



# **Complementarity: The Constitutional Role of the Senate of Canada**

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# TABLE OF CONTENTS

<b>Introduction</b>	<b>2</b>
<b>A. Complement to the House: A Constitutional Role Rooted in the Appointive Principle</b>	<b>7</b>
<b>B. In the Senate, Self-Restraint is the Constitutional Watchword</b>	<b>11</b>
<b>C. The Senate’s Power to Amend, Legislate and Influence Public Policy</b>	<b>17</b>
<b>D. We “Ping”, But We Generally Ought not “Pong”</b>	<b>28</b>
<b>E. A Prudent Yet Vigilant Approach to Fiscal and Budgetary Initiatives</b>	<b>30</b>
<b>i. Restricted Access to the Purse Strings</b>	<b>30</b>
<b>ii. A Tradition of Vigilance and Self-Restraint on Confidence and Budgetary Matters</b>	<b>31</b>
<b>iii. The Omnibus Caveats</b>	<b>33</b>
<b>F. The Senate Extraordinary and Rarely Used Power to Defeat Government Legislation</b>	<b>37</b>
<b>G. Democratic Deference to the Government’s Election Platform</b>	<b>41</b>
<b>H. Private Members’ Bills and the Senate’s “Pocket” Veto</b>	<b>47</b>
<b>Epilogue: Better Serving Canadians</b>	<b>49</b>

## INTRODUCTION

*“If we enact legislation speedily, we are called rubber stamps. If we exercise the constitutional authority which the Senate possesses under the British North America Act, we are told that we are doing something that we have no right to do. I do not know how to satisfy our critics.”*

The late former Senator Carl Goldenberg, Senate Debates of January 11, 1974

Many senators are working hard to close a credibility gap that was created by many difficult years and prove the Senate’s public value as an appointed upper chamber. The national conversation about the Senate is slowly changing, moving away from negative manifestations of partisanship towards a discussion on how it should best fulfil the role that the Founders of Confederation envisioned. While the Senate has done some good work throughout its history that has all too often gone unnoticed, the shift toward the appointments of senators that would sit as independents has been a positive step towards bolstering Canadians’ confidence, and one that did not require amending Canada’s Constitution.

As a legislative body designed to provide a complementary review of government bills before they become the law of the land, and a counterweight to majoritarianism, the Senate plays an important role in our federal, bicameral parliamentary system. By the same token, formally speaking, the Senate is the most powerful unelected legislative body in the western world. In theory, the Senate’s veto power allows it to amend or defeat virtually any government bill, including election commitments and confidence measures, such as budget bills. Yet, citizens justifiably expect the Senate to provide meaningful contributions to public policy without overstepping its constitutional role as an unelected upper house.

Given this, as the Red Chamber transforms into a more independent and less partisan body, an old question has gained new relevance: how far should the Senate go – as an appointed body – in challenging legislation that has been approved by Canadians’ elected representatives? This question has hounded senators for 150 years and the answer has invariably been imprecise. And perhaps for good reason: every bill sent the Senate’s way is a unique product of policy and political context.

Unsurprisingly, a healthy dose of skepticism emerged early in the Government’s mandate about the shift toward a non-partisan Senate. Two contradictory perspectives featured prominently in the national conversation at the time.

On one hand, critics argued that a more independent Senate could undermine representative democracy. Such commentators posited that a Senate free from the constraints of party discipline would jeopardize the democratic process by routinely challenging the elected representatives of Canadians. One such critic warned about a looming constitutional crisis driven by a Senate membership that is “armed with the mandate of virtue.”<sup>1</sup> Another commentator, less preoccupied with perceived virtue than potential power, has raised the fearsome specter of a FrankenSenate,

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<sup>1</sup> “Andrew Coyne, “The Senate has no Business meddling with the federal budget”, National Post, January 18, 2017.

an unwieldy and monstrous organism hostile to its creator.<sup>2</sup> Although one academic has argued that “this dominant media narrative about the Senate bears little semblance to reality”<sup>3</sup>, senators remain acutely mindful of the underlying concern.

On the opposite end, some critics stated that the Government’s appointment process would transform the Senate into a politically diminished advisory body. Proponents of this view have included Senator Claude Carignan, former Prime Minister Stephen Harper’s point man during a notoriously top-down era. Despite his years in a political culture of extreme discipline, Senator Carignan once mused about the independent reform’s “risk of emasculating the Senate — of making it a powerless debating society, disconnected from the true political issues of the day”.<sup>4</sup> In other words, the argument runs, adversarial partisanship alone can provide effective criticism and review to government initiatives. Notwithstanding that nine out of ten Canadians have never held a party membership, in Senator Carignan’s view, the Government’s decision to appoint non-partisan Senators “turns the Senate into one big and powerless advisory committee, more akin to a group of bureaucrats than legislators”.<sup>5</sup>

These two perspectives share a common denominator: pessimism. Beyond that, they continue to be polar opposites. To some, senators will be damned if they do, and damned if they don’t. The Senate has wrestled with this dilemma since Confederation. Accused of wielding too much and too little power, it became clear early in the current Government’s mandate that the new Senate would have to work diligently to disprove these two hypotheses, occupying the golden mean defined by the Senate’s constitutional role.

The complementary role of the Senate lies somewhere between the two views outlined above. It is that temperate and judicious middle ground that the Senate must occupy, exactly where the Founders of Confederation intended – that the Senate be neither a rival to the elected representatives of Canadians nor a rubber stamp for the Government. This model, ever mindful of the Senate’s institutional purpose, is in stark contrast with the ideology espoused by some members of the Conservative Opposition in the Senate. On the face of it, some Conservative senators would have the institution be a rubber stamp when their party is in power, and an aggressive rival to the elected House when their party is in opposition. To them, I would posit that Senators can – and ought to – act reasonably and according to their complementary role in dealing with any government. While there is a very fine balance between rubber stamping and overreaching, it is that middle ground that the Senate must travel. Sir John A. Macdonald termed this activity sober second thought.

More than two years into the new model, the Senate is on its way to achieving this high-wire act, albeit with the benefit of a few cautionary experiences. The upper chamber has made meaningful and significant contributions to the government and non-government legislation of the 42<sup>nd</sup>

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<sup>2</sup> Tony Keller, “Mr. Trudeau’s FrankenSenate: It’s alive, and it’s dangerous”, *The Globe and Mail*, June 14, 2017

<sup>3</sup> Emmett Macfarlane, “Proposing amendments isn’t Senate activism. It’s the Senate’s job.”, *MacLean’s*, June 19, 2017

<sup>4</sup> Proceedings of the Special Committee on Senate Modernization, Issue No. 6 - Evidence - October 19, 2016. Official translation from French.

<sup>5</sup> *Ibid.* Official translation from French.

Parliament. It has successfully alerted public opinion to important policy issues. And it has continued to maintain the Senate’s customary practice of deferring to the will of the elected House of Commons where Senate amendments were not accepted. In the process, commentators and stakeholders have increasingly recognized the Senate for its useful contribution to the legislative process.<sup>6</sup> Canadians are now alert to a viable – and, I think, preferable – Senate model that better protects their rights and serves their interests in Parliament.

So far so good? On balance, yes. Drawing on examples of the Senate’s work, I will offer some thoughts on the positive track record that the Senate has been developing in the course of this Parliament, in the fulfilment of its role as a complementary body of sober second thought. But the renewed Senate is still finding its footing and cannot afford to rest on its laurels. The fragile balance requires vigilance and attention. The future of the institution may well turn on the individual choices of senators.

For this reason, this discussion paper examines the conceptual question of “how” we as senators decide to vote. The question is invariably complex and each vote must be assessed on its own merits. Yet, in most cases, the Senate can find answers by looking to its core constitutional function as a non-elected upper chamber in Canada’s Parliament, which is to *complement* the work of the House of Commons through sober second thought. There can be no shortcuts: on each and every bill or proposed amendment, senators must exercise their judgment in a matter grounded on the public policy question at issue; the role of the Senate in Canada’s constitutional architecture; and the restraint that is rightly expected of appointed senators in a society where democracy is foundational and, in politics, uniquely legitimizing. As one columnist recently wrote, prompted by the Senate’s recent rewrite of the *Transportation Modernization Act*, Bill C-49, “[T]he Senate needs to find some principles of restraint, not just about when it’s okay to defeat government legislation, but when it’s appropriate to amend it.”<sup>7</sup>

What follows in this discussion paper are some reflections on the Senate’s role as a robust complement to the work of the House of Commons in a modern democracy. Readers will note that it does not contain purely prescriptive policy recommendations. This is because the theme addressed – the Senate’s complementary role – is nuanced. This paper argues not for strict rules or limitations, but rather for a flexible approach informed by a set of basic principles that include those outlined below.

That the Senate:

- ❖ continue to view the defeat of government legislation as exceptionally rare, a safety valve to protect Canadians against the tyranny of the majority;

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<sup>6</sup> See, for example: “Jusqu’où iront les sénateurs ?”, L’actualité, Alec Castonguay, 1 avril 2018; “Un sénat... utile!”, La Presse, Editorial, Paul Journet, 21 février 2018; “Globe Editorial: Praise the Senate – and fear it”, The Globe and Mail, Editorial, June 22, 2017; “The “new” improved Senate”, Policy Options, Paul G. Thomas, January 26, 2018; “Le Sénat n’est pas devenu un monstre”, La Presse, Editorial, Paul Journet, 6 juin 2017; “Meaning of Meredith: Is the Senate getting more accountable?”, Alex Ballingall, The Star, May 5, 2017.

<sup>7</sup> Campbell Clark, “Lobbyists find fresh targets in the newly-empowered Senate”, The Globe and Mail, March 28, 2018.

- ❖ adopt a stance of democratic deference to the Government’s electoral platform when passed into law by the House of Commons, in accordance with the principles underlying the Salisbury Convention (which does not preclude amendments that would improve the legislation);
- ❖ forsake the “pocket veto” of procedural obstruction over legislation passed by the House of Commons, and instead act in accordance with the principle that every bill is deserving of a democratic vote;
- ❖ continue to foster a tradition of self-restraint on confidence, budgetary and fiscal matters, while ensuring that omnibus bills are appropriately scrutinized;
- ❖ customarily respect the will of the House once it has declined, modified, or accepted some but not all Senate amendments;
- ❖ strike a balanced approach to amending government legislation, with an outlook emphasizing – but not strictly limited to – the areas that are at the heart of the Senate’s institutional mission, including sober review of:
  - the interplay of legislation with:
    - the Constitution of Canada, including the *Canadian Charter of Rights and Freedoms* and the division of legislative powers between Parliament and the provincial and territorial legislatures; and
    - Treaties and international agreements that Canada has ratified;
  - the detrimental impact of legislation on minorities and economically disadvantaged groups;
  - the impact of legislation on regions, provinces and territories, but with a view to the national interest of the federation as a whole;
  - consultations conducted with stakeholder groups, if at all required by law;
  - the text of the legislation for drafting errors, serious unintended consequences or other potential oversights;
- ❖ defer to legitimate and reasonable government policy choices accepted by the House of Commons that aren’t inherently bad or fundamentally ill-considered, and for which MPs (including cabinet ministers) will ultimately be held to account by the public; and

- ❖ continue to exert influence in the policy process through a wide range of “soft power” tools (such as public policy studies and Senate public bills).

To be clear, such principles are necessarily flexible. I, for one, would not favour strict rules that would materially hinder the Senate’s ability to uphold a fundamental democratic principle; protect Canadians from a heinous or egregious deprivation of basic rights and freedoms; or to defend against a shocking encroachment of underrepresented regional interests.

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## A. Complement to the House: A Constitutional Role Rooted in the Appointive Principle

*“The Senate was designed to serve the needs of the new federation, a purpose the Fathers of Confederation took seriously, despite depictions of them lounging eternally at Charlottetown and Quebec City. Every account of the Quebec Conference testifies that they spent more time on the plan of the new upper chamber than they did on any other subject, an allocation of interest that signalled the exceptional enterprise underway.”<sup>8</sup>*

Professor David E. Smith

One must acknowledge that, if given the choice, many Canadians would instinctively opt for an elected Senate over an appointed Senate. Influenced as they were by the experiences of upper houses at both Westminster and Washington,<sup>9</sup> the Founders themselves struggled with the question of appointment versus election. It is no surprise, therefore, that since its creation in 1867, most Senate reform initiatives have focused on the possible shift to an elected Senate. Whatever the merits or pitfalls of a second elected chamber in our federal Parliament (and there are valid arguments for both), the fact that the Senate was purposely created as an appointed body to fulfill a specific role has all too often been lost in the debate.

In this regard, the Supreme Court of Canada’s 2014 reference opinion on Senate reform provided much needed clarity as to the upper house’s place in Canada’s constitutional architecture. According to all eight justices of the Supreme Court having heard the reference, the Senate’s role is to “complement” the work of the elected House of Commons by providing a “distinct form of representation for the regions that had joined Confederation”.<sup>10</sup> This role, the Justices said, is a direct function of the Senate’s appointed nature. As a result, a shift toward an elected Senate would require the approval of seven provinces representing more than half of the Canadian population, consent that could only be gained by constitutional negotiations. In practical terms, because the Senate’s complementary function depends upon the appointive model, it is clear today that unless we choose to reopen the Constitution, the Senate, as an appointed chamber, is here to stay.

We have a Senate, so let’s make it work. No country as large as Canada, as regionally, linguistically and culturally diverse can function properly without a second chamber in its national political institutions. Our Constitution insists on it and well it should. The second chamber provides what all democratic systems require—checks and balances to hold the Government’s legislative output to account — and what all federal systems need — a voice for smaller regions and minority

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<sup>8</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150*, University of Toronto Press, 2017, p. 49.

<sup>9</sup> See, for example: *The Canadian Senate in Focus 1867-2001*, Senate Committees and Private Legislation Directorate, May 2001: “The United States Senate, whose senators were appointed by state legislatures at the time of Canadian Confederation, only confirmed the notion that Canadian senators should be centrally appointed, as the Fathers of Confederation were of the opinion that it was the power struggle between the states and central government that had precipitated the American Civil War. The concept of having an elected upper chamber was also unappealing to the Fathers, as it begged the obvious question of whose will would prevail if both Houses were composed of the chosen representatives of the voting public.”

<sup>10</sup> *Reference re Senate Reform*, [2014] 1 SCR 704, par. 15.

interests so that they are not drowned out by the larger and louder voices. This is why membership in the Senate is by region and why the guarantee of equal regional representation is enshrined in our Constitution. Not all Canadians are aware that the notion of regional equity<sup>11</sup> was necessary to strike Canada's Confederation bargain. Without it, there would be no Canada. George Brown, an influential Father of Confederation, summed it up: "On no other condition could we have advanced a step."<sup>12</sup> George-Étienne Cartier said that "the count of heads must not always be permitted to out-weight every other consideration."<sup>13</sup> That explains why the Senate and its role dominated the debates during the 1864 Quebec Conference.

