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BILL S-205, AN ACT TO AMEND THE CRIMINAL CODE (SUICIDE BOMBINGS)

Speech by:

The Honourable Jerahmiel S. Grafstein

Tuesday, February 10, 2009

THE SENATE

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CRIMINAL CODE

BILL TO AMEND—SECOND READING— DEBATE ADJOURNED

Hon. Jeremiah S. Grafstein moved second reading of Bill S-205, An Act to amend the Criminal Code (suicide bombings).

He said: Honourable senators, this bill has been on the Order Paper for four years. The bill, then numbered Bill S-43, was first placed on the Order Paper in October 2005. I will not go through all the iterations, but it was reintroduced as Bill S-210 on October 27, 2007. It was finally given second reading and then fully considered by the Standing Senate Committee on Legal and Constitutional Affairs. It was passed in the committee without amendment and given third reading here on May 24, 2008. It then went to the other place, only to die on the Order Paper upon prorogation.

Here we are back at it again. For the purpose of the record, I will reiterate some of the arguments, as we now have new senators who have not had the benefit of previous debates.

This legislation started as Bill S-43. It then became Bill S-206, then Bill S-210, and it is now Bill S-205. The simple amendment encapsulated in this bill clarifies the explicit gap in the language of section 83.01 of the Criminal Code. The proposal is to amend that section of the Criminal Code by adding the following after subsection (1.1):

(1.2) For greater certainty, a suicide bombing comes within paragraphs (a) and (b) of the definition "terrorist activity" in subsection (1).

This amendment, honourable senators, is a definitional clause to include suicide bombing explicitly in the Criminal Code. It will establish suicide bombing per se, the very words, as a criminal offence. This bill, honourable senators, goes to the very nature and purpose of the criminal law.

Law and Canada are inseparable. This bill goes to the very purpose of criminal law, and the major purpose of this chamber, as we all know, is to create laws. That is the heart and essence of our business as senators.

Only last week in The New York Times there was a story of an imprisoned grandmother in Iraq who specialized in enlisting her children, her grandchildren, her family and other children to become suicide bombers. How obscene that is, yet how timely.

Canada, unlike other countries, is a country created by laws, not by violence. In 1908, the great English author Rudyard Kipling, on a visit to Canada, wrote to his family his impressions of Canada and Canadians. Here is a quotation from that letter:

. . . the law in Canada exists and is administered, not as a surprise, a joke, a favour, a bribe . . . but as an integral part of the national character — no more to be forgotten or talked about than one's trousers.

Earlier, in 1861, John Anderson, a fugitive slave being discharged for murder by the Court of Common Pleas in Upper Canada said:

I have never known that there was so much law in the world as I find in Canada.

The late Robertson Davies, in his 1954 masterpiece, *Leaven of Malice*, wrote these words:

. . . never go to law for simple vengeance; that's not what law is for. Redress, yes; vengeance, no.

In 1960, the Right Honourable Lester Bowles Pearson, a mentor of this senator and others in this chamber, spoke these words in House of Commons debates:

Incorruptible and respected courts, enforcing laws made by free men in Parliament assembled and dealing with specific matters and, with specific sanctions to enforce their observance; these are the best guarantees of our rights and liberties. This is the tried and tested British way, and is the better course to follow than the mere pious affirmation of general principles to which some political societies are addicted.

The paramount purpose of our work in Parliament is no more and no less than to make laws. That is what we do; that is what Parliament does.

. (1600)

Parliament transforms experience into principles, and these principles are then expressed in explicit laws. We make laws and we administer the execution of those laws, especially criminal laws. Parliament has an exclusive oversight of criminal law power, and this power is tied to the question of freedom, liberty and security, which are the organizing principles at the heart of federal governance. Criminal laws are Parliament's definition of our civilization's standards of conduct and care.

To fall below these standards of care by unwanted conduct is to invite penalties, prompting state action and, more important, to provide a clear, unequivocal warning against conflict, a prophylactic against uncivilized conduct that is actual, apparent, intentional or unintentional.

Ultimately, criminal law seeks to prevent and ostracize egregious conduct and, in the process, to transform the attitude and intentions of those who practise such conduct. It is to transform public opinion, public conduct and private conduct.

