the Government): Honourable senators, with leave of the Senate and notwithstanding rule 5-5(g), I move:

> That when the Senate adjourns today it do stand adjourned until Monday, June 16, 2014, at 6 p.m., and that rule 3-3(1) be suspended in relation thereto.

The Hon. the Speaker: Is leave granted?

Hon. Senators: Agreed.

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

Hon. Senators: Agreed.

(Motion agreed to.)

(The Senate adjourned until Monday, June 16, 2014, at 6 p.m.)

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