The current Government's approach to the Senate seeks, through the removal of a party-affiliated government caucus and the appointment of independent senators who have no personal stake in the election of a political party, to foster the conditions that will allow the Senate to leverage its unique qualities and demonstrate to Canadians its value as a complementary body of sober second thought. Having recently marked my second anniversary as a member of the Senate, I can confidently assert that the institution works quite well when it embraces the features that differentiate it from the House of Commons.

First and foremost, the Senate is meant to engage in the legislative process in a fashion that is removed from the pressures of the electoral cycle and the partisan politics of the day. Because senators were appointed for a long tenure, it was originally expected that they would not place the interests and fate of political parties at the heart of its deliberations. Rather, senators would take an independent and dispassionate approach to the task of legislative scrutiny and debate, and apply their thoughtful judgment unimpeded by electoral or partisan pressure.

As Professor David E. Smith, one of Canada's most distinguished parliamentary scholars and an eminent Senate expert, writes in his excellent book *The Constitution in a Hall of Mirrors: Canada at 150*, "independence is an essential element in the Senate's performance of its complementary function in the legislative process."<sup>14</sup> By virtue of the length in tenure of senators, the Senate has always been less partisan than – and independent from – the House of Commons. Senators, after all, do not need to get re-elected. Despite this institutional difference, over time, it became increasingly clear that partisan affiliation and heavy-handed executive direction interfered with this core feature of the Senate's complementary role. For one thing, the electoral fate of political parties remained a top-of-mind issue for many (but certainly not all) senators. Not everyone shares my view that partisanship has served the Senate in a negative way. I respect their view, and would acknowledge without hesitation that the Senate has accomplished terrific work during the time of the two-party system. Some of the most respected and accomplished senators that sit in the Senate today were appointed as party-affiliated senators by previous Prime Ministers. Rookie senators – which include the author of this paper – look to them for guidance on a daily basis.

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<sup>11</sup> At the time of Confederation: 24 senators each for Upper Canada; Lower Canada; and the Maritimes.

<sup>12</sup> *The Confederation Debates in the Province of Canada, 1865*, edited by P.B. Waite, 2006, p. 40

<sup>13</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150*, *supra*, p. 57.

<sup>14</sup> *Ibid*, p. 77

However, the past decade illustrated the extent to which partisanship in the Senate can turn ugly, undermining the complementary purpose of the institution. Pressure and direction of the executive was brought to bear on senators in spectacularly muscular fashion, something that was particularly problematic during Prime Minister Stephen Harper's time in power. The proceedings of the Ontario Superior Court of Justice case *R. v. Duffy* provided Canadians with a revealing glimpse into the type of relationship that was fostered between the executive and the Senate at the time. In the Court's judgment, Justice Charles H. Vaillancourt noted that email evidence filed in the case confirmed that Prime Minister Harper's senior-most staffer had been "ordering senior members of the Senate around as if they were mere pawns on a chessboard", with those members of the Senate "meekly acquiescing" to the staffer's orders, "robotically marching forth to recite their provided scripted lines".<sup>15</sup> Astonishingly enough, a draft memorandum to then-Prime Minister Harper dated March 22, 2013 - crafted by the upper echelons of his PMO and now in the public domain - lamented the tabling of "Senate committee reports that call on the government to lower airport rents, create a national pharmacare plan and invest heavily in aboriginal education". For the PMO, there appears to have been a pressing need to deploy "constant direction, supervision and follow-up ... to ensure that Government messaging and direction are followed."<sup>16</sup> Prime Minister Harper switched gears shortly thereafter, appointing a new Government Leader in the Senate during the summer of 2013.<sup>17</sup> Given this highly partisan and controlling approach, it is no surprise that between 2013 and 2015, only one of the previous Government's 61 enacted bills was amended. The Senate's institutional independence, and therefore its capacity to fulfill its complementary role, was severely compromised. No doubt the Conservative Party at that time saw value in maximally transforming the Senate into a partisan platform, but would most Canadians say the same? As Smith writes, "when the Senate turns partisan, it loses public trust in its deliberative capacity - the quality of the institution Canadians most admire".<sup>18</sup> Hence, he continues, the imperative of a more independent Senate:

"If it is the function of the Senate to detect and communicate the views and opinions that the representative system in the Commons fails to detect adequately, how may silencing or limiting the upper chamber in the performance of its (non-elected) mandate be defended? ... The need for second chamber independence is pressing."<sup>19</sup>

By contrast with its predecessor, the current Government's approach to the Senate (both in terms of appointments and working relationships) is primarily designed to re-establish and safeguard the Senate's institutional independence as a non-biased, less partisan, and more effective, place of sober second thought; an institution that brings accountability, transparency and maturity of sober review and scrutiny to the Government's legislative initiatives. This is a sharp and necessary break from the not-so-distant past. As for the role of the Government Representative Office in the

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<sup>15</sup> See: *R v. Duffy*, 2016 ONCJ 220, par. 1029-1038

<sup>16</sup> As reported and made available by CBC. See: Kady O'Malley, "Senior PMO officials fumed at lack of control over Tory senate caucus", CBC News, November 20, 2013

<sup>17</sup> "Harper names Claude Carignan Senate leader to replace LeBreton", CBC News, August 30, 2013.

<sup>18</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150, supra*, p. 69.

<sup>19</sup> *Ibid*, p. 85-86.

Senate, I of course work with Ministers and their offices to ensure that the Government's agenda is prosecuted efficiently and deliberatively in the Senate. But the executive does not seek to direct or interfere with the management of our affairs and I equally work to represent the concerns of the Senate to the Government.

Another important feature of complementarity is the ability, through lengthy tenure, to retain institutional knowledge and experience in parliamentary institutions — to be the “corporate memory.” While the House of Commons is characterized by high turnover rates at each election, it has proven useful, in the legislative process, to have the input of parliamentarians who have followed issues and evaluated policies over many governments. Senators' long tenure, and their resultant wealth of experience, also allows the Senate to operate as a specialized and professional body of legislative review. The ability to scrutinize legislation is a skill that is developed over time. The appointive model fosters the development of this complementary asset. For example, anyone currently in the Senate with an interest in the fiscal estimates process knows that their first conversation should be with Senator Joe Day. Similarly, for any given subject matter, a handful of senators generally come to mind as must-consult institutional resources.

The Senate's smaller size (105 seats) relative to the House of Commons (338 seats) is yet another complementary feature, one that is conducive to more intimate and in-depth policy debates.

During the course of Canada's history, the appointive principle has also allowed the Senate to become a vehicle that guarantees, within Parliament, a complementary form of representation for minority and sectional interests that have historically been underrepresented (and in some cases unrepresented) in the House of Commons. It is by virtue of the appointive principle that it has been possible to provide a direct voice in Parliament for Indigenous, ethnic, cultural and linguistic groups that have been historically underrepresented in the House of Commons, and to provide a greater gender balance than in the House of Commons. Through appointment, it has been possible for Prime Ministers to provide representation in the Parliament of Canada to groups that — while numerous — have otherwise been too spread out over different ridings to be able to land a seat in the House of Commons. In many ways, Canada — and the ever-shifting makeup of its population — has shaped the Senate over time.

All of these distinct features provide the Senate with a unique and complementary frame of mind for the review of government legislation and the scrutiny of bills passed by the House of Commons.

Yet there is one remaining feature of the Senate's identity that must always be underscored, both within and outside the Senate chamber. Complementarity necessarily requires a practice of voluntary self-restraint and reasonable deference to the elected House of Commons. When the Founders opted for an appointed Chamber that would not share the House's ballot-box legitimacy, this was perhaps the determinative factor.

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## **B. In the Senate, Self-Restraint is the Constitutional Watchword**

*“The framers of the Constitution Act, 1867 deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of “sober second thought” ... The appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body, shapes the architecture of the Constitution Act, 1867.”*

The Supreme Court of Canada in *Reference re Senate Reform*, [2014] 1 SCR 704

It would be misguided to equate the Senate’s “formal powers” under the Constitution with the Senate’s “role” in our constitutional architecture. This is a false equivalency. The Senate’s powers do not define the institution: they exist to serve it in the appropriate discharge of its role as Canada’s complementary upper house.

To be clear, the issue to be addressed is not how far the Senate *can* go in its relationship with the House of Commons, for its powers allow it to go farther than any other unelected legislative body in the democratic world. Rather, the question is how far the Senate *should* go when it challenges the will of the elected chamber.

Yes, the Senate has extensive formal powers. But the analysis does not end there.

It certainly doesn’t for the Governor General, whose “formal” legal powers under the Constitution would theoretically allow the office holder to refuse to grant Royal Assent to legislation passed by both chambers; dissolve and prorogue Parliament at leisure; or even summon senators different from those recommended by the Prime Minister. Science fiction? Surely. The Crown’s constitutional “role” (and legitimate freedom of action, under constitutional convention) is much more circumscribed than its formal powers would state. Such unilateral actions would breach a number of our constitutional conventions and undermine the basic tenets of our Constitutional architecture. To be clear: the claim here is not that the powers of the Senate and the Crown should be ascertained in the same fashion. Rather that, for any of the three parts of the Canadian Parliament (The Crown, the Senate and the House of Commons), a simple reading of formal constitutional powers does not provide the whole story.

The Senate’s constitutional role is not strictly defined by its constitutional powers. In fact, the method of selection chosen for the Senate in 1867 is a much more accurate indicator of the Senate’s intended function. Senators are appointed precisely because the Founders believed that, without a democratic mandate, senators would have the good sense to thwart the will of the House of Commons in only rare and exceptional circumstances.

It is crucial, in this time of change in the Senate, to recognize the subtlety of the role that the Founders of Confederation envisioned for the Senate. They sought an upper house with enough power to act as a legally effective safety valve against the tyranny of the majority (what Oscar Wilde described as the “the bludgeoning of the people by the people for the people”), a complementary “check” on the excesses of a winner-take-all majority rule. In doing so, Senators

appropriately assign particular importance to the impact of legislation on their region, minorities and fundamental rights and freedoms. This role remains highly relevant today given the significant power that majority governments wield in Canada and the wave of populism that has hit some corners of the world.

However, the Founders indisputably wanted to avoid the gridlock that comes with two elected houses, a desire that was determinative of the decision to create an appointed upper house. In choosing the appointive model for Canada's upper house, the Founders drew upon their own experience with the Legislative Council of the Province of Canada, the precursor to the Senate. In 1856, it was decided that the Legislative Council would be transformed from an appointed to an elected body. The decision was made despite the objection of some prominent politicians of the era, such as the Clear Grit George Brown, the founder of the *Globe* (now known as *The Globe and Mail*). He feared that an elected Legislative Council (the upper house) would rival the Legislative Assembly (the lower house), and notably tread on its dominion over financial legislation. When the issue was revisited in the lead up to Confederation, he and the Founders understood clearly and distinctly that, as an appointed chamber, the Senate would not have the political legitimacy to act as a perennial rival to the House of Commons.

The bottom line is that Confederation provided an opportunity to return to the relative safety of an appointed upper house that worked as a complement to the elected lower house instead of as a rival. The Founders took it.

The Supreme Court confirmed as much in 2014 when it decided that implementing consultative elections for the Senate would require a constitutional amendment involving substantial provincial buy-in. Having combed through numerous pleadings, historical materials, doctrine, and expert evidence, the Court unanimously opined that under the constitutional architecture adopted by the Founders, our upper chamber was specifically designed to exercise voluntary self-restraint in its relationship with the House of Commons. Consultative elections for Senate seats would have fundamentally upset this balance, disturbing the constitutional structure of Parliament.

The Court was crystal clear about this in its core reasoning:

“The choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process. Appointed Senators would not have a popular mandate — they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons.”

...

The appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary

legislative body, shapes the architecture of the *Constitution Act, 1867*. It explains why the framers did not deem it necessary to textually specify how the powers of the Senate relate to those of the House of Commons or how to resolve a deadlock between the two chambers. Indeed, on its face the *Constitution Act, 1867* grants as much legislative power to the Senate as to the House of Commons, with the exception that the House of Commons has the exclusive power to originate appropriation and tax bills (s. 53 )

...

The proposed consultative elections would fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design."<sup>20</sup>

The Supreme Court of Canada could hardly have been more explicit: the constitutional design of an appointed (and not elected) Senate reflects the unequivocal intent of the Founders to ensure that the democratically elected House of Commons' work would be complemented by an appointed chamber of sober second thought.<sup>21</sup> As Smith notes, "rather than compete, the upper house completes the work of the lower house."<sup>22</sup> Indeed, the Supreme Court's ruling promotes the Senate not as an adversary to the House of Commons, but instead as "a critical ally of responsible government."<sup>23</sup> Neither house is meant to be superior or inferior; they simply have distinct roles. The upper house is not to be in the driver's seat. It is to complement, supplement and improve the work of the lower house, not to stand in its way as a competitor, yet retaining a reserve power to act as a counterweight to protect Canadians from majoritarian excess.

This conclusion is further reflected in certain explicit provisions of the Constitution itself. In 1867, the Founders decided that the Senate does not have the power to increase or impose a tax, or to incur an expenditure from the consolidated revenue fund. And when the Constitution was repatriated in 1982, it was agreed that the Senate would not have an unfettered power to block constitutional amendments requiring provincial consent, but instead a House of Lords-style suspensive veto. The *Constitution Act, 1982*, specifically provides that the House of Commons can override a Senate refusal to approve constitutional amendments. If anything, the decision to limit the power of the Senate in respect of constitutional amendments is entirely consistent with the

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<sup>20</sup> *Reference re Senate Reform*, [2014] 1 SCR 704, par. 57-63

<sup>21</sup> On this point, Professor David E. Smith writes: "... senators see themselves as parliamentarians, as an integral part of the legislative process. They also realize that, notwithstanding the absolute veto given them by the constitution, it is the House of Commons that is the confidence chamber. Members of the lower house are elected by and accountable to the people.": David E. Smith, *The Canadian Senate in Bicameral Perspective*, University of Toronto Press, 2017 edition (initially published in 2003), pp. 110-111.

<sup>22</sup> David E. Smith, *The Canadian Senate in Bicameral Perspective*, *supra*, p. 159.

<sup>23</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150*, *supra*, p. 51.

constitutional design of the Senate as a complementing, not a competing, actor in the legislative process.