Ignorance of the law is no excuse. All citizens are presumed to know the law. A fortiori, there is a clear and present obligation of Parliament to ensure that the criminal laws are clear and lucid, especially because of their criminal consequences. To deprive a person of his liberty because of precipitous or unwanted conduct requires lucidity of the highest order. That is why the common jargon, phrases and parlance have been picked up specifically in our Criminal Code and in other criminal law, for example, as in England, with terms like "kidnapping," "murder" and "theft."

We took common parlance and moved it explicitly into the code so the public would not be confused and would clearly understand the law.

The Criminal Code is bound up in the protection and security of people and properties. Two of the Tablets of the Covenant, Moses' Ten Commandments, are clear and simple: "Thou shalt not kill" and "Thou shalt not steal." Words are as important as the laws themselves. Laws rest on practice, moral principles and clarity. Natural laws float above the normative laws. Natural laws encapsulate our moral principles. The normative laws draw upon the natural laws and specify the enforcement of moral offences with particularity and precision; hence, the high onus of proof and the high presumption of innocence when offensive conduct results in the loss of liberty.

Therefore, at the core of the debate on this bill lies the core of our culture, our civilization, namely, the reverence for life and the sanctity of life rather than the promotion of a cult of death. Put another way, criminal law purpose is to unify normative principles and social standards. As the great judge Oliver Wendell Holmes once put it, "no grand principle is worth a damn unless it is applied to specific cases."

Let me turn to the specific question of suicide bombing. Both suicides and bombing of innocents are condemned in the Old Testament, the New Testament and, surprisingly, the Quran itself. Let me quote from the website of the Iraq Foundation: "Suicide bombing is a terrorist activity." Therefore, on their website, the Iraq Foundation supports the predecessor of this bill, Bill S-206. It is on their website. By the way, I did not know about this website until it was brought to my attention. The website goes on to state the following:

We, the undersigned, support and seek your support for Senate Bill S-206, which amends Section 83.01 of the Criminal Code to ensure suicide bombing is clearly within the definition of "terrorist activity".

Suicide bombing has become an all too frequent practice in many countries throughout the world. Thousands of civilians are killed and maimed to advance a cause based on falsely implanted expectations of glory and martyrdom. We say no cause can justify suicide bombing.

Bill S-206 aims beyond those who strap explosives to their bodies and look where they can cause maximum pain, suffering, death and dismemberment. It will help focus on those who promote terrorism by teaching, organizing and financing the killers in the name of ill-conceived ideology, distorted belief or abhorrent political conviction. The amendment will assist law enforcement agencies to pursue the individuals promoting this heinous tactic.

Penal statutes must unambiguously state which actions are criminalized. Rather than assuming that suicide bombing is currently covered by implication in the Code, this amendment specifies suicide bombing as prohibited terrorist activity.

Arnold Toynbee, in his magnificent work, *A Study of History*, is dedicated to analysis of the rise and fall of civilizations. He traces the characteristics that led to the disintegration of a civilization. He examines the schism in the social body and the collective

experience. He then examines the "outward and visible sign of inward and spiritual rift" resulting from internal schism.

Toynbee explores this underlying schism in society that is characteristic of a disintegrating civilization. He looks deeper into what he calls "the schism in the souls of members of a disintegrating society," the individual members of sect societies.

A society unravels, Toynbee notes, when an individual looks at his failed or failing society, his disintegrating society, and becomes a "truant" and turns to so-called "martyrdom." It is a way of stepping beyond the current malaise of his fragmenting society, much like a soldier who no longer seeks to minimize the risk to his life while inflicting damage on others. Instead of this course, the "truant" from society, as Toynbee says, chooses to court death, to take the offensive in the face of manifest moral defeat, decay and drift. Having failed to reform his own society and cultural environment, the suicide now seeks to master his own self.

Honourable senators, I will not go on with this, but I urge you to read Toynbee because he makes the point in historic terms. He concludes that "the pain is the punishment for the sin of idolatry worshipping the creature rather than the Creator."

Honourable senators, the problem with suicide bombing goes beyond martyrdom when the suicide intentionally targets other innocent lives as a measure of success and thus promotes the cult of death, overriding the reverence for life, including his own.

