Special Senate Committee on Senate Modernization
Senate of Canada

Outline of Testimony

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Background

I am a Full Professor in the Common Law Section of the University of Ottawa's Faculty of Law. I teach in the areas of Public Law, Constitutional Law and Legal Ethics. I have authored two books: *The Canadian Constitution*, 2nd ed. (Dundurn, 2016) and *Solicitor-Client Privilege* (Lexis Nexis, 2014). The former was named one of the Top 100 Canadian books on public policy by *The Hill Times* in 2013 and again in 2016. I have co-edited eight books, including *Public Law: Cases, Public Law: Cases, Commentary and Analysis*, 3d ed. (Toronto: Emond, 2015) (with Prof. Craig Forcese of the University of Ottawa). I have written various articles relating to the Senate, omnibus bills and the Supreme Court, among other subjects. My testimony is presented wholly in my individual capacity and not on behalf of any group or organization.

Overview

My submissions to this Committee consist of four points: (1) the relationship between the Senate and the House of Commons cannot be divorced from a consideration of the Senate's legitimacy; (2) the Senate should impose constraints on its powers to delay and veto House bills; (3) the Senate should scrutinize and divide omnibus bills with greater vigilance; and (4) the Senate should be more assertive in scrutinizing private members bills as compared with government bills.

1. The Senate's Legitimacy

Considerations of the proper relationship between the Senate and the House of Commons cannot be divorced from the issue of the Senate's legitimacy. Elsewhere, I have argued that the Senate faces a "triple deficit": (1) an integrity deficit; (2) a legitimacy deficit; and (3) a democratic deficit.[1] The "democratic deficit" is most obvious and can be dealt with quickly. The Senate is not elected and therefore it is a complementary legislative body, rather than a rival to the elected House of Commons.[2] The Supreme Court has recognized in the *Senate Reform Reference* that this character of the Senate shapes its relationship with the House of Commons. This character is not going to change in the foreseeable future. However, the other two deficits can be addressed by the Senate. They also impact on the proper relationship between the Senate and the House of Commons.

[1] Adam Dodek, "Addressing the Senate's 'Triple Deficit': The Senate as Driver of its own Reform" (2015) 24:2 Constitutional Forum 39.
[2] *Reference re Senate Reform*, 2014 SCC 32.

The Senate suffers from an integrity deficit because of the reputation that the Senate has for not being a particular demanding job, and, more importantly, because of recent scandals that are a continuation of a history of scandal which the Senate has not taken sufficient steps to address. The Senate suffers from a legitimacy deficit because of the integrity deficit and because of its history of patronage appointments. To be clear, I do not think that the change in the appointments process initiated by the current government sufficiently addresses the legitimacy deficit. In my opinion, what Senators do once they appointed is far more important than how they were appointed to the Senate.

It is for this reason that I believe that the Senate cannot separate the issue of ethics and conflict of interest from the issues being considered by this Committee to modernize the Senate. The success or failure of attempts to modernize the Senate will rest on addressing the Senate's legitimacy deficit which is directly tied to its integrity deficit. To be direct, if the Senate does not deal forcefully and quickly with malfeasance and adopt and enforce the highest standards of ethics, I do not believe that it will ever to be able to successfully exercise its functions as a complementary legislative chamber within the Parliament of Canada.

2. Self-imposed Legislative Limitations

In order to exercise its constitutional functions more effectively, the Senate should adopt self-imposed constraints on the exercise of its constitutional powers. As a matter of constitutional law, the Senate has virtually the same powers as the House of Commons (with the exception that it cannot introduce money bills).

I support the adoption of a "suspensive veto" on the model that exists for the House of Lords in the United Kingdom Parliament and for the Senate under section 47 of the *Constitution Act, 1982*, respecting constitutional amendments. It is my belief that by circumscribing its own power, the Senate will be able to more effectively exercise its constitutional role as a chamber of "sober second thought." Professor Andrew Heard of Simon Fraser University has argued that "[a] self-limitation on [the Senate's] powers may ironically result in a more vibrant and effective Senate."[3]

As a matter of parliamentary privilege, the Senate has the power to regulate its own internal proceedings. Professor Heard has recommended that the Senate Rules could be amended to state that bill emanating from the House shall be deemed to have received third reading in its original form 6 (or 12) months after its introduction.[4] As Professor Heard recognizes, there is no magic to the time length chosen. The point is to establish a reasonable outer limit for the Senate to delay passage of a bill from the House. The Senate would lose its absolute power to veto but it would likely gain the power to influence the shape of House bills on a more regular basis.

[3] Andrew Heard, "Tapping the Potential of Senate-Driven Reform: Proposals to Limit the Powers of the Senate" (2015) 24:2 Constitutional Forum 47 at 49.
[4] Ibid. at 51.