While the Senate and the House of Lords differ in many respects, in principle, the Canadian upper house's complementary legislative role is not unlike that of its British relative. As the Supreme Court noted in its reference:

“The upper legislative chamber, which the framers named the Senate, was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide “sober second thought” on the legislation adopted by the popular representatives in the House of Commons.”<sup>24</sup>

Lord Wakeham, former Conservative Leader of the Government in the House of Lords *and* British House of Commons, recently spoke to Canadian senators about the role of the appointed upper house in the Westminster tradition. Lord Wakeham underscored its value as a complementary partner in good governance:

“The House of Lords works if you accept that the government of the day has a majority in the House of Commons. They have been duly elected and are entitled to get the major parts of their program through. We do our best to improve what they're doing. That works pretty well but it does require restraint. ... We accept that the House of Commons is the dominant house with the real power. The House of Lords is there to advise and to help. In very rare occasions we will clash head on with the House of Commons... Our system would not work if one house was in conflict with the other over anything that was too major. Our task in the House of Lords is to try and improve what the government is doing. Of course we have our political differences, but our system is set up to try and encourage the government of the day to get their bills in better shape than they have them in already.”<sup>25</sup>

These comments were echoed by Lord Norton, another Conservative peer recognized as one of the world's foremost experts on parliamentary and constitutional issues:

“We don't seek conflict with the Commons. We use what powers or what resources we have essentially as persuasive tools rather than as coercive tools. Hence, as I stress, the politics of justification: getting the government to justify, to listen and to work with the house rather than to say there's a form of a conflict.”<sup>26</sup>

Similarly, the Senate works wonders when it uses its power not to coerce but to persuade, whether through a first round of amendments to legislation received from the House of Commons, leveraging the visibility of Parliament to alert public opinion, initiating Senate Public bills, or through the publication of prescient committee reports addressing public policy.

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<sup>24</sup> *Reference re Senate Reform*, [2014] 1 SCR 704, par. 15.

<sup>25</sup> Proceedings of the Special Committee on Senate Modernization, Issue No. 11 – Evidence - April 5, 2017.

<sup>26</sup> *Ibid.*

Arguably, the Senate's powers have historically not been overly fettered (whether by constitutional change or by procedural self-limitation via Senate rules) because the Senate has only rarely overstepped its role. By contrast, the powers of the British House of Lords were reined in because it went much too far in challenging the elected will on fiscal and budgetary matters. Indeed, overreach from the unelected side of the Westminster Parliament set the stage for the *Parliament Act of 1911*, a bill that severely restricted the powers of the House of Lords with respect to money bills and other bills passed by the British House of Commons. It bears mentioning that the question of the upper chamber's veto has been, and remains, a live one in Canada too. At the outset of what is now widely considered to have been the Senate's most activist period in the modern era, particularly in its treatment of fiscal and budgetary legislation, the Government of Prime Minister Brian Mulroney tabled a resolution to amend the Constitution in order to similarly limit the Senate's power to a 30-day suspensive veto over money bills and a 45-day suspensive veto over other legislation, a move that would have required a level of provincial buy-in that proved elusive at the time. Yet, even now, a number of pundits<sup>27</sup>, academics<sup>28</sup> and former senators<sup>29</sup> have called for the adoption of a suspensive veto for the Senate. Many Canadians would likely agree with them.

So long as they are exercised with great restraint, in my view, the formal powers of the Canadian Senate remain useful on the books because the Senate retains the ability to act extraordinarily in extraordinary circumstances. Historically, circumstance has notably allowed the Senate to gut a post- Second World War bill disenfranchising Canadian voters on the basis of race by removing many of its discriminatory provisions (but shamefully not removing those applying to Japanese Canadians) and to resist the re-introduction of a criminal abortion framework in Canada. Ultimately, the Founders struck the right balance: in their upper chamber, Canadians have an effective complementary "check" on majoritarian rule that is designed not to generate systemic stalemate with their elected representatives. While the logic – and beauty - of this blueprint is often lost in historical translation, this Parliament has provided excellent examples of sober second thought that illustrate the Senate's purpose.

It is in this context that senators were intended to study government legislation by applying their sage and independent judgment, while maintaining a healthy level of self-restraint in challenging legislation that has been passed by the House of Commons. At times, a senator's judgment and vote may not align with a senator's public policy preference. However, in all but exceptional circumstances, if a senator wishes to insist on policy, a senator should run for office.

Hence, by constitutional design, the Senate's natural bias should be self-restraint. Or, as the philosopher Larry David might advise senators: curb your enthusiasm.

But what is appropriate self-restraint? The short answer: it's complicated.

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<sup>27</sup> "Andrew Coyne: Trudeau facing a Senate conundrum", National Post, October 30, 2015.

<sup>28</sup> Andrew Heard, "Tapping the Potential of Senate-Driven Reform: Proposals to Limit the Powers of the Senate", Constitutional Forum, Vol. 24, No. 2, 2015, pp. 48-54.

<sup>29</sup> Michael Kirby and Hugh Segal, "A House Undivided: Making Senate Independence Work", Public Policy Forum, September 22, 2016.

Each case must be assessed on its own merits. Yet, a range of considerations should factor into the discharge of the Senate's constitutional duties. Some considerations are customary in the Senate by long practice, even though they have not been considered straightjackets. Other considerations derive from strict constitutional limitations, the boundaries of which have nonetheless been tested from time to time. It may be helpful to examine some of these themes, including consideration of the Senate's rarely invoked power to defeat government legislation and the parameters of its role with respect to budgetary and fiscal legislation. But first, I turn to an analysis of some of the means that are available to the Senate on a day-by-day basis to fulfill its complementary role, with a particular focus on its ability to amend government legislation. The discussion, as a whole, provides an opportunity to reflect on what has been, since the 2015 election, a positive track record in the Senate of robust bicameralism. One that has been effective, policy-oriented and always respectful of the role of the representative House of Commons.

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### C. The Senate's Power to Amend, Legislate and Influence Public Policy

*“A senator’s first role is as legislator, a role that has concomitant responsibilities. Senators are keenly aware that, as a parliamentary institution which studies legislation originating in a house of elected representatives, senators must treat with respect the wishes of the government of the day as embodied in the other place. There is general acknowledgement that the appointed nature of the Senate requires that it exercise its powers cautiously.”*

Former Senator Jack Austin, then Leader of the Government in the Senate, Senate debates  
of February 18, 2004

For many years, subject matter experts have recognized that the Senate supplements the process of legislative review and serves as an important think tank in the development of public policy over a wide range of issues within the government’s jurisdiction. The Senate is at its best when, true to its purpose, it objectively improves upon legislation in a fashion that is consistent with the spirit and intent of the policy initiative under scrutiny or when it triggers a national debate over a controversial issue touching the core of its mission. Were the Senate to simply rubber stamp legislation, the public would naturally revert to questioning the institution’s usefulness and legitimacy. As University of Waterloo political scientist Emmett Macfarlane observes, amending legislation is “well within the bounds of the chamber’s traditional role of “sober second thought” you read about in high school.”<sup>30</sup> After all, the Senate is a legislative chamber, and so it must legislate.

By the same token, the Senate should seek to strike a balanced approach. In reflecting on the Senate’s complementary role and level of combativeness, it is important to be mindful that since 1960, on average, the Senate has only sent approximately two government bills per year back to the House of Commons with amendments, and on only six of those occasions has the Senate insisted further following one House refusal. Sending government legislation back to the other place should not be done lightly. There are factors that are imperative to consider, as they go to the very heart of the Senate’s multifaceted mission:

- ❖ The interplay of legislation with:
  - the Constitution of Canada, including the *Canadian Charter of Rights and Freedoms* and the division of legislative powers between Parliament and the provincial and territorial legislatures; and
  - Treaties and international agreements that Canada has ratified;
  
- ❖ The detrimental impact of legislation on minority or economically disadvantaged groups;

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<sup>30</sup> Emmett Macfarlane, “Proposing amendments isn’t Senate activism. It’s the Senate’s job.” MacLean’s, June 19, 2017.

- ❖ The impact of legislation on regions, provinces and territories, but with a view to the national interest of the federation as a whole;
- ❖ Consultations conducted with stakeholder groups, if at all required by law; and
- ❖ The text of the legislation for drafting errors, serious unintended consequences or other potential oversights.

The Senate is well equipped to review these issues and it has a clear constitutional responsibility to do so. Amendments that fall within the scope of these issues are justifiably considered by senators to be on the most appropriate side of the senatorial compass. However, the Senate's analysis of these areas should not automatically lead to amendments.

For example, it is not because the impact of a policy on one region will be more positive than another that the Senate will feel the need to amend. Indeed, the role of regional representation can, at times, be outweighed by the responsibility to consider federal policies through the prism of the national interest.

Similarly, the Senate need not rewrite a bill because a *prima facie* argument can be made that a bill may breach the *Charter of Rights and Freedoms*. Constitutional law is arguable, particularly in the abstract. It is true that, in some instances, Senate amendments brought on constitutional grounds have the potential to limit court challenges to federal legislation. At the very least, such concerns may be helpful prompts to the Government and the House of Commons to think twice, as was done for the medical assistance in dying bill. However, despite what has at times been unhelpfully implied in the Senate, *Charter* compliance issues are rarely black and white. Where there is a lingering ambiguity, once the Senate has made its concerns clear to Canadians, the Government and the House of Commons, the appropriate forum to resolve the issue with finality is the apolitical judicial branch. This is uniquely an environment where each litigant has a guaranteed procedural right to make a full case, with the benefit of an exhaustive evidentiary record, before an impartial decision-maker. Not so in the Senate, where lobbying is often one-sided and political calculus may result in unbalanced hearings at committee. While the Senate may become more independent and less partisan, it will always remain an inherently political body. The Courts are best equipped and constitutionally empowered to assess – with the benefit of complete arguments from both sides – whether there is a limitation to a protected right or freedom and, if so, whether the breach is justified in a free and democratic society. As Senator Marc Gold, one of the Senate's constitutional experts, has noted in a recently published article:

“The Senate has a responsibility to ensure that proposed legislation respects the Constitution and its values. But unless a bill so obviously and unambiguously violates the Constitution, the Senate should not substitute itself for our courts. Where the Government's policy choices are reasonable and based upon credible evidence, where its constitutional position is supported by impartial and distinguished academic analysis, and where the Government receives an electoral

mandate to enact the bill in question, the Senate ought to defer to the policy decisions of the House of Commons.”<sup>31</sup>

Furthermore, while the above considerations are at the heart of the Senate’s role, they are by no means the only justification for Senate amendments. Useful Senate amendments, which the House of Commons may well support, can at times fall outside of the core areas outlined above.<sup>32</sup> The Senate would be less useful to Canadians if its complementary review function was so circumscribed. Subject-matter experts in the Senate give a permanent voice to Canadians in Parliament in fields as diverse as health, education, law enforcement, the agricultural sector, Indigenous self-governance, journalism, social work, business and sport. Sometimes a good idea is just a good idea.

Having said this, most cases call for some measure of restraint. While this is not a failsafe approach, the further one goes from the Senate’s core responsibilities, the less compelling the case for a Senate amendment. In some instances, a legitimate government policy approved by the House of Commons may leave senators lukewarm. In others, senators may agree that the objectives of the Government are valid, but that the measures contained in a bill – albeit positive – are not ideal. In these cases, senators may wish for the Government to change course on a policy option, even though the Government has clearly made up its mind. The Senate can attempt to persuade its colleagues in the House of Commons, but it must respect a government commanding the confidence of the House’s right to govern. This means respecting the Government’s discretion to craft and implement policies with the approval of the House of Commons if those policies aren’t fundamentally ill-considered and have been transparently explained and defended in the public square.

As University of Manitoba Professor emeritus Paul G. Thomas writes:

“The “new Senate” should not, for the purpose of demonstrating its independence and co-equal parliamentary status, engage in maximum combativeness by regularly picking fights with the government and the House of Commons. Instead it should adopt a stance of “judicious combativeness.” This would mean rarely seeking to defeat or amend the fundamentals of legislation. Instead, it would develop a number of less confrontational, low-key, subtle, less immediate and more indirect ways to influence the medium- and long-range policy thinking of governments and the bureaucracy. ... An independent, influential Senate should rely more on the “soft power” of legislative review, scrutiny, evaluation, advice and publicity and less on the “hard power” of attempts at defeating, amending in fundamental ways and prolonging unduly the passage of government bills already approved by the Commons.”<sup>33</sup>

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<sup>31</sup> Marc Gold, “Bill C-46 is constitutional and should be passed by the Senate”, *The Lawyer’s Daily*, March 23, 2018.

<sup>32</sup> As has occurred in this Parliament, notably on Bill C-25 (Corporate Reform), where highly technical amendments were passed in the Senate with Government and stakeholder support

<sup>33</sup> Paul G. Thomas, “The “new” improved Senate”, *Policy Options*, January 26, 2018.

Restraint on policy differences with the elected chamber need not be the end of the road for the Senate. Consider the whole range of parliamentary tools at the Senate's disposal that can be deployed to monitor the status quo or promote policy options. Senators occupy a unique platform. They can alert public opinion, and influence Ministers and MPs to drive political change.

For example, and non-exhaustively:

- ❖ A Senate committee can study a subject and issue a report that can benefit governments for years to come, as has occurred on many occasions;
- ❖ Senators can introduce Senate public bills to propose changes to Canadian law, an approach that in this Parliament has repeatedly attracted constructive Government support,<sup>34</sup> Government changes to regulations,<sup>35</sup> Government-initiated policy,<sup>36</sup> and even approval from a majority of the House of Commons with only partial policy endorsement from the Government <sup>37</sup>;
- ❖ Senators can organize to alert public opinion and lobby the Government;
- ❖ Senators can pre-study legislation that is before the House of Commons, allowing the Senate to have input at a critical stage of the legislative process, when changes may be more efficiently brought in the House of Commons;
- ❖ Parliament can ensure the inclusion within a government bill of a strict timetable for the review of the legislation by parliamentary committees, guaranteeing that Parliament will ascertain, with the benefit of hindsight, whether the Government's initial policy has been successful and recommend adjustments if needed;
- ❖ The Senate can hold open caucuses on a subject, accessible to the public and media, an excellent innovation to our collective work brought by the Independent Liberal caucus;
- ❖ Any senator can launch an inquiry in the Senate, allowing all senators to debate the issue; and
- ❖ Special committees can be created to study specific areas of policy (for example, the Senate has recently accepted to create two new special committees, both of them positive

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<sup>34</sup> Former Senator Runciman's Bill S-233 [Conveyance Presentation and Reporting Requirements Modernization Act]; Senator Carignan's Bill S-231 [Journalistic Sources Protection Act]; Senator Greene-Raine Bill S-228 [Food and Beverage Marketing for Children]; Senator Griffin's Bill S-235 [Recognition of Charlottetown as the Birthplace of Confederation Act]; Senator Frum's Bill S-232 [Canadian Jewish Heritage Month Act]; Senator Andreychuk's Bill S-226 [Sergei Magnitsky Law]; former Senator Céline Hervieux-Payette's Bill S-208 [National Seal Products Day Act]; and Senator Jane Cordy's S-211 [National Sickle Cell Awareness Day Act].

<sup>35</sup> Senator Vernon White's Bill S-225 [Substances Used in the Production of Fentanyl].