Roscoe Pound, a leading American teacher and writer, in his magnum opus, *An Introduction to the Philosophy of Law*, defined 12 organizing ideas of law from ancient times to the present, from Mosaic law to the Code of Hammurabi, to Greek and Roman law, to medieval law and to the origins of social then economic justice. The common thread — the organizing idea of the rule of law throughout the ages — has always allowed greater political freedom and security of individuals aligned with reciprocal duties to refrain from aggressive violent conduct towards others that would limit, in the extreme case, suicide bombings to end innocent human life. This work, honourable senators, I commend to you. It is a brilliant analysis of this problem.

Reverence for life is a lynchpin of all religions and the keystone of the rule of law. All our laws are wrapped around this central idea.

I raise the question of suicide bombing because it cuts so contrary to the essence of our concept of civilization and our reverence for life.

There are two arguments against this amendment. The first is that the notion of criminalization of suicide bombing is already implicit in the criminal law by other words; so have said some of the critics. I return to my original thesis. The criminal law should and must incorporate accepted and clear-headed words that emerge from common usage in order to enhance the clarity of the criminal law in the public mind.

The express, operative precautionary words in the amendment are for "greater clarity."

In the Ouimet report, the Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections, 1969, said the following:

No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means.

It is accepted by the Law Commission of Canada that the criminal law ought to be “pruned” to differentiate between what it calls “real crimes.” The commission wrote:

To count as real crime, an act must be morally wrong . . . The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values.

I am directing my comments to this particular bill, but these comments and principles have a wider significance because of the other criminal justice measures that shortly will come before the Standing Senate Committee on Legal and Constitutional Affairs.

The second argument against this bill, more vague and inexact, is that this amendment would somehow dilute the application of international law as illustrated in international relations or treaties. Allow me to address yet again this latter argument.

The Latin phrase *pacta sunt servanda* means “agreements must be honoured.” That maxim from Roman law is presupposed to be the organizing principle of international law. Unfortunately, in international law, the principle and the practice diverge. This principle has not been observed nor has it been practised. What, then, is the relationship between treaty law and domestic law? The aim is the same, but the practice of enforcement is obviously different. International law has no direct enforcement mechanism other than the International Court of Justice, with its limited mandate, funding and access. The articles of the UN Charter empower the Security Council to enforce its resolutions.

(1610)

I will not belabour a self-evident proposition other than to say that the UN actions of enforcement have been episodic, inconsistent and highly politicized. Politics rather than justice, equality and the rule of law have governed its enforcement policies.

Enforcement policies in the United Nations depend on a coalition of the willing. The Security Council has been politically polarized on issues of enforcement contrary to the hopes of the architects of the UN Charter itself, including our late and revered former Prime Minister Lester Bowles Pearson, one of Canada’s greatest foreign ministers, and, of course, the late, great and very honourable Louis St. Laurent, who also served as a great and innovative foreign minister. Both of them were unhappy and displeased with the UN; hence, they moved forward on NATO. That is a historic fact as well.

Observers such as the brilliant Senator Moynihan, in his book *On The Law of Nations*, argue that enforcement of the international rule of law by one state unilaterally is ineffective, especially when politically renounced by other states. This, of course, was not the intention of the fathers of the UN, especially Canada.

So, we are in a no-man’s land of good intentions when it comes to international law. The best way to address this chasm of enforcement is to establish and enforce domestic law — hence this

amendment. A made-in-Canada law will resonate throughout the international community.

When Senator Eggleton first approached me on the subject, it was his view and that of an outstanding Canadian, former Justice Reuben Bromstein of the Supreme Court of Ontario, that we should pass merely a resolution in this chamber.

I concluded that that would not, in any way, shape or form, enhance the situation in Canada. The only way to enhance the situation in Canada would be by an amendment to our Criminal Code. I think that Senator Eggleton and Mr. Justice Bromstein agreed with that, and hence this amendment.

Senator Moynihan argued that the canons of international law are thought to be normal, necessary and satisfactory, so the international law and domestic law converge in the same objectives: renunciation of aggressive conduct, aggressive violence against innocent individuals, with the political purpose to sow terror in democratic states to retard the growths of freedom, liberty, stability and, above all, the security of the individual and the reverence for life.

