The Senate's Role in Reviewing Bills from the House of Commons

A brief submitted to the Special Senate Committee on Senate Modernization

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Modernization of the Senate is vital to its survival, and it is crucial that Senators take full advantage of their opportunities in this Parliament to make substantive changes to the way the upper house functions. It might be prudent to consider two rounds of reform during this Parliament. The current Special Committee has a mandate to report by June 1, 2016, and it can make some substantial progress in that time towards improving the Senate. An initial focus can be on adjusting the Senate's rules and committee structure for lack of a formal government caucus, as well as the anticipated influx of new Senators who will sit as independents. However, the Senate should also take the opportunity to delve more deeply into its place in the Canadian political system, and consider reforms that address the fundamental issues underlying the profound lack of confidence most Canadians have in the Senate as it is currently structured and operates. While it might be better to wait to include the new Senators in the deeper conversation, this brief will explore issues that must still be kept in the forefront.

Since this committee's mandate is to "consider methods to make the Senate more effective within the current constitutional framework," this paper will examine measures which can be achieved internally by the Senate itself. While the Senate has a number of other valuable roles to play in our system of government, this paper will focus principally on the Senate's role in the legislative process, as a chamber of sober second thought for measures already approved by the House of Commons. The foundation for these discussions is provided by a statistical analysis of the treatment of Commons bills in the Senate during the last five Parliaments, covering the period 2000 to 2015. This period covers a useful range of changing political circumstances and a shifting balance of power between parties in both the Senate and House of Commons; it also covers the full senatorial working lives of all but a dozen of the current Senators. In the discussion that follows, I hope to reveal just what the Senate has or has not done with the government and private members' bills sent to it by the House of Commons. With the facts in hand, some suggestions can be made about improving the Senate's review of Commons bills and to increase its impact in the legislative process. Ultimately, the hope is to identify ways to gain the public's acceptance of an appointed Senate as a positive contributor to the policy process that reinforces rather than undermines parliamentary democracy. In my

view, one justification for an appointed Senate lies in it having a substantial role to play in improving the laws which emerge from Parliament.

Of 512 Commons bills introduced into the Senate between 2000-2015, 427 gained royal assent (83.3%), and only 31 were amended (6.1%). As one will see, however, significantly different treatment was given to these bills over time, and government sponsored bills received different treatment compared to private members' bills. The implications of these findings point to some ways to make the Senate more effective in its legislative review function.

Government Bills

A total of 405 government bills from the Commons were introduced in the Senate in this period. Of this group, 368 gained royal assent (90.9%) and 26 were amended (6.4%). 37 died on the order paper; three of these had passed third reading with amendments that were unresolved with the Commons prior to prorogation/dissolution. Fifteen of the bills that died on the order paper had not received second reading. The late transmission of bills from the Commons to the Senate does explain some lack of success in completing review of legislation in the Senate. For example, 18 bills left on the order paper had been introduced into the Senate within 90 days of the end of a session. Many of the bills that expired on the order paper were introduced within a month of the summer break, with prorogation or dissolution coming either in the late summer or September. However, several bills did not complete three readings in the Senate despite spending long periods of time there.

Table One: Treatment in the Senate of Government Bills from the Commons, 2000-2015

Session	Bills Introduced	Amended	3rd Reading	Resolved with Commons	Royal Assent
2001-2	50	5	47	5	47
2002-3	41	6	28	3	26
2004	23	1	21	1	21
2005	46	3	46	3	46
2006-7	43	5	36	5	36
2007-8	31	2	29	2	29
2009	36	3	33	1	31
2010-11	29	0	28		28
2011-13	51	1	50	1	50
2013-15	55	0	54		54

It is somewhat surprising that 23% of government bills were given no detailed examination in committee, perhaps undermining the detailed foundation upon which the Senate can provide sober second thought. Only 311 government bills were considered by a committee (76.8%), including in pre-study; a further 2 Common bills were given pre-study but were not subsequently introduced into the Senate prior to prorogation/dissolution.

Another surprise is the short period of time that many bills were formally in the Senate. For the 372 government bills that completed third reading in the Senate, an average of only 41 calendar days were spent in to reach that point.

One concern that has been expressed about the Senate's unlimited legislative powers is that it can effectively kill Commons legislation through a subtle and sometimes unseen "indirect veto," by simply failing to proceed with bills before the end of a parliamentary session. However, the data revealed very few examples of the indirect veto of government legislation in this period. The clearest example of an indirect veto of a government bill is well known, Bill C-10 introduced in October 2007. This bill to amend the Income Tax Act did not progress beyond first reading, despite the fact 313 days remained in the session. However, the Senate may have delayed another bill, Bill C-26 introduced in 2009 to tackle auto theft. The Senate took six months before the Legal and Constitutional Affairs Committee held a single hearing on the bill, in which law enforcement officials expressed mixed views on the effectiveness of the measures. (Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs Issue 22 - Evidence, December 10, 2009; see: http://www.parl.gc.ca/Content/SEN/Committee/402/lega/22eva-e.htm?Language=E&Parl=40&Ses=2&comm_id=11) As will be seen below, several private members' bills were clearly shelved to prevent their enactment.

Particular constitutional and practical considerations arise in the case of Commons bills amended by the Senate, as both houses must agree to the final form of a bill before it can be presented for royal assent. On most occasions where these amendments occur with the support or acquiescence of the government, the Commons approves the Senate changes very quickly; more than half the time, the Commons has approved Senate amendments within 3 weeks. Only twice in the period studied has the Commons taken more than 60 days to review and approve Senate amendments.

In session 37-2, in 2002-3, two bills died on the order paper before Senate amendments were resolved with the Commons. The fate of C-34 is easily explained, as it received third reading in Senate only 5 days before prorogation, but C-10B (Criminal Code, Animal Cruelty) was a special case and was one of the most visible clashes between the two houses. C-10B was one of two bills split from original C-10, with the Commons agreeing to the split. The Senate passed C-10A without amendments after a total of 55 days in the Senate. However, C-10B had 232 days in Senate before third reading was given with 5 amendments included. The Commons then agreed to 2 of these amendments, disagreed with another two, and amended the remaining Senate

alteration. The Senate referred this matter back to committee and adopted its report, insisting on one amendment the Commons had disagreed with, replacing another, and amending the third. The Commons replied with disagreement to all the new changes. By this time, four months had passed. The Senate took another 37 days before referring the matter back to committee. Parliament prorogued 6 days later without resolution. The bill spent 167 days in unresolved disagreement between the two houses, and a total of 399 days since C-10 was originally introduced in the Senate.

There is one example of the Commons agreeing to Senate amendments on its second round of consideration. This occurred with Bill C-2 on accountability in 2006, where the Senate insisted on some amendments to which the Commons had initially not agreed.

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 Senate should consider limiting itself to obliging the Commons to reassess legislation just once, and accede to the wishes of the elected House once they are made clear in reaction to the Senate's amendment. 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. To avoid protracted disputes with the Commons, it may be necessary to more fully explain the need for specific amendments