<sup>36</sup> Former Senator Wilfred Moore's Bill S-203 [Ending the Captivity of Whales and Dolphins Act] (now sponsored by Senator Murray Sinclair)

<sup>37</sup> Former Senator Jim Cowan's Bill S-201 [Genetic Non-Discrimination Act]

initiatives of the Independent Liberal caucus: the Special Committee on the Arctic; and the Special Committee on the Charitable Sector).

When the Government, with full political accountability and the assent of the confidence chamber, has made its policy choice, one that is legitimate and reasonable, it is not enough to argue that it would be *preferable* for the Government to adopt an entirely different public policy. If, within a range of reasonable policy options available to it to meet its objectives, the Government has selected one policy over another as reflected in its bill, its policy choice should in most cases be left intact. The Senate is not designed to be a rival to the House of Commons, and it is not the role of senators to govern from the relative comfort (and electoral safety!) of the Red Chamber. To be blunt, amendments to government bills are not cheaper by the dozen.

As Senator André Pratte stated in the Senate prior to a vote on Bill C-49, to which the Senate had brought 18 amendments:

“Throughout our work on the bill, I wondered whether we were getting involved in policy minutiae, whether we were going beyond what should be the Senate’s role, which is to deal with issues of principle, not with the technical, detailed matters of policy. The Senate is not elected to govern. It is appointed to exercise sober second thought – not sober second-guessing. Looking at the number of amendments that the committee adopted and at the nature of some of them, I think we may have overdone it.”<sup>38</sup>

I would not dwell on Bill C-49, in process at the time of this paper’s composition. Yet, come what may, C-49 is a reminder that the Senate does not exist to second guess government policy-making at every turn and substitute its views without caution. Smith aptly suggests that “bicameralism is not – nor should it be – a contest of wills.”<sup>39</sup> The credibility of Senate as a whole (and of Senate amendments) depends on a measured and judicious approach to its relationship with the other place.

In sum, amending government legislation passed by the House of Commons is often an appropriate function of the Senate, particularly where an issue falls within the ambit of the Senate’s core mission or where the legislation is hasty and fundamentally ill-considered. However, legislation should not be altered lightly.

The more selective and focused the Senate amendments, the more likely they are to receive the approval of the House of Commons, and the more effective, legitimate and credible the Senate will become to the public.

By and large, the Senate has been true to this approach in the present Parliament.

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<sup>38</sup> Senate Debates of March 29, 2018.

<sup>39</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150*, *supra*, p. 71

Because some would seek to reverse the move to an independent Senate, I would be remiss not to observe that the Senate has come a long way from the rubber stamping echo chamber shaped by the previous Government.

During the course of the 42nd Parliament, the Senate has provided sober reflection to government legislation through rigorous analysis, and where appropriate, proposed major and minor amendments that have enhanced and improved legislation in a complementary fashion. In strictly numerical terms, while the Senate amended only one government bill in the last session of the 41<sup>st</sup> Parliament, in the current session it has proposed amendments to 9 government bills, which equates to 22% of the Government's total legislative output. The Government accepted some, if not all, Senate amendments in all but two cases (Bills C-4 and C-44). Hence, the Senate has successfully amended 17% of the Government's legislation.

With this legislative record in mind, Thomas has argued that:

“It is probably time to revise our negative stereotype of the Senate as a complete failure at performing its three main roles: providing sober second thought on legislation, representing regional concerns in the national policy process and helping to hold governments accountable for their actions and inactions. ... Since 2014 the role of the Senate has been changing in a positive direction.”<sup>40</sup>

In a similar vein, Macfarlane has observed as follows:

“The current Senate, meanwhile, has offered up several amendments which the House of Commons (and the government) has accepted, and others that the House has refused ... The Senate is not engaged in activism when it proposes amendments that are accepted by the House of Commons. The Senate is not engaged in obstructionism when it proposes amendments the House of Commons refuses and it then passes the original legislation. Instead, the Senate is merely exercising an advisory or complementary role consistent with its purpose. One might even argue that the record thus far suggests the new Senate has in fact acted with more principle than in the recent past.”<sup>41</sup>

In other words, the renewed Senate has been effective and useful, fostering a robust bicameralism that is producing better policy outcomes for Canadians.

In substantive terms, in most cases, the successful amendments have been squarely (but not always) within the Senate's core constitutional function. The Senate has been effective at promoting amendments falling within the ambit of its role with respect to the defence of fundamental rights, the protection of minorities and the voicing of regional and provincial concerns in matters falling under federal jurisdiction.

It is worth reviewing some of those achievements.

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<sup>40</sup> Paul G. Thomas, *supra*.

<sup>41</sup> Emmett Macfarlane, *supra*.

In dealing with Bill C-6, which repealed elements of the *Citizenship Act* brought in by the previous Government, Independent Senator Elaine McCoy (working closely with Senator Ratna Omidvar) presented a major amendment which implemented an appeals process in circumstances where an individual's citizenship may be revoked due to fraud or false representation. Conservative Senator Victor Oh brought forth an amendment which made it easier for minors to apply for citizenship without a Canadian parent. The Government's acceptance of these legislative amendments, with some modifications, resulted in a strengthening of Canada's immigration laws. I was inspired that Bill C-6, once enacted, opened the path of citizenship to a Senate staffer.

Bill C-7 was brought by the Government to implement a labour rights regime for RCMP members and reservists, largely in response to *Mounted Police Association of Ontario v. Canada (Attorney General)*. In that case, the Supreme Court of Canada ruled 6-1 that the internal system for labour negotiations at the Royal Canadian Mounted Police (RCMP) violated the members' constitutionally protected freedom of association. The Government responded to the court's ruling with Bill C-7, which sought to balance organizational interests with individuals' rights to collective bargaining. Independent Senator Larry Campbell sponsored Bill C-7 in the Senate and worked with hard-nosed determination to get the bill right. Notably, with Senator Campbell's support, the Senate proposed expanding the scope of issues that could be subject to collective bargaining and adopting a more targeted management rights clause. The Government agreed to broaden the scope of collective bargaining and adopted a more targeted management rights clause. The final bill passed in May 2017. Compared to the original bill, the final bill, now law, more fully realized RCMP members' freedom of association. Because of the Senate's changes, issues subject to collective bargaining may now include matters commonly associated with harassment and workplace wellness, appointments and appraisals, and measures to mitigate the impact of discharges and demotions of RCMP members.

During the historic debate on Bill C-14 concerning medical assistance in dying, the Senate proposed a series of changes which the House of Commons accepted, including more stringent reporting to Parliament, and a duty on the Minister of Health to engage in consultations with provincial and territorial counterparts concerning guidelines on death certificates. The House of Commons, however, chose not to proceed with an amendment that would have broadened the accessibility of medical assistance in dying to a greater number of Canadians.

Gender equality and Indigenous rights were at the heart of the Senate's debates on Bill S-3, the federal Government's response to a Quebec Superior Court ruling concerning historical discrimination against women and their descendants in registration provisions of the *Indian Act*. To provide context, Status Indians have certain rights and benefits, including on-reserve housing benefits, expanded health coverage and exemption from taxes in specific situations. The aim of the legislation was to remedy sex-based *Indian Act* registration issues to 1951, the year the modern registry came into effect. The Government also pledged to follow up with additional consultations and legislation in the future, acknowledging that there were other significant historical *Indian Act* registration issues also requiring attention. Bill S-3 originated in the Senate with Independent Senator Frances Lankin as its sponsor. The Standing Senate Committee on Aboriginal Peoples reviewed the legislation and amended it to require the Government to report back to Parliament—

and all Canadians —on its progress toward broader *Indian Act* registration and membership reform. Another amendment brought forward by Senator Marilou McPhedran, dubbed the “6(1)(a) all the way” approach, intended to provide 6(1)(a) Indian status to all those who had lost status back to 1869 and to all their descendants born prior to 1985.

The House of Commons initially sent a message to the Senate on June 21, 2017 indicating that it would accept most Senate amendments but not “6(1)(a) all the way”. Over the summer, the federal Government commissioned demographer Stewart Clatworthy to research how various changes to the *Indian Act* might affect registration numbers. The court also extended the deadline to Dec. 22, 2017 for new legislation to respond to its ruling.

On November 7, 2017, as the Government Representative in the Senate, I tabled the demographic information and introduced a motion indicating that the federal Government would “enshrine in law the removal of all gender-discrimination in the Indian Act,” including prior to 1951. I indicated that the Government would begin necessary consultations early this year to figure out how—not whether—to best bring into force the clause dealing with the 1951 cut-off. Several Indigenous leaders in the Senate spoke in support of the motion, including Senator Lillian Dyck, the Chair of the Aboriginal Peoples’ Committee and a long-time champion for gender equity in the *Indian Act*. “We’ve been trying to get this for so many decades. It’s hard to believe that we actually have it,” she said. “Finally, Indian women will be recognized in law as having equal rights as Indian men to transmit their status as registered Indians and all that goes with it—your language, your culture, your connection to your family, your connection to your community.”<sup>42</sup> Senator Dyck also noted that the Senate must and will remain vigilant as consultations and implementation proceed. On November 9, 2017 the Senate adopted the motion. The House of Commons adopted the message from the Senate on December 4, 2017.

Minister of Crown-Indigenous Relations and Northern Affairs Carolyn Bennett complimented the Senate in the House’s deliberations on the message. She told the House, “The Government has worked closely with the Standing Senate Committee on Aboriginal Peoples and many other senators on numerous amendments to the original version of Bill S-3. These amendments have greatly improved this legislation.”<sup>43</sup> Elizabeth May, Leader of the Green Party of Canada, also had positive things to say about the Senate’s work on S-3:

“The new and expanded role of a Senate with independent senators and indeed the role of indigenous senators in the other place, Senator Dyck, Senator Dan Christmas, Senator Murray Sinclair, have helped enormously in bringing about that sober second thought which we used to think the other chamber was capable of providing, particularly from an Indigenous perspective.”<sup>44</sup>

The Senate has also been an effective voice for provincial and regional interests, as illustrated by its deliberations on Bill C-29, budget implementation legislation that would have provided

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<sup>42</sup> Debates of the Senate, November 7, 2017.

<sup>43</sup> Debates of the House of Commons, November 29, 2017.

<sup>44</sup> Debates of the House of Commons, November 29, 2017.

uniform consumer protections in the banking sector across the country and be paramount to any provincial consumer protection law. When C-29 arrived in the upper chamber, some Senators argued that, in the federally regulated banking sector, the bill could override provincial consumer protection laws of general application. Many Senators believed that certain provincial regulations were more robust than those proposed by the federal Government. Independent Senator André Pratte led the challenge to this provision in the bill. He argued that paramountcy did not reflect the principle of cooperative federalism and risked encroachment on provincial jurisdiction with respect to property and civil law. He also maintained that the Quebec *Consumer Protection Act* already provided legal recourse for consumers who believed they had been wronged by a financial institution and that implementing the federal regime would eliminate those avenues of added protection. The Government gave the issue further consideration. As the Government Representative in the Senate, I moved an amendment at the Standing Senate Committee on National Finance to remove C-29's measures related to consumer protection in banking, indicating the Government would revisit the issue at a later date. Senator George Baker, a Senate Liberal (now retired), who was then a member of the Finance Committee, stated, "I congratulate the Government of Canada for looking at this again and saying, 'Let's have some sober second thought.'"<sup>45</sup> Senator Pratte was quoted at the time saying the situation demonstrates that there is a new political dynamic present in the Senate.

All of these changes occurred because, ultimately, the Government agreed with the Senate's sober second thought. But it is crucial to acknowledge that these changes would not have occurred without the collective attention of the Senate.

But the Senate's complementary work, and its achievements since 2015, are not limited to the successful amending of government legislation. The exercise of restraint where appropriate is also a worthy of achievement, as it speaks to the wisdom of senators that might have personally preferred a different policy outcome but collectively chose instead to adopt a measured outlook.

For example, during the consideration of Bill C-22, which established the National Security and Intelligence Committee of Parliamentarians ("NSICOP"), many senators were ready to move forward with wide-ranging amendments. Some amendments were on the left side of the ideological spectrum, while others were on the right. With time, senators came to view the Government's approach as a cautious balancing of interests. The Standing Senate Committee on National Security & Defence therefore proposed detailed observations through its committee study, with areas to be monitored by the NSICOP Secretariat. Restraint was also shown on Bill C-23 (which enacted a positive border preclearance agreement between the United States and Canada, but raised Charter concerns in the eyes of some senators) and Bill C-25 (where some senators disagreed with the Government's choice of public policy instrument to promote diversity and gender inclusiveness on corporate boards).

The Senate's complementary work has not been limited exclusively to the domain of legislative review. Senate committees have successfully brought attention to specific issues in the national

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<sup>45</sup> Standing Senate Committee on National Finance, Evidence, December 12, 2016.

interest. Notably, the Standing Senate Committee on Banking, Trade and Commerce published a detailed report in June 2016 underscoring the economic importance of eliminating internal trade barriers in Canada, and the need to replace the old Agreement on Internal Trade with a modernized framework. Following the Government's announcement of the new Canadian Free Trade Agreement in April 2017, the Minister of Innovation, Science & Economic Development publically acknowledged the Senate's work in this regard: "I also want to acknowledge my honourable colleagues on the Standing Senate Committee on Banking, Trade and Commerce. Their rallying cry for Canada to tear down the walls created by trade barriers within our own country has contributed to a stronger economic union."<sup>46</sup>

In considering the Senate's complementary role in Parliament, as well as its value to Canadians, I further note the innovative and thoughtful contributions to public policy frequently made by way of Senate public bills, which often address the policy gaps unaddressed by the Government in complementary fashion.

Senate public bills are new laws proposed by individual senators, not by the Government of the day – that is, the Senate equivalent of private Members' bills in the House of Commons.<sup>47</sup> This Parliament has seen the Senate pass Senate public bills on topics as diverse as the use of genetic information in insurance and labour markets (former Senator Jim Cowan); the protection of journalistic sources (Senator Claude Carignan); the imposition of liability for foreign human rights abuses through a Magnitsky law (Senator Raynell Andreychuk); the facilitation of recreational boating on Canadian waters adjacent to the US border (former Senator Bob Runciman); the advertising of unhealthy food to children (Senator Nancy Greene Raine); and the distinction between unethical practices and cultural practices (Senator Mobina Jaffer). Many of these proposals are now law, their final versions frequently the result of collaboration between senators and the Government, or other Members of Parliament.

In complementing the Government's executive role and legislative functions, Senate public bills may have significant influences on public policy by simply being proposed and debated. For example, Bill S-225 – Senator Vernon White's bill to help alleviate the scourge of opioid overdoses in Canada by banning the chemical precursors of fentanyl – has now been implemented by the Government through regulatory changes. Several important aspects of Bill S-203 – former Senator Wilfred Moore's bill to phase out whale and dolphin captivity, now sponsored by Senator Murray Sinclair – have now been taken up by Minister of Fisheries, Oceans and the Canadian Coastguard Dominic LeBlanc in government Bill C-68.