Death is the most serious crime that can be inflicted on a person and it carries the harshest penalties in criminal law — so says the Law Commission of Canada; so says our Criminal Code. To leave an express void in our domestic criminal law against acts of suicide bombers is neither salutary nor celebratory for peace, order and good government in Canada. Canada can lead the way internationally in its express criminal law to suffocate and hopefully eradicate suicide bombing as a weapon of choice for whatever purpose.

Honourable senators, I will not belabour the point any further other than to say that a resolution encapsulating calls for addressing suicide bombing has been consistently passed by the OSCE — 56 states. Our honourable colleague Senator Di Nino is the chairman of our delegation and he can affirm that statement.

At meeting after meeting, the 56 democratic states of the world, the largest international parliamentary human rights organization in the world, on which I serve as vice-president, have passed resolution after resolution condemning suicide bombing and recommending that they be passed explicitly in domestic legislation. This is not a simple whim of Senator Eggleton, Justice Bromstein or I; this has the support of 56 other nations.

There they have difficulty because they say they want to propose this not only as suicide bombing but as a “crime against humanity.” I argued earlier that the idea is to make it much more specific, congruent and coherent as it applies to our own domestic laws — clarity again, clarity.

As I said, honourable senators, this amendment fully accords with Jewish, Christian and Muslim teachings against the intentional homicide of innocent persons by persons committing suicide by their tragic action.

Honourable senators may recall that on July 18, 2005, in response to a suicide bombing in London on July 7, more than 500 British Muslim religious leaders and scholars offered condolences to the families and victims, and issued a fatwa which stated in clear and unequivocal language that the use of violence and the destruction of human lives are vehemently

prohibited. This fatwa was proclaimed by the British Muslim Forum outside the British houses of Parliament.

The Secretary-General of that organization, the BMF, Mr. Gul Mohammad, quoted from the Quran, Surah al-Maidah, paragraph 5, verse 32:

Whoever kills a human being . . . then it is as though he has killed all mankind; and whoever saves a human life it is as though he has saved all mankind.

He then stated:

Islam's position is clear and unequivocal: murder of one soul is the murder of the whole of humanity; he who shows no respect for human life is an enemy of humanity.

Approximately 50 Muslim leaders and scholars from around the U.K. stood together outside the houses of Parliament to support Mr. Gul Mohammad as he publicly read out that fatwa.

In a separate statement, the British Muslim Forum, with nearly 300 mosques in the U.K. affiliated to it, noted that this fatwa would be read out in all mosques across Britain on July 22, 2005, which it was. The public statement also said:

We pray for the defeat of extremism and terrorism in the world.

Then, honourable senators, 40 Islamic leaders and scholars met in London's Islamic Cultural Centre and issued yet another declaration denouncing suicide bombers.

Since the time of Moses, the intentional taking of human life has been prohibited. Witness the story of Cain and Abel. This edict is encapsulated in the sixth of the Ten Commandments. At Sinai, in the two Tablets of the Covenant that Moses unveiled, the idea of freedom was limited or circumscribed by the Ten Commandments. One tablet dealt with honour and respect and the other with human well-being. This is found in Exodus 20:13 and Deuteronomy 5:17.

The original Hebrew text of the Old Testament uses different words for "intentional" versus "unintentional" killing. The King James Version, in modern translation, now uses this translation: "Thou shalt not murder." This translation is more linguistically nuanced and more closely represents the original meaning of the ancient Aramaic text. The Hebrew word "tirtzach" in the sixth Commandment is "ratzach," which ordinarily refers to intentional killing without cause and accidental killing.

I say this, honourable senators, to explain that this runs deep into the Christian, Jewish and Muslim religions.

The Talmud went on to explain the references to suicide and said — and it is very remarkable that it is similar to the Quran:

For the world was created for only one individual to indicate that he who destroys one human life is considered as if he destroyed the whole world.

In effect, the Quran echoes the precise principle as laid out in the Talmud.

Hebrew law considered accidental killing as not punishable. Thus, in the Old Testament, there were "cities of refuge" where

people could flee to escape retribution. Under the Old Testament, breaking other sacred laws such as honouring the Sabbath is permissible if breaking that law will save just one human life. To protect one's own life against intentional murder by another, the law of self-defence is equally permissible.