3. The Senate Should Be More Assertive in Scrutinizing and Dividing Omnibus Bills

This Committee identified the problem of omnibus bills in its October 2016 report. As the Committee correctly stated, omnibus bills which "include financial or budgetary measures together with measures that are more appropriate as separate bills . . . compromise the ability of a legislative chamber to hold governments accountable; they are a challenge for parliamentarians to properly scrutinize legislation, depriving Parliament of the opportunity to identify and correct any flaws in the legislation; and they make it difficult for legislators to properly respond to inquiries from constituents and the public about the legislation." (p. 27).

I wholly endorse the recommendations of the committee that "the Senate be more assertive in using its powers to more effectively scrutinize omnibus bills" (p. 28). As I have argued, I believe that both the Senate and the House need to adopt measures to curb the use of omnibus bills in order to protect and promote parliamentary democracy for the reasons identified by this Committee. Moreover, I believe that such measures are necessary in order to protect the privileges of Parliament because I believe that court challenges to the abusive use of omnibus bills are inevitable and could result in judicial narrowing of the scope of parliamentary privilege to reconcile it with other constitutional doctrines.[5]

The problem of omnibus bills may be divided into so-called "ordinary" omnibus bills and omnibus budget bills (also known as "omnibudget bills"). Ordinary omnibus bills address multiple subjects or amend multiple statutes. They may or may not be problematic from a perspective of parliamentary scrutiny. Omnibudget bills are bills which implement budget measures but often have non-budget-related matters "tacked" onto them. These are highly problematic for many reasons.[6]

The preamble to the *Constitution Act, 1867* states that we have "a Constitution similar in principle to that of the United Kingdom". In this area, we can learn from the United Kingdom. The Senate should follow the wisdom and experience of the House of Lords on this matter. Erskine May, *Parliamentary Practice,* 23rd edition states at p. 924:

> *In former times, the Commons abused their right to grant Supply without the Lords, by tacking to bills of aids and supplies provisions which, in a bill that the Lords had no right to amend, must either have been accepted by them unconsidered, or have caused the rejection of a measure necessary for the public service. This practice infringed the privilege of the Lords, no less than their interference in matters of finance infringes the privileges of the Commons.*

In response to this problem, the House of Lords created Standing Order No. 53 which embodies a Resolution of the 9th of December 1702 which provided: "The annexing of any clause or clauses to a bill of aid or supply, the matter of which is foreign to and different from the matter

[5] See Adam Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2016) 48:1 Ottawa Law Review 1.
[6] See ibid. at 11-14.

of the said bill of aid or supply, is unparliamentary, and tends to the destructions of constitutional government." (LJ (1701-05) 185.

This Standing Order has not been invoked as the basis for rejection of a Commons bill since 1807. The Rules of Order of the House of Commons in the United Kingdom now "exclude the possibility of foreign matter being tacked to such bills by way of amendment; and respect for constitutional practice prevents the inclusion of such matters among their original provisions." (May, *supra* at 924). It is regrettable and injurious to parliamentary democracy in Canada that the House of Commons in Canada has not shown the same degree of respect for constitutional practice.

To be clear, tacking on subjects that have no connection to a budget bill infringes the privileges of the Senate (see May, *supra* at 924). This is because by constitutional convention and practice, the Senate does not reject or amend budget bills.

At a period in its history where the Senate's role as a chamber of "sober second thought" is increasingly being called into question, the Government's practice of tacking foreign subjects onto a budget bill damages the prestige of the Senate. Simply put, this "unparliamentary practice" does not allow the Senate to serve its critical function as a chamber of "sober second thought" and further contributes to the perception held by some that the work of the Senate is irrelevant, or worse. The Senate should vigorously assert its privileges with respect to scrutiny of all omnibus bills and divide them as necessary in order to ensure proper scrutiny.

4. The Senate Should Closely Scrutinize Private Members' Bills

In furtherance of its role as a protector of minorities and the rule of law, the Senate should closely scrutinize private members' bills. Private members' bills are not subjected to the vigorous process of review, approval, risk analysis, regulatory impact analysis and constitutional analysis to which government bills are subjected. The *Canadian Bill of Rights* requires the Minister of Justice to review every government bill to determine whether any provision of it is inconsistent with the purposes and provisions of the Bill and to report any inconsistency to the House of Commons. The *Department of Justice Act* imposes a similar obligation on the Minister with respect to the review of all government bills for inconsistencies with the *Charter of Rights and Freedoms* (section 4.1). Private members' bills are excluded from this review. The Senate should therefore exercise heightened scrutiny of private members' bills for concerns relating to the *Charter of Rights* and the *Canadian Bill of Rights*. This is consistent with the Senate's role as a protector of minorities and the rule of law.

Private members' bills should be exempt from any suspensive veto adopted by the Senate because they have not been through the vetting process to which government bills are subject. This would also prevent attempts by governments to circulate the requirements of the *Canadian Bill of Rights* and the *Department of Justice Act* by supporting controversial measures contained in private members' bills.

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