Senators' long tenure and appointed status, both key features of complementarity, undoubtedly help shape their Senate public bills. Their length of tenure allows senators' work to continue on a bill over the span of several Parliaments where necessary, affording the time for groundbreaking policy proposals to change hearts and minds, and for senators to shape a bill to balance competing

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<sup>46</sup> Press Conference on the Free Trade Agreement, Speech by the Minister of Innovation, Science and Economic Development, April 7, 2017.

<sup>47</sup> Constitutionally, Senate public bills may not initiate spending or impose taxation, but otherwise senators may legislate on any subject matter of federal jurisdiction.

interests and eventually earn majority support. Senators' long tenure also fosters institutional memory of legislation that may have come close to passage in the past, but never reached a final vote, often for reasons related to procedural pacing and backlogs at committees. Further, senators' appointed status affords them greater institutional liberty to explore policy areas that may not be top of mind for a Member of Parliament working, quite understandably and appropriately, to advance the direct and pressing interests of an electoral constituency.

For my part, Senate public bills offer Canadians excellent policy value. However, there is ample room for procedural improvements to the Senate's treatment of both Senate public bills and private Members' bills, to ensure that all legislation receives fair and timely consideration. As Senator Jim Munson has said on debate on Bill S-203, the Senate must be a house of debate, not a house of delay. This Parliament, I have been dismayed to see instances of procedural obstruction being employed to prevent votes on some Senate public bills and private Members' bills (notably, as referenced below, Bill C-210, the gender-neutral national anthem bill, passed by a strong majority of the House, but delayed through procedural tactics for 18 months before adoption). A Senate business committee could assist in more responsibly organizing our deliberations on such legislation, and I note that in 2014, Conservative senators advanced a proposal to better structure these deliberations.<sup>48</sup> I agree with the spirit of that proposal, and I hope we can move forward soon.

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<sup>48</sup> Fifth Report of the Standing Committee on Rules, Procedures and the Rights of Parliament, June 11, 2014.

## D. We “Ping”, But We Generally Ought Not “Pong”

*“We cannot — and I will not — thwart the will of the elected members of Parliament. We have done our job, and although it breaks my heart, I am going to continue to do my duty by voting for this bill in the form that it has been sent back to us by the peoples' representatives.”*

Senator David Tkachuk, Senate Debates on the House of Commons message relating to Bill C-14, June 17, 2016

Once the House of Commons has made up its mind and the Senate’s suggested amendments have been rejected, senators customarily stand down and accept the will of the democratically elected House of Commons. This must be so because democratic accountability for public policy-making flows through the other chamber. Some, like Professor Andrew Heard of Simon Fraser University, go so far as to argue that the Senate should *never* insist upon its amendments once the House has twice rejected them:

“While two extended rounds of exchange between the Senate and House of Commons are rare, it is not clear why they should occur at all. If the Senate’s principal task in legislative review is to provide sober second thought, then that role appears fulfilled with the Commons’ initial response to Senate amendments. ... The alternative is to unnecessarily pit the wishes of elected MPs against appointed Senators, with the Senate appearing to be an obstacle rather than a complement to the elected chamber”.<sup>49</sup>

What Professor Heard describes is incredibly rare. Since 1960, only six bills involved a decision by the Senate to insist on some or all of its amendments once the House had rejected them.<sup>50</sup> That equates to roughly one bill per decade. Hence, while amending Government bills is a very well-accepted function of the Senate in its modern constitutional form, insistence on amendments –

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<sup>49</sup> Andrew Heard, “The Senate’s Role in Reviewing Bills from the House of Commons”, brief submitted to the Special Committee on Senate Modernization, p. 4

<sup>50</sup> The following: (1) Bill C-2, *Federal Accountability Act*, 1st Sess, 39th Parl, 2006 : the Senate made 158 amendments, the House disagreed with many, the Senate then insisted on a few of its original amendments, and the House accepted; (2) Bill C-10B, *An Act to amend the Criminal Code (cruelty to animals)*, 2nd Sess, 37th Parl, 2003: the Senate made amendments, the House rejected some, the Senate insisted on the remaining amendments (either as written, or slightly modified), the House rejected them again, and the Senate then debated the rejection until the session ended; (3) Bill C-21, *An Act to amend the unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, 2nd Sess, 34th Parl, 1989: the Senate made amendments; the House agreed with one, amended five, and disagreed with the rest. The Senate then agreed with two of the House’s amendments but insisted upon its other amendments. The House in turn agreed with one of the Senate’s amendments but continued to disagree on other amendments. At that point, the Senate decided not to insist any further, and the bill was granted Royal Assent; (4) Bill C-22, *An Act to amend the Patent Act and to provide for certain matters in relation thereto*, 2nd Sess, 33rd Parl, 1987: the Senate made amendments; the House agreed with one, amended two, and disagreed with the rest. In response, the Senate made more amendments. The House disagreed; the Senate did not insist any further; and the bill was granted Royal Assent; (5) Bill C-157, *Pest Control Products Act*, 1st Sess, 28th Parl, 1969: the Senate made one amendment with which the House disagreed. The Senate then substituted a new amendment instead with which the House agreed. The bill was granted Royal Assent; Bill C-72, (6) *An Act to amend the Customs Tariff*, 4th Sess, 24th Parl, 1961: The Senate made one amendment, the House disagreed, and the Senate insisted. No further action was taken.

although far from unprecedented – is much less common. Fear that the Senate would deviate from this approach was a predictable byproduct of the reform toward a more independent Senate. Thankfully, since the 2015 election, the Senate has followed the principle of deference to the doubly expressed will of the House of Commons. That, too, is a worthy accomplishment for an institution that is in the midst of transformative change. But it is also a product of a respectful engagement of the House of Commons and the Government with respect to Senate amendments.

A very positive sign came early in the Government’s mandate in the form of the Senate’s handling of Bill C-14, the medical assisted dying legislation. The Senate gave sober second thought to Bill C-14, successfully triggered a gripping public debate, and convinced the Government and the House of Commons to reconsider their position. Some amendments were accepted, others were not. Though it was difficult for many Senators given the stakes of Bill C-14, when the time came to accept or reject the message from the other place, the Senate recognized that it was time for the Senate to accept the judgment of the elected office holders. Having brilliantly discharged its duty and alerted public opinion, the Senate appropriately accepted that, in Canada, the elected chamber has the final word. The Senate’s debate on medical assistance in dying is a blueprint for the appropriate discharge of the Senate’s role as a complementary legislative body of sober second thought. It illustrates precisely how to go about safeguarding the balance between power and legitimacy established at Confederation. In the end, the Senate acted neither as rubber stamp nor as a rival to the people’s representatives, precisely as the Founders had intended and precisely as Canadians expect.

What’s more, since 2015, the same collective wisdom has prevailed without exception. The Senate has notably respected the will of the House by accepting the messages on Bills S-2, C-4, C-6, C-7, C-37, and C-44, and has accepted a government compromise on Bill S-3. While, as discussed, a more independent Senate has been more effective at proposing good amendments to government legislation– and the Government has been much more open to accepting them when they present good policy outcomes for Canadians– the Senate has appropriately adhered to its customary deference to House refusal.

This track record is a tribute to senators who undoubtedly have, at times, fundamentally disagreed with the House’s decision. But in the Senate, the credibility and legitimacy of the institution relies on the good judgment of its individual members.

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## **E. A Prudent Yet Vigilant Approach to Fiscal and Budgetary Initiatives**

*“[What] was we most feared was that the legislative councillors would be elected under party responsibilities; that a partisan spirit would soon show itself in the chamber; and that the right would soon be asserted to an equal control with this house over money bills. ... Could they not justly say that they represent the people as well as we do, and that the control of the purse strings ought, therefore, to belong to them as much as to us?”*

George Brown, Confederation Debates, Legislative Assembly of the Province of Canada  
February 8, 1865

### **i. Restricted Access to the Purse Strings**

The Senate’s interaction with the purse strings is restricted by the Constitution in certain instances. In our bicameral system – comprised of two legislative Chambers, one elected and the other unelected – the elected chamber has sole rights and accountability with respect to the initiation of financial and fiscal legislation. The *Constitution Act, 1867* established in our fundamental national law the exclusive role of the House of the Commons in originating federal bills containing financial initiatives or imposing a tax, as authorized by the Crown through Royal Recommendations. Section 53 embodies the principle of no taxation without representation: “Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.” This is a basic principle of Canadian parliamentary democracy.

As a result, the Senate is not constitutionally empowered to originate a bill to impose or raise a tax, or to incur expenditures from the consolidated revenue fund. All such bills must be proposed by the Government and considered first in the House of Commons, the confidence chamber. In addition, when financial and fiscal initiatives of the Government make their way to the Senate, it is not constitutionally open to it to pass amendments that have the effect of increasing the appropriated funds or tax. Any such amendments would be ruled out of order as an infringement on the Crown’s financial prerogative.

Nevertheless, in 2016, a Senate Committee then controlled by the Conservative caucus provided Canadians with an example of Senate overreach by attempting to rewrite Bill C-2, the middle class tax cut, a central and a specific campaign commitment. The rewrite was presented in haphazard fashion with no advance warning by the Conservative Chair of the Senate’s National Finance Committee. Having been taken completely by surprise by the amendments, one of the two independent members of the Committee observed, accurately, that “sober second thought is not doing calculations on a napkin.” Senator André Pratte continued:

“I put myself in the shoes of a taxpayer, of a voter who voted for the Liberal government based on a major aspect of their platform and who sees that the House of Commons has passed that bill and now sees an appointed house doing all these calculations and deciding that what has been voted on by the electorate, and then by the elected house, and decides this is not good. ...

I think it will be seen as illegitimate. I think this is not a serious exercise, and I refuse to be part of it.”<sup>51</sup>

The Speaker of the Senate ruled the amendment out of order for the obvious reason that the Senate does not have the power to tax Canadians. Speaker Furey was direct in his reasons, concluding that the proposed rewrite by the National Finance Committee “violates a basic principle governing parliamentary business in general, and the Senate's specific understanding of how it deals with tax bills.”<sup>52</sup>

## **ii. A Tradition of Vigilance and Self-Restraint on Confidence and Budgetary Matters**

The above-discussed limitations on the Senate’s powers exist because taxation and purely budgetary matters go to the heart of the system of responsible government introduced to the United Province of Canada 170 years ago by Robert Baldwin and Louis-Hippolyte Ménard *dit* Lafontaine. Yet even outside of those strict limitations, when it comes to fiscal and financial matters, Canadians expect the Red Chamber to be *vigilant* in its scrutiny, yet *sparing* in its actions.

As senators, we should not forget that the House’s primary role over fiscal and budgetary matters featured prominently in the Founders’ collective decision to opt for an appointed and not elected upper house. On this point, during the Confederation debates of 1865, George Brown spoke about the threat of overreach that an elected Senate would pose to the lower house’s primacy over the purse strings. Conversely, Mr. Brown firmly believed that there would be little to no risk of overreach from an appointed Senate:

“[I]s it not an imaginary fear—that of a deadlock? Is it at all probable that any body of gentlemen who may compose the Upper House, appointed as they will be for life, acting as they will do on personal and not party responsibility, possessing as they must a deep stake in the welfare of the country, and desirous as they must be of holding the esteem of their fellow-subjects, would take so unreasonable a course as to imperil the whole political fabric? The British House of Peers itself does not venture, *à l’outrance*, to resist the popular will, and can it be anticipated that our Upper Chamber would set itself rashly against the popular will?”<sup>53</sup>

Fiscal and budgetary initiatives also happen to be quintessential confidence measures. The making and the unmaking of governments is the sole dominion of the lower house in Westminster-style bicameral democracies. It would not be publically tenable for a government that has won a confidence vote in the House of Commons to be stifled in the Senate, remaining in power yet unable to implement its fundamental program for the country. Thus, sheltering responsible government from the upper chamber’s interference appears to have been yet another

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<sup>51</sup> Proceedings of the Standing Senate Committee on National Finance, Issue No. 19 - Evidence - November 22, 2016.

<sup>52</sup> Speaker's Ruling, Point of Order by Senator Harder on amendment to Bill C-2, November 29, 2016.

<sup>53</sup> Confederation Debates, Legislative Assembly of the Province of Canada February 8, 1865

motivation for the Founders' decision to create an appointed and not an elected Senate. On this point, Professor Janet Ajzenstat writes the following:

“Why did Liberals like Brown, traditionally more inclined to identify with the popular element, support appointment? Christopher Moore suggests that Brown for one favoured an appointive upper chamber because he believed it would have less legitimacy and would therefore be less forward politically and less inclined to interfere with responsible government, the principle for which Liberals had successfully campaigned for so many years.”<sup>54</sup>

Therefore, it is only reasonable that bills that have passed the House as matters of confidence – meaning that their defeat by the House would result in the defeat of the Government – should be afforded a high degree of deference in the Senate. After all, in the United Kingdom, it was the House of Lords' overreach on a fiscal and budgetary matter – over a century ago – that set the stage for the *Parliament Act of 1911* limiting the Lords' power over money bills to a one-month delay, after which the bill receives Royal Assent.<sup>55</sup>

Even if an issue may fall outside of the Constitution's strict limits on the Senate's powers, the Senate has almost always adopted a stance of appropriate self-restraint with respect to fiscal and purely budgetary legislation, ultimately deferring to the elected will. Only rarely, though not without precedent in the modern era (see: the Mulroney years, including the debate over the GST), has the Senate challenged the will of the House on budgetary and fiscal matters. This tradition of self-restraint is notably exemplified by the Senate's handling of the first budget of Prime Minister Stephen Harper (then-Leader of a minority government). At the time, the Senate comprised 63 Liberals, 23 Conservatives, 4 Progressive Conservatives and 6 Independents. Yet, even with a 3-1 Liberal majority in the Senate, Senators understood that the Government has the right to govern.

In the 42<sup>nd</sup> Parliament, the Senate has deferred to the House on pure budgetary and fiscal measures. However, and notably, the Senate explored these limits in the course of its deliberations on Bill C-44, the 1<sup>st</sup> *Budget Implementation Act* of 2017. The Standing Senate Committee on National Finance adopted an amendment eliminating an excise tax on alcohol products. Senator Yuen Pau Woo, the bill's sponsor, highlighted that the Senate may wish to tread lightly on taxation matters:

“[T]his is a budget bill, and taxation is the prerogative of the government. We all understand, of course, that we do not have the power to increase taxes, which I guess means we have the power to lower taxes. That is what Senator Marshall's amendment will do. However, lowering taxes does have a material impact on the

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<sup>54</sup> Janet Ajzenstat, “Bicameralism and Canada's Founders”, in *Protecting Canadian Democracy: The Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, p. 12.

<sup>55</sup> *Parliament Act of 1911*, Section 1(1): “If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.”

government, because taxes are the way in which it funds its operations. So, we cannot do this lightly. We have to take this change as a very significant and perhaps problematic amendment and understand that this amendment, in the scheme of the constitutional responsibilities that we have, is not a trivial matter.”<sup>56</sup>

The amendment was adopted, largely on the strength of a large Conservative bloc vote and not without controversy. As expected, the House of Commons unanimously rejected the amendment and the Senate ultimately concurred in the decision, while collectively making a point of upholding the Senate’s right to amend legislation under the *Constitution Act, 1867*. In a peculiar twist, even though all parties in the House of Commons (including the Conservatives) supported the message rejecting the Senate’s amendment, Conservative senators rejected the decision of the confidence chamber in an unexpected last-minute vote. In my view, while the Senate was within its formal legal rights to insist on its fiscal amendment, such a move would have set the stage for an unhealthy confrontation with elected MPs into the summer months. Such a conflict would have been highly damaging to the institution. Thankfully, sober second thought prevailed, as it often does.

In sum, the Senate must scrutinize budgetary and fiscal initiatives with great vigilance, and alert the House of Commons and Canadians if something is amiss. However, once the scrutiny has been given, because such matters go to the heart of responsible government, it must continue to be sparing in its actions and deferential in its approach.

### **iii. The Omnibus Caveats**

A caveat must apply in the case of abusive omnibus bills. Where policies entirely unrelated to budgetary matters have been quietly inserted into a budget implementation act (“**BIA**”), the Senate’s review function is particularly crucial.

The governments of Prime Minister Stephen Harper routinely utilized omnibus budget bills to enact measures unrelated to budgetary, economic and fiscal policies. The public came to consider omnibus BIAs abusive because they included a host of major policies neither in the budget, nor economic or fiscal in nature. In a minority government context, items were inserted to avoid defeat of controversial initiatives by the House by bundling them in budget bills subject to a confidence vote (meaning that defeat would trigger an election that the opposition parties may not be politically inclined to fight). Examples of these extraneous inserts include measures affecting the right to strike for some federal employees and, notoriously, amendments to the *Supreme Court Act* in response to the controversy surrounding the appointment of a new Justice. Bill C-9, the BIA of 2010, was a 880-page document that notably authorized the Government to sell off the Atomic Energy of Canada’s business activities; reduced the scope of the *Environmental Protection Act* and the number of projects requiring environmental assessments; and eliminated the monopoly of Canada Post over some kinds of mail. And not one of these items was included in the budget. In 2007, Bill C-10 contained 21 lines in a 568 page document effectively imposing

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<sup>56</sup> Senate Debates of June 20, 2017.

ensorship on the Canadian film industry. The outcry from film professionals, the cultural industry and Canadian actors testifying before the Senate Banking Committee led to the-then Government removing the offending section.

Where a government abuses the omnibus format, the Senate's complementary role can be deployed to provide the type of sober scrutiny that might not have been given in a whipped House of Commons and alert public opinion.

Yet this caveat has a caveat.

It has become fashionable in the Senate to thunder the words "Omnibus Budget Bill", as though there is some nefarious design behind every BIA. The problem with this perspective is that there is nothing inherently ominous about an omnibus bill. While one must readily concede that questionable omnibus bills were commonplace prior to the 2015 election, we have to remember that omnibus bills have been a feature of our parliamentary life for some time, and not all are abusive.<sup>57</sup> In this day and age, with a modern and complex economy, it would be practically impossible for a federal government not to bring forward omnibus budget legislation. BIAs are necessarily and naturally wide-ranging because they implement the yearly budget of a G-7 country, and more broadly enact the Government of Canada's ongoing economic plan. Omnibus budget bills are reflective of the complex and multifaceted nature of Canada's economy, and of the related budgetary and fiscal policy of its federal Government. Budget bills are now definitionally omnibus bills.

To present all the separate budgetary, economic and fiscal policies of the Government in separate bills would be cumbersome in the extreme and the wheels of government would grind to a halt. How long would it take for the Government to implement its economic and fiscal program with each policy implemented by an individual bill? The Senate would face hundreds of separate bills, all going through the process of First Reading to Third Reading.<sup>58</sup> Indeed, if omnibus budget bills did not exist, the Senate would likely have to develop rules and practices to channel all those separate bills into a unified review process, particularly to analyze how the measures may interact towards broader objectives.

Thus, our focus should not be on whether budget implementation legislation is or is not omnibus. Modern budget bills are inherently omnibus, voluminous and the source of amendments to many

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<sup>57</sup> See, for example: Emilie St-Pierre, Audrey Lapointe and Charles Maher, "Législation: entre rationalité institutionnelle et parlementarisme." *Journal of Parliamentary and Political Law*, Vol. 9, No. 2 (September 2015): 363-386: "Omnibus bills have been part of the Canadian legislative landscape for decades, if not centuries. Their usefulness is indisputable, having served several times to establish the scaffolding of the welfare state and to effectively modify a myriad of legislative texts. Since the 1990s, they have been manifested mainly through budget laws, omnibus by nature, whose volume and scope have gradually increased." [Translation from French to English is ours.]

<sup>58</sup> This is a point that is notably made in article on omnibus legislation written by the University of Alberta's Center for Constitutional Studies in 2012 ("The Omnibus Budget Implementation Bill: Balancing Democratic Accountability with Legislative Efficiency," Centre for Constitutional Studies at the University of Alberta, August 3, 2012.): "The Annual Budget is a naturally omnibus bill because it sets out spending and taxation for all areas of government. It necessarily addresses several subjects and will impact many pieces of legislation. There is no question that dealing with each budget issue on its own bill would paralyse the legislating process. Therefore, ordinary a budget bill is considered a 'legitimate' omnibus bill."

different acts. In the Senate, the question to ask is whether a given BIA is an *abusive* use of the omnibus format.

Two key factors enter the picture. First, is there substantive content in the BIA that would make it an abusive bill? Second, has the legislative review process of the Senate been unduly curtailed, rendering the parliamentary exercise abusive? This is highly relevant to the analysis because the omnibus format is vulnerable to deliberate efforts to circumvent parliamentary scrutiny.

On this point, I would emphasize the new reality of a more independent and less partisan Senate. In the past, the Government *du jour* could readily deploy tools to ensure passage of its legislation with limited scrutiny.<sup>59</sup> However, in the current environment, scrutiny can plainly not be avoided by the government unless there is improbable buy-in from a majority of the Senate. By virtue of the Government's own policy on the Senate, the Government no longer has the ability to avoid the scrutiny of its legislation in the upper chamber by burying non-fiscal or budgetary measures in an omnibus bill. It is simply not possible for the Government to whip votes in order to expedite the process without scrutiny. This, surely, is a giant step the Government has taken, albeit indirectly, to end the abusive use of omnibus bills, and further, to foster greater transparency of process in the Senate on all government legislation.

The Senate actually *does* have the tools to scrutinize BIAs in an efficient and timely manner (notably through pre-study) while remaining mindful of the legitimate timing objectives of the Government. A recent report of the Senate Committee on Rules, Procedures and the Rights of Parliament has made this abundantly clear:

“The Senate has developed a practice whereby, in the case of complex bills, different committees may be authorized to pre-study specific parts of the bill, in addition to one committee being authorized to study the entire bill. This practice has been applied to budget implementation bills, as was noted in a Speaker's ruling of February 3, 2015. In this way, committees can deal with specific parts of the bill relevant to their mandates, while one committee (up to early 2017, the National Finance Committee) retains a comprehensive view of the entire bill.”<sup>60</sup>

In the case of BIAs brought forward in the current Parliament, the Senate played its complementary role quite well.

One recent example is 2017's BIA1, Bill C-44. Through pre-study, the Senate had the opportunity to provide constructive feedback on the measures relating to the parliamentary budget officer. This contributed to the Government's decision to bring forward amendments in the House of Commons. The same could be said about the pre-study's look at the Canada Infrastructure Bank

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<sup>59</sup> For example, during the last Parliament, the previous Government used time allocation over 20 times in the Senate. This Government has not used time allocation on any Government bill in the Senate. In addition, the Government and Opposition caucuses would exchange bills being mutually held up. This horse-trading was yet another tool to pass Government legislation in a timely fashion. The GRO has abolished the practice of the Government sitting on Senate Public bills to horse-trade by upholding the principle that every bill is worth debating and worthy of a vote.

<sup>60</sup> Fifth Report of the Standing Committee on Rules, Procedures and the Rights of Parliament, April 6, 2017.

provisions of C-44, a serious exercise in scrutiny that was instrumental to avoiding a confrontation with the House over timing.<sup>61</sup>

Another example is 2016's BIA2, Bill C-29. Through pre-study, the Senate scrutinized all parts of the bill such that when C-29 arrived, the Senate was able to zero in on the most vital issues requiring further analysis. These were the primacy of a federal consumer protection regime in the banking industry and the removal of certain tax loopholes. The Senate's debate on these issues was thorough, accessible to Canadians, and comprehensive. The cooperative federalism debate on consumer protection in banking, commenced by Senator André Pratte, also convinced the Government to remove that section of the bill for later consideration.

In a nutshell, in the analysis of whether an omnibus bill is abusive, the new Senate is a significant countervailing factor. And the current Government that has willingly taken steps to ensure that the Senate can fulfill its role of properly reviewing all legislation, including budget bills through pre-study and again through sober second thought following its reception in the Senate. The Senate has a responsibility to do so. But the Senate must also exercise self-restraint when it comes to fiscal and budgetary measures, and other matters subject to the confidence of the House. Complementarity means doing both.

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<sup>61</sup> The work of the Senate was lauded in the House of Commons on June 9, 2017 by the Government's then-Parliamentary Secretary to the Minister of Finance Ginette Petitpas Taylor: "The scrutiny and the in-depth study that the Senate applied to Bill C-44 has been an important element in our parliamentary process. Their work has informed our deliberation by providing us with the benefits of independent legislative review during the course of the House proceedings. Senators, including independents and Senate Liberals and Conservatives, raised issues that the government has, as a result, given additional consideration and careful consideration. ... I would like to thank the Senate for the benefit of its pre-study, and note for the record that this scrutiny has informed the government's deliberation in advance of Bill C-44's passage."

## F. The Senate Extraordinary and Rarely Used Power to Defeat Government Legislation

*“The fathers of Confederation gave that power to the Senate to make sure that MPs would understand the importance of its role. However, since that time, the situation has changed profoundly and democratic legitimacy has a different meaning than in 1867. ... The Senate’s refusal to pass legislation approved by the House of Commons, except under special circumstances, would raise the question of the legitimacy of its veto power in a democratic society such as ours. Indeed, the future of the Senate may well hinge on this question.”<sup>62</sup>*

Gil Rémillard, jurist and former Quebec cabinet minister

From a constitutional perspective, the Senate’s absolute veto (i.e. the power to defeat a government bill by voting against it) allows it to defeat any bill. However, the Senate has infrequently exercised this power with respect to government legislation, and for the most part only in grave or unusual circumstances. Senators of all stripes (and no stripes) are conscious that, as appointed parliamentarians, it would be extremely controversial for us to defeat an initiative of the Government that has been approved by elected MPs. The late Eugene Forsey, for example, spoke of it as the Senate’s “reserve power” to provide emergency protection from tyranny.<sup>63</sup>

That is not to say that the Senate’s constitutional power is a paper tiger.

Most importantly, even if its use is a highly remote possibility, the veto provides the Senate with a strong bargaining position vis-à-vis the House of Commons. Indeed, the deterrent force of the veto ensures a level of receptiveness from the Government and the House when considering the Senate’s perspective, which is frequently an expression of the concerns of minority groups or a region of our federation.

In addition, the veto remains useful as a safety valve in Parliament to protect Canadians against the tyranny or oppression of the majority. For example, one might consider the veto if there is an urgent need to prevent a heinous and egregious deprivation of basic rights and freedoms or to uphold a fundamental democratic principle. One can think, for example, of a bill that would warrant the detention of a specific ethnic group, or one that would overtly and arbitrarily disenfranchise a group of Canadian voters without due process. As Canadians, we should never forget that in the wake of World War 2, Parliament passed a law that disenfranchised Japanese Canadians on the basis of race, denying them the right to vote. While the Senate resisted the initial will of the House to disenfranchise Canadian descendants of other Axis-countries, the bill passed

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<sup>62</sup> Gil Rémillard, “Senate Reform: Back to Basics”, in *Protecting Canadian Democracy: The Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, p. 126.

<sup>63</sup> Helen Forsey, “Salvaging the Senate (Part I)”, Canadian Center for Policy Alternatives, May 1, 2013.

insofar as it applied to Japanese Canadians.<sup>64</sup> One can speculate as to whether such legislation could arise again, if at all, in a country like Canada. Yet, history has shown that the unimaginable is not the impossible. In such circumstances, Canadians could be well served by the Senate's veto and its vigilance to safeguard human dignity.

While the existence of the veto can be justified on this basis, its misuse would irreparably damage the credibility and institutional legitimacy of the Senate.

From an historical perspective, the Senate has been willing to exercise its veto to defeat government bills in the past, especially during the first 75 years of Confederation. However, it is worth noting that since the Second World War, only 4 government bills have been rejected outright by the Senate.

In 1961, the Senate defeated the Diefenbaker Government's controversial Bill C-114, *An Act with Respect to the Bank of Canada*. Introduced at the boiling point of the "Coyne Affair" (a protracted public dispute between the Governor of the Bank of Canada, Mr. James Coyne, and the Government of John G. Diefenbaker over economic policy), the bill's only goal was to remove Mr. Coyne as Governor of the Bank of Canada. It contained but one clause: "The office of the Governor of the Bank of Canada shall be deemed to have become vacant immediately upon the coming into force of this act." The House of Commons' Progressive Conservative majority passed the bill overwhelmingly, where Mr. Coyne did not have the opportunity to be heard. Yet, during the course of the Liberal-dominated Senate's proceedings, Mr. Coyne had the opportunity to provide his side of the story. Having heard Mr. Coyne's position, the Senate defeated the bill. While the Senate underscored the propriety of Mr. Coyne's actions, as one historian noted, "[T]he unofficial reason for the recommendation seemed to hinge on Coyne's statement that he intended to resign."<sup>65</sup> For all intents and purposes, the bill would no longer serve any purpose. Indeed, as one senator is reported to have said at the time:

"The thing the government wished to achieve is the departure of Mr. Coyne from the position of the Governor of the Bank of Canada. Well, if that is achieved, why do we need to go and further soil the pages of our history with a transaction of this kind, and I think it is in the public interest in every respect that that be avoided."<sup>66</sup>

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<sup>64</sup> See: Carol F. Lee, "The Road to Enfranchisement: Chinese and Japanese in British Columbia", *BC Studies*, no. 30, Summer 1976: "In the Senate, which debated the bill on June 28 and 30, Senators Bench and Lambert of Ontario led an unsuccessful fight to delete the disfranchisement clause. According to them, Clause 5 violated the principles of justice, democracy and citizenship. Embodying the Nazi principle of racial hatred, the disqualification was "out of sympathy with the democratic viewpoint of Canadians as a whole". On the other hand, those who supported the retention of the controversial provision argued that the Japanese were undesirable and unassimilable immigrants, incapable of understanding the principles of democratic government. They sought to hold the Canadian Japanese responsible for the actions of the Japanese government, including the mistreatment of Canadian prisoners. The dominion should follow the lead of B.C. in disfranchising all Japanese-Canadians, they urged. After extended debate, the Senate defeated a motion to strike Clause 5 by a vote of 9 to 13. The upper house did narrow the wording of the clause so that it applied only to Japanese-Canadians, not potentially to members of other "enemy races"."