Christian theology, including Protestant, Catholic, Orthodox and Eastern Rites denominations makes it equally clear, prohibiting intentional murder of innocent people — Matthew 19:18, Corinthians 6:19 to 20 all prohibit the taking of human life intentionally.

The entire rationale of our Criminal Code is precise to ensure that crimes are proved beyond a reasonable doubt. Strict onus of proof remains with the state. Clarity is essential when the powers of the state are arraigned against any person.

The Criminal Code is a codification of our laws. Is it there any reason, honourable senators, not to clarify the Criminal Code and make suicide bombings an express, explicit criminal offence?

On a careful reading of the Criminal Code and the Anti-terrorism Act, there is no specific criminal offence of suicide bombing, per se, and the Anti-terrorism Act will return to us again and again in other forms. Those who are on that committee will once again re-examine that question.

A specific prohibition against suicide bombing would directly assist and enhance the prosecution of those unsuccessful suicide bombings and those who individually and collectively conspire to assist in suicide bombings. Peace, order and good government, as I said, lie at the base of Canada's system of the rule of law.

Suicide bombing is contrary to the very heart of our constitutional principles. Criminal law as it stands does not expressly prohibit those who intentionally choose to take their own life as a means of taking as many lives as possible. If suicide bombing is tantamount to homicide, the Criminal Code should eliminate any doubt about it as a clear-cut, express criminal offence.

This surgical amendment will help bring attempted suicide bombers, those teaching this cult of death and those collaborating with them or assisting them directly or indirectly, to justice.

(1620)

This surgical amendment would discourage, as the Criminal Code should, the encouragement of such conduct that we conclude is abhorrent to our entire civilized society. While this is a modest amendment, it represents an important clarification in the principles deeply embedded in our natural law and in the Criminal Code.

The nature of criminal law is to mediate between morality and reason. The purpose of criminal law is to draw precise lines between what is acceptable and what is abhorrent. In the process, criminal law forewarns, censures, ostracizes, isolates and seeks to undermine and reduce, if not expunge, aberrant behaviour from our society. The criminal law requires precision rather than vagueness as the state arraigns its mighty powers against the aberrant behaviour of the individual.

I believe, honourable senators, I have made a case to remediate our Criminal Code and criminal law expressly to prohibit suicide bombing.

I commend to honourable senators a book entitled *Dying to Win: The Strategic Logic of Suicide Terrorism*, by Robert Pape, a professor at the University of Chicago. In it, he painstakingly analyzes a demographic profile of suicide bombers and the groups who conspire to assist them. He concludes that, for the most part, these individuals are neither poor, desperate, nor uneducated religious fanatics. More often than not, they are well-educated, middle-class political activists.

Honourable senators, when I read this book, I called Mr. Pape and I asked him what was happening since he published the book. He stated: "Suicide bombing continues to raise rapidly around world." Regretfully, honourable senators, it has become an intentional weapon of choice in every violent corner of the globe.

In Iraq and Afghanistan, innocent lives, particularly Canadian lives, have been lost because of suicide bombers. We are fighting against suicide bombers abroad, so surely at home we can make this activity an explicit criminal offence.

Should we not lead the other countries of the Organization for Security and Co-operation in Europe who have condemned suicide bombing as abhorrent to civilized societies?

Canadians Against Suicide Bombing was organized and led by former Mr. Justice Bromstein, and thousands upon thousands of citizens have signed its petition. Numerous outstanding Canadians have been listed as supporters of this bill. The former Mr. Justice Bromstein has urged the United Nations and Parliament to take action to remediate against this uncertainty in the criminal law.

I commend the former Mr. Justice Bromstein who has taken this responsibility upon himself. When he retired as a judge, he took his voluntary responsibilities to the highest level of civic duty in our country. I believe we should all commend him.

The website of the Canadians Against Suicide Bombing has received over 75,000 hits, which indicates a deep interest in this issue from Canadians in every corner of the land. The legal views I have reviewed include those of the great professor of law, formerly the editor of *The Canadian Bar Review*, known to many lawyers in this chamber: Professor Jean Castel.

Honourable senators, I urge the speedy adoption of this bill. This amendment would send a clear message of abhorrence and condemnation to those who would praise, plan or implement suicide bombing against innocent citizens here and abroad.

Honourable senators, I conclude with a quote from another mentor of mine, my distinguished former dean and friend, the late Cecil Augustus Wright of the University of Toronto Law School. In a speech he made at the University of Toronto, he quoted from Mr. Justice Frankfurter of the U.S. Supreme Court. He said:

Fragile as reason is and limited as law is as the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling.

Honourable senators, this amendment reaches into the pith and substance of our Criminal Code. I will briefly summarize what took place in the Standing Senate Committee on Legal and Constitutional Affairs that, after considering the predecessor bill, approved it. I commend all honourable senators who served on

that committee, who cross-examined the witnesses and ended up with an instructive and educated rhetoric. At the culmination of the committee hearings, the committee recommended the adoption of that former bill without amendment.

The evidence before the committee was overwhelmingly in support of the bill. The only opposition was offered by representatives of the Department of Justice. They said that elements of suicide bombing were already contained in the Criminal Code and, as a result, cause confusion with respect to prosecutions. However, the RCMP responsible for prosecutions, called by the government as a government witness, denied this confusion. They refuted the testimony of the Department of Justice officials. I wish to be careful in summarizing their evidence because honourable senators will read the record. In effect, the RCMP said they supported the bill but suggested, perhaps, that it did not go far enough.

In addition, other witnesses were called: Professor Patrick Monahan, Dean from York University's Osgoode Hall Law School. He is well known to Parliament and spoke in favour of the bill. Other witnesses who supported the bill include: Ed Morgan from the University of Toronto Law School, an international expert who talked about international ramifications; Leo Adler, a defence lawyer with international experience; and Mark Sandler, an outstanding defence lawyer.

The most telling piece of evidence called by the committee was the representative of the Canadian Council of Criminal Defence Lawyers, William Trudell. Amazingly, he supported this bill. As the members of the Standing Senate Committee on Legal and Constitutional Affairs will recall, it is a rare occasion when that association supports or accepts any amendment of the Criminal Code put forward either by the government or by private members.

I urge honourable senators who have any questions about the bill to read Mr. Trudell's evidence, which is instructive, as well as the transcripts, which are not long. I also urge honourable senators to return the bill as quickly as possible to the Standing Senate Committee on Legal and Constitutional Affairs who, after full deliberation, approved it without amendment and so approved it at third reading and sent it to the other place. The bill went to the other place and died on the Order Paper in the second to last Parliament.

Now, honourable senators, we must repeat the process. However, the Senate can expedite the process and expedite the hearings in the Standing Senate Committee on Legal and Constitutional Affairs.

Honourable senators, let me conclude with this point. I have said that this bill is supported by thousands of Canadians and it is. However, explicitly supporting the bill as well are three former Prime Ministers: The Right Honourable Kim Campbell, the Right Honourable John Turner and The Right Honourable Jean Chr tien. By the way, they are all former attorneys general. As well, the bill is supported by the former Chief Justice of Ontario, himself also an attorney general of Ontario, and it is also recently — last week — supported by former Prime Minister Paul Martin, who has added his support.

Four former prime ministers support this measure and urge its speedy adoption. Four former provincial premiers support this bill, as well as religious leaders from every religion in Canada, and

distinguished Canadians including Ed Broadbent, a former leader of the NDP. This bill has overwhelming bipartisan support because these supporters all understand that the purpose of suicide bombing is to kill innocent people for political, ideological or so-called religious objectives and to sow terror in the hearts and minds of the population. This cult of death is anathema to every organized religion, be it Christian, Muslim, Jewish, Hindu, Buddhist or others. Agnostics and atheists alike all abhor "suicide bombing" as contained in this bill.

The Criminal Code is an educative tool. It is also a tool for deterrence. In recent weeks alone, honourable senators — and this evidence is anecdotal — I have counted in the newspapers over 150 deaths caused by suicide bombings across the world, as well as countless injuries, damage and pain.

This bill, honourable senators, will send a clear and simple message to the international community that Canada stands resolutely against suicide bombing, whether at home or abroad, in any way, shape, form or under any circumstances.

Honourable senators, I urge, once again, its speedy adoption and the expedition by the committee back to this chamber so it can be sent over to the House of Commons.