<sup>65</sup> Daniel Macfarlane, "The Value of a "Coyne": The Diefenbaker Government and the 1961 Coyne Affair", *Past Imperfect*, Volume 14 (2008), p. 135.

<sup>66</sup> *Ibid.*

The singular content of Bill C-114 (essentially the termination of employment of a highly public figure) and the circumstances of its defeat are incredibly unique. As *The Globe and Mail* noted upon Mr. Coyne's passing in 2012, such a peculiar spat between the Governor of the Bank of Canada and the Government would be unimaginable today. Parliament rewrote the *Bank of Canada Act* in the wake of the Coyne Affair, and successive governments have since respected the bank's independence.<sup>67</sup>

In 1991, a rare Third Reading tie vote (43 to 43) in the Senate had the effect of defeating Bill C-43, *Criminal Code Amendment (abortion)*. This legislation would have reintroduced a criminal abortion framework in Canada. The bill came a few years after the Supreme Court, in *R. v. Morgentaler*, struck down the Criminal Code's abortion prohibition framework, finding it breached women's constitutional right to the security of the person. Through Bill C-43, the Government of Brian Mulroney was seeking to introduce a new criminal framework that could potentially satisfy the Supreme Court's legal findings. Many senators did not see it that way and felt that the bill constituted a regression for women's rights as they stood (and still stand today) post-*Morgentaler*, leading to the historic tie vote.

The Mulroney Government's Senate travails did not end with Bill C-43. Two years later, in the twilight of his mandate, the Prime Minister revisited torment with a tie vote (39 to 39) defeating a major piece of legislation. This time, however, the victim was Bill C-93, *Budget Implementation (Government Organizations)*, an omnibus finance bill streamlining federal boards, agencies, commissions and tribunals. The principal bone of contention was the merger of the Social Sciences and Humanities Research Council and the Canada Council for the Arts. Critics argued the merger would jeopardize "the distinct voices of the arts and social sciences and humanities research communities".<sup>68</sup> To this day, the two organizations remain separate. In light of the galvanization of the Senate's opposition to the merger, one could argue that it was a misstep for the Government to refuse to remove the merger from the omnibus legislation. The tie outcome of the Third Reading vote is generally regarded as a surprise, partially borne out of miscalculations on the part of the Government Whip. Therefore, while the Senate did defeat the finance bill, the incident can be regarded as an outlier. The Senate's overwhelming historical record shows strong customary deference to the House of Commons with respect to budgetary legislation and other confidence matters.

Finally the Senate defeated the Chrétien Government's bill cancelling a deal struck by the Mulroney Government soon before the 1993 election to privatize the Pearson Airport. After years of delay (and one prorogation) the Senate defeated the bill on (yet!) another Third Reading tie vote (48 to 48) generated by defections from the government caucus. Notwithstanding this bump in the runway, so to speak, the Government settled the dispute with the Pearson Airport developers soon thereafter, ending the saga. Of note, the cancellation of the Pearson Airport deal was a Liberal election promise, though not the extraordinary terms of Bill C-28, *Pearson Airport*

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<sup>67</sup> Kevin Carmichael, "James Coyne, 1910-2012: How the 'Coyne Affair' paved the way for Carney", October 15, 2012.

<sup>68</sup> C.E.S. Franks, "Modern Times", in *Protecting Canadian Democracy: The Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, p. 164.

*Agreement Act*. Bill C-28 was singular insofar as it denied the basic private rights of the contracting parties affected by the cancellation, something that was not part of the electoral platform. Many senators deemed that this interference violated the basic tenets of the rule of law. As Professor C.E.S. Franks has noted:

“The Pearson Airport bill was unusual, not only in that it was introduced by the Government to honour an election commitment, but also in that it was highly controversial and based on dubious legal and commercial principles. In particular, many senators opposed the provisions that would have denied the company the right to sue for lost profits as being an abuse of governmental legislative power. In the end, it was defeated by the defection of senators from the Government’s own side.”<sup>69</sup>

The historical record shows that, while the Senate has exercised the power to defeat Government legislation, it is an infrequent occurrence. Three of the modern era’s four outright vetoes were the result of unlikely tie votes, while the fourth was uniquely directed at the employment rights of a specific individual. If one excludes the defeat of Bill C-43, each negative vote related to bills that affected the basic rights of persons in one way or another. As Senator Joyal observed in a 2003 study of the Senate’s role, with respect to the veto as it has applied to all bills passed by the House (Government bills and private Members bills):

“The Senate has used its veto power judiciously and infrequently, where proposed legislation:

- was of grave detriment to one or more regions;
- breached constitutionally protected rights and freedoms;
- compromised collective linguistic or minority rights;
- was of such importance to the future of Canada as to require the government to seek a mandate from the electorate;
- was so repugnant as to constitute a quasi-abuse of the legislative power of Parliament”<sup>70</sup>

In typical circumstances, the Senate has accepted that Canada is a modern country that has long embraced the precepts of representative democracy, one with strong checks and balances that include not only the Senate but, significantly, one of the most robust and healthy judicial branches in the world. And while the count of heads must not always be permitted to outweigh everything else, the advent in 1982 of the constitutionally entrenched *Canadian Charter of Rights and Freedoms* has ensured that the judicial branch has the tools to be an effective (and now proven) backstop for the rights and freedoms of Canadians. Hence, while the Senate unquestionably has the formal power to defeat any government bill, senators justifiably view such action as a last resort, an extraordinary action that should be reserved for the most serious of circumstances.

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<sup>69</sup> *Ibid*, p. 167.

<sup>70</sup> Serge Joyal, “The Federal Principle”, in *Protecting Canadian Democracy: The Senate You Never Knew*, edited by Serge Joyal, McGill-Queens University Press, 2003, p. 305.

Senators know that the misguided use of the veto would have disastrous consequences for the institution.

### **G. Democratic Deference to the Government's Election Platform**

*“Remember the Salisbury Convention that Senator Joyal introduced me to many years ago. If a government has been elected on a specific element of its platform, undertaking to do a specific thing, although even then we may correct some of the errors of oversight or inattention that might creep into the necessary legislation.”*

Former Senator Joan Fraser, expression of thanks for tributes, Senate Debates of January 31, 2018

Where a government bill has been introduced to fulfill an explicit electoral pledge to voters and that has been approved by the House of Commons, the Senate's customary reluctance to defeat legislation has been rather consistent. To be sure, it has been a longstanding practice for the Senate not to defeat bills that are advanced in response to the Government's explicit mandate, or to insist on amendments that would have the effect of preventing it from meeting a clear pledge to voters. And for good reason: the people have spoken once through the ballot box and again through their elected MPs.

It has certainly been natural for the Senate to follow the principles underlying the Salisbury Convention, a key Westminster convention regulating the relationship between the British House of Lords and the House of Commons. The convention provides that the upper house does not oppose the Second or Third Reading of bills which have been put before the electorate and approved, and the unelected body should not insist on amendments that would defeat the bill's intent. With roots in the late 19<sup>th</sup> Century, the modern understanding of the Salisbury Convention originates from a deal reached by leaderships in the House of Lords during the 1945-51 Attlee Government.<sup>71</sup> At the time, the new Labour Party Government – having won a landslide victory – faced a very large Conservative Party majority in the House of Lords. This raised the specter of a systemic deadlock that could be damaging to the unelected House of Lords, something that the Tory opposition wanted to avoid. Lord Wakeham addressed the origins of the Salisbury Convention when he spoke to senators at the Special Committee on Senate Modernization. He stressed that adopting the principle was a means for the Conservative Opposition in the Lords to shield their institution from the harm that could be self-inflicted by a lack of restraint in the use of the chamber's powers:

“The leadership of the Conservative Party in the House of Lords realized that unless they acted with restraint, there would be serious difficulties about how the House of Lords could continue. Therefore, they brought in this convention in order

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<sup>71</sup> Between Viscount Addison, the Labor Leader of the House of Lords, and his Opposition counterpart Viscount Cranborne, the fifth Marquess of Salisbury.

to control their own backbenchers. It wasn't the government doing it. It was the opposition saying, "Look, we have to be sensible".<sup>72</sup>

The Salisbury Convention has worked well for the House of Lords. With successive Governments not holding a numerical majority (i.e. 50%+1 majority) in the House of Lords since the 1980s, governments have successfully relied on conventional practices, such as the Salisbury Convention, to advance their election mandate.

An open question, and one that I do not seek to resolve in these pages, is whether this deferential practice has crystallized into a parliamentary convention.<sup>73</sup> What can be said is that the consistency of this historical practice is such that, over time, a number of senators have endorsed the Salisbury Convention, explicitly or implicitly accepting that it applies to the Senate in principle. For example, one of my esteemed predecessors and Leader of the Government in the Senate during the Liberal Government of Paul Martin, former Senator Jack Austin, was unambiguous in his endorsement of Salisbury during Senate debates in 2004. In passionate remarks delivered on an address in reply to the Speech from the Throne, Senator Austin discussed the role of the Senate:

"The Senate often exercises restraint in rejecting bills from the other place. We have tacitly agreed to follow the Salisbury-Addison document originating in Westminster, a convention of not opposing measures proposed by the government if those same proposals are a key part of the elected mandate. Discussion is key to democratic debate, and what could be a more public forum than an election for debating and determining the direction of public policy."<sup>74</sup>

Over her nearly 20 years in the Senate, former Senator Joan Fraser (an expert on the traditions of the Senate if there ever was one) consistently advocated for the Senate's robust role in Parliament, as a complementary chamber of sober second thought. Not one to make short shrift of the Senate's powerful role as an appointed legislative chamber, Senator Fraser nonetheless frequently endorsed the Salisbury Convention. For example, during the course of a 2014 inquiry on the subject of the Senate's roots, history, origins and evolution, Senator Fraser noted that "if the Government has a mandate from the people to proceed with a measure, we may amend its technicalities, but we will not oppose it root and branch, however wrong we may think it is."<sup>75</sup> Similarly, on debate over the *Clarity Act*, Senator Fraser could hardly have been clearer: "We do not block the clearly expressed popular will, even in matters where, in law, we have the power to do so."<sup>76</sup> It was therefore fitting for her to remind the chamber in her final remarks to the Senate

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<sup>72</sup> Proceedings of the Special Committee on Senate Modernization, Issue No. 11, April 5, 2017.

<sup>73</sup> For a judicial discussion of constitutional conventions, and the factors that may lead to their formation, see the Supreme Court of Canada's Patriation Reference: *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753.

<sup>74</sup> Senate Debates of February 18, 2004.

<sup>75</sup> Senate Debates of February 6, 2014.

<sup>76</sup> Senate Debates of March 30, 2000.

last January, in a time of significant change and before numerous newly minted senators, of the importance of the Salisbury Convention.<sup>77</sup>

Rookie senators, such as myself, have been listening. For example, Senator Frances Lankin – one of the first individuals appointed under Prime Minister Justin Trudeau’s new appointment process – stated the following in December 2016:

“One of those parliamentary conventions is that the Senate would neither defeat nor insist on its amendment to a bill that implements a policy or program that’s clearly articulated in the government’s mandate, that is, if they ran on it and it was part of the election campaign commitment; if elected with a majority, they have a clear mandate. By parliamentary convention, that’s not something the Senate would reach into and attempt to overturn or block. This apparently is often referred to as the Salisbury Doctrine.”<sup>78</sup>

If anything, deference to a Government’s clear election platform was most assuredly expected by the Founders of Confederation. After all, Sir John A. Macdonald famously stated that, while the Red Chamber “would be of no value whatever were it a mere Chamber for registering the decrees of the Lower House” and therefore should not be regarded as a rubber stamp, by the same token “it will never set itself in opposition against the deliberate and understood wishes of the people.” In the context of our parliamentary system and the parameters of first past the post, what could be more of a deliberate and understood wish of the people with respect to a public policy than a clear election promise, thoroughly debated and publicized, that received the endorsement of voters at the polls and most importantly– once in its legislative form – the approval of the House of Commons?

In addition, in the context of a more independent Senate (where the Government, without a caucus, has no lever of hard power), the case for the Salisbury Convention is even stronger. In many ways, the Government finds itself in a position not unlike that of the Attlee Labour Party in 1945. Just as the Salisbury Convention was a means for a House of Lords dominated by the Opposition to shield itself from the institutional harm of overreach, the doctrine provides Canadian voters with the assurance that the Government’s electoral program – should it receive the confidence of the elected House – will not be blocked by the Senate. The principles of the Salisbury Convention operate to safeguard the role of elections as a legitimizing vehicle for public policy-making.

Whether the Salisbury Convention is binding upon the Senate as a fully crystalized convention is a complex question – requiring deeper analysis – that the present discussion does not seek to answer authoritatively. Yet, I would suggest that, in the day-to-day work of the Senate, it matters little whether we consider it a custom, a constitutional convention or a practice. What is beyond dispute is that there exists a principle of democratic deference to the Government’s election platform that is – appropriately – a determining factor when senators cast a vote. What is also not

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<sup>77</sup> Senate Debates of January 31, 2018.

<sup>78</sup> Senate Debates of December 6, 2016

in question is that, should the Senate defeat a bill implementing a key electoral pledge, the political consequences for the credibility of the institution would be grave. Canadians expect the policies they voted on, and that the House of Commons passed, to be implemented.

Furthermore, while election promises should – in principle – be passed by the appointed Senate once approved by the House of Commons, one could reasonably maintain that certain rare cases should not be sheltered by such a convention given key features of the Senate’s core mission as a safety valve against potential excesses of majority rule. The Salisbury Convention would not serve the Canadian public – nor would it respect the Senate’s role as a safeguard against the tyranny of the majority and defender of regional and minority rights – if the doctrine precluded the Senate from blocking egregious deprivations of basic rights and freedoms. What if a government was to be elected on a promise to proceed with a bill providing for the internment of a specific ethnic or religious group? The judicial branch would surely intervene in some fashion. But would the Senate not have a constitutional duty to block such a bill, notwithstanding the Salisbury Convention?

In my view, the principles underlying the Salisbury Convention simply work better in practice than in theory. There is a balance to be struck, and it is the Senate that is best situated to make these determinations on a case-by-case basis. But the potential for difficult cases should not confuse the prevalence of straightforward ones.

In addition, there is no question that Senate continues to retain the legitimacy to improve bills that implement election promises. Senators advance these improvements through amendments, changes that are at the core of the complementary function. To illustrate this, let us consider two recent examples (one live, one already passed) of the Senate grappling with complex bills implementing clear election promises.

First, during the 2015 federal election campaign, the Liberal Party promised to repeal elements of Bill C-24, 2014 legislation that gave the Government the power to revoke Canadian citizenship if a dual citizen is convicted of certain offences. The bill enacted additional barriers to attaining citizenship. The commitment to repeal these provisions echoed the Prime Minister’s expression of the principle that *a Canadian is a Canadian is a Canadian*. Bill C-6, *An Act to amend the Citizenship Act and to make consequential amendments to another Act*, was tabled as the fulfilment of that promise. Yet, Senate amendments significantly improved C-6 in a manner that was in line with the spirit and intent of the Government’s electoral pledge.

As sponsor of Bill C-6, independent Senator Ratna Omidvar (an internationally recognized voice on immigration, diversity and inclusion, and the founding executive director of the Global Diversity Exchange at Ryerson University’s Ted Rogers School of Management) was the driving force behind a major amendment, one of the most significant to a government bill this Parliament. Moved by independent Senator Elaine McCoy, the amendment restored an individual’s right to due process if facing potential citizenship revocation on the grounds of fraud or false representation. As well, Conservative Senator Victor Oh championed an amendment granting minors the ability to independently apply for citizenship, paving the way for children who have lost their parents to conflict and adversity to come to Canada to reside with extended family

members. Previously, minors could only request a waiver for a grant of citizenship on compassionate grounds from the Minister. Where minors once required a waiver, they would now have a right. Frustratingly enough, the Conservative caucus in the Senate voted against the bill (meaning that their whipped and disciplined voting bloc, as it routinely does, voted with the intent of defeating a legitimate election promise made in an election that Conservatives lost). This vote occurred even with the adoption of the amendment of their colleague. Notwithstanding this, the Government was very pleased to support the policy improvement brought by Senator Oh, regardless of his partisan affiliation.

Ahmed Hussen, Minister of Immigration, Refugees and Citizenship, noted the impact of the Senate amendments in bringing important issues to light that were not originally addressed in the proposed legislation implementing the Liberal electoral commitment. “Our Government feels that the collaborative work of the Senators has made Bill C-6 stronger,” he said. Senator Omidvar called the amendments “outstanding examples of the Red Chamber exercising its ability to improve legislation and uphold the Charter, in particular on behalf of minorities.”<sup>79</sup>

Second, I would point to a live example: Bill C-45, the Government bill that would legalize and strictly regulate cannabis.

As we all know, the Liberal Party promised in 2015 that, if elected to form government, it would pursue a policy of legalization, regulation and taxation of cannabis.

Bill C-45 is the fulfilment of that promise.

As a result, the general principle of democratic deference to clearly outlined features of the Government’s election platform, once they are passed by the House of Commons, means that it would be contrary to custom (and inappropriate) for the Senate to defeat C-45. While some senators may have serious reservations about legalization, I would argue that is it is not their call. Canadians have spoken. Therefore, the principles of legalization, taxation and regulation should be left intact by the Senate.

However, the Senate nonetheless has an important role to play in the review of Bill C-45, and in bringing forward amendments that would improve upon the current version of the bill. The concerns of senators should inform that work. In other words, the Senate can *complement* the work of the House of Commons. As Government Representative, I was happy to reach an agreement that ensures that the Senate will proceed to a deep dive on an issue of such importance to Canadians.

In that spirit, the Senate agreed to allow cameras in the chamber while three cabinet ministers spent two hours answering questions from senators on issues related to the legalization and regulation of cannabis (a proposal, I would note, the Opposition strangely voted against). The Senate also asked five separate committees with subject matter expertise to look at different aspects of the bill and then report back to the Senate as part of an extensive consultation and study

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<sup>79</sup> Press release of Senator Ratna Omidvar, June 15, 2017.

process. Further, the Senate formalized the deliberation process with every group in the Senate and thereby agreed to a deadline for a date to vote on the legislation.

Despite the seriousness of the work under way, at the time of writing, the Canadian public remains very concerned about the warning issued by the Leader of Her Majesty's Official Opposition, Andrew Scheer, that Senate Conservatives would use "all the democratic tools" available to them to try to "block" the bill.<sup>80</sup> While it is eyebrow raising to describe Senate procedural obstruction as democratic, this concern was compounded by the Conservative Party Health Critic's assertion, in the House of Commons, that the Senate "do its true deed", noting that bill C-45 "shouldn't survive".<sup>81</sup> Canadians recently discovered that these were not idle warnings, as Conservative senators voted as a bloc to defeat C-45 at Second Reading, an extremely rare move in the modern era with respect to government legislation. Let it be clear: Bill C-45 represents a central campaign commitment on which the governing party was elected. The legislation expresses what John A. Macdonald described as "the deliberate and understood wishes of the people". Yet, the Conservative Party of Canada – apparently dissatisfied with the outcome of the 2015 election – appears to be seeking a second kick at the policy can through the Senate. Had the National Conservative Caucus been successful, the Senate would have been robbed of the opportunity to fulfill its constitutional duty to conduct sober second thought, studying the legislation at committee and potentially proposing amendments that could improve the bill and provide better policy outcomes to Canadians.

I strongly urge all parliamentarians, including Mr. Scheer and all members of their National Conservative Caucus in the Senate, to endorse the basic democratic principles embodied by the Salisbury Convention.

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<sup>80</sup> Marie Vastel, "L'étude du projet de loi sur la légalisation du cannabis s'annonce ardue au Sénat", *Le Devoir*, December 1, 2017. See also: <https://www.facebook.com/CBCPolitics/videos/1876291089066384/>

<sup>81</sup> Marie-Danielle Smith, "Keep our great country safe from all the weed, Conservative critic pleads in Parliament poem", *National Post*, December 1, 2017

## H. Private Members' Bills and the Senate's "Pocket" Veto

*"Private members' bills are approved by a majority of Canada's elected representatives and deserve the appointed Senate's meaningful and timely engagement. The Senate must not continue to delay consideration of these bills, to the point that a large portion die on the order paper."<sup>82</sup>*

Professor Andrew Heard

In considering the Senate's complementary relationship to the House, another important question is the Senate's treatment of private Members' bills ("PMBs"). From what I have seen, these bills have sometimes not received the respect they deserve, as legislation passed by the elected body. Although PMBs come to the Senate with the stamp of approval of elected MPs, they are much less likely than government bills to ever come to a Third Reading vote and are often left in limbo through deliberate tactics of procedural delay. The end of a Parliament marks the death knell for legislation, such that running out the clock or shuttling a bill back to the House late in a session has the same effect as an outright veto. This is why this problematic practice is referred to as the "indirect" or "pocket" veto. Professor Andrew Heard has conducted research on this topic covering the Senate's deliberations over 5 Parliaments, from 2000 to 2015. His findings speak for themselves:

- Of 107 private members' bills sent from Commons, only 59 got royal assent (55.1%);
- PMBs that did not secure Royal Assent spent an average of 210 days in the Senate prior to the end of the session;
- While Government bills attaining Royal Assent spent an average of 41 days in the Senate, PMBs attaining Royal Assent averaged 168 days;
- Of 7 bills given first reading in the Senate on October 17, 2013, four spent the remaining 654 days in the session without emerging from committee, with one never completing second reading;
- Only one PMB was outright defeated: Bill C-311, legislation passed by the Commons' opposition parties in 2010 that would have compelled the Government to produce reports on the policies implemented to counter climate change, was defeated by the Conservative majority in the Senate at Second Reading.<sup>83</sup>

During this Parliament, the gender-neutral national anthem bill was one of the most conspicuous examples of delay. Bill C-210, replacing "all thy sons command" with "all of us command" in the English version of the National Anthem, stalled in the Senate for 18 months before passage. The

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<sup>82</sup> Andrew Heard, "The Senate's Role in Reviewing Bills from the House of Commons", *supra*, p. 6.

<sup>83</sup> *Ibid*, pp. 4-5.

cause was the protracted procedural obstruction employed by a small group of senators opposing the change. It became apparent this small group of senators would seek to prevent a democratic vote from ever occurring prior to the end of Parliament, effectively killing the bill. The rationale was as follows: because the bill (one that carried the legitimacy of an overwhelmingly positive vote from the House of Commons) would pass the Senate if it came to a vote, then that vote should never take place. Executed by independent Senators Frances Lankin and Chantal Petitclerc, the procedural gridlock was ultimately ended by a rare procedural mechanism foreclosing any further obstruction.

Professor Heard correctly observes that, in the Senate, “private member’s bills are definitely treated as poor cousins in the process, despite being approved by a majority of elected MPs.”<sup>84</sup> In the corridors of the Senate, and at times in debate, private member’s bills are characterized as unimportant. Extreme procedural delay, culminating in the “pocket” veto, has been rationalized on the basis that the matter cannot be considered to be of utmost importance because it has not been introduced by the Government. However, the procedural tactics are characteristically deployed to prevent a vote from occurring by those who know that the outcome would not be in their favour. In my view, all bills (government bills, PMBs and Senate public bills) deserve fair and timely consideration, and ultimately a democratic vote. I do not imply that all PMBs should be rubber stamped and given the green light. I merely state that these bills should be studied and voted on. The Senate, as a complementary body of sober second thought, should not act as a graveyard for the business brought forward by MPs and passed by the House. Doing so needlessly damages the Senate’s legitimacy with the public and undermines the ongoing institutional effort to bridge its credibility gap, as illustrated by an appropriately negative editorial published by a major national newspaper in the midst of the Senate’s delay of two PMBs.<sup>85</sup> The “pocket veto” reminds Canadians – many of whom remain keen on abolition – that these bills, duly passed by their elected MPs, would be law were it not for the Senate refusing to proceed to a vote. The Senate expects MPs to respectfully consider Senate public bills passed by the Senate. It takes two to tango.

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<sup>84</sup> *Ibid*, p. 5

<sup>85</sup> “Globe editorial: Senate showing its undemocratic side with delay of bills”, *The Globe and Mail*, October 29, 2017: “using such obvious delay tactics is an insult to the intelligence of Canadians and a violation of the primacy of the Common. ... Senators are a legitimate part of the legislative process. But when they delay bills for overtly partisan reasons, or deliberately move slowly on issues about which the House of Commons has expressed an urgency, then they overstep their bounds.”

## **Epilogue: Better Serving Canadians**

*“[I]t seems to me that our functions may be exercised most usefully, not as registrars of the executive opinion on the one hand, nor servile echoes of fleeting popular feeling on the other, but as the balance-wheel of this government, guiding always, obstructing never and in all things manifesting a superiority to the promptings of an angry partisanship.”*

The late former Senator Donald McDonald, a member of Canada’s first cohort of senators,  
Senate Debates of November 11, 1867

Conventional wisdom would dictate that, so long as it is appointed, the Senate will always and forever be seen by its critics to be in the wrong. It will either be a rubber stamp, or it will do something for which it has no democratic mandate. This is a false dichotomy.

I do not accept the notion that the Senate will remain Canada’s most maligned political institution, no matter how good and noble the Senate’s work, and no matter how cautious and appropriate its scope of action. When political parties lose support, they put their best foot forward, improve their brand, refresh personnel, review their policy platforms, and address the issues that have turned off the public. The same can be said about businesses, big and small, seeking to generate loyalty from their clients.

In fact, I would suggest that it is possible for the Senate to be redeemed in Canadians’ eyes if it embraces the qualities that distinguish it from the House of Commons.

Senators’ must serve Canadians. To serve them right, an appointed Senate must play the part it has always been designed to achieve: that of a complementary body of sober second thought, one that does not replicate nor compete with the House of Commons.

Senators intent on closing the credibility gap of the institution for good have a colossal task on their hands. Unfortunately, this challenge is significantly exacerbated by the Opposition’s fealty to a system that continues to replicate the partisan dynamics of the House of Commons in the chamber of sober second thought. The trouble is that this approach, if replicated carelessly in the appointed Senate, poses a direct challenge to representative democracy. Votes are cast in a bloc with the explicit intent of defeating legislation that would implement the Government’s election platform. Votes are cast in a bloc to defeat messages from the House of Commons declining Senate amendments on confidence measures, such as budgetary and fiscal legislation. Procedural tactics are deployed routinely and relentlessly with the apparent goal of exercising the undemocratic “pocket veto”, precluding votes from ever taking place on legislation passed by wide margins in the elected House of Commons. Government legislation endorsed by the House of Commons continues to be delayed, with the apparent goal of giving the public the false impression that a complementary, less partisan and more independent Senate cannot work diligently or efficiently. If anything, the behaviour of the Conservative Opposition provides further evidence that overt partisanship hampers the appropriate discharge of the Senate’s constitutional duties, validating the thesis of the present Government and other Senate experts.

The upper echelons of the previous Government swung a partisan wrecking ball at the Senate. These days, certain senators are swinging yet another wrecking ball, this time directed at the current Government's Senate renewal initiative. They have shown a willingness to go to great lengths to work toward its failure, a sought-after prize for their arsenal in the forthcoming election campaign. Yet these are parliamentarians that happen to be sheltered from electoral judgment precisely to ensure that partisanship will not pervade their work. The Senate is not a stage for partisan theatre.

The solution to the Senate's credibility gap lies right before it. The Senate was designed to provide a complementary voice to Canadians in our bicameral system that is unfiltered by electoral and partisan calculus. It is this quality – a product of the appointive model – that the Senate ought to highlight in order to cultivate a respectful partnership with the House of Commons; gain the confidence of the public; and secure – ironically enough – a more consistently deferential outlook to the contributions of the Senate from governments. Professor David E. Smith concluded a compelling analysis of the state of the Senate as follows:

“Embracing these qualities, the Senate acts as a bridge to the public, whose concerns most often are not political so much as concerns about the workplace, family, religion, health, diversity and citizenship ... Like the country it serves, the Senate has demonstrated a capacity for adaptation, and may still do so. Distinctively Canadian at its creation, it remains so 150 years on. ... The opportunity exists to help empower civil society, for unelected though it is, the Senate stands as an ally and not an opponent of the popular will. ... Under a system of parliamentary government, the Senate must never replace the Commons and hold government responsible, but it may make government more responsive – and responsible – and, in that respect, help moderate public cynicism about politicians and the constitution.”<sup>86</sup>

If the public comes to see that the Senate is their ally in Parliament, the credibility gap will close. Thankfully, progress is actually taking place in the Senate at a quick pace. The Senate is complementing the House better than before and its credibility is improving. Those who would reverse the reform that has achieved this result should give their position sober second thought.

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<sup>86</sup> David E. Smith, *The Constitution in a Hall of Mirrors: Canada at 150*, *supra*, pp. 82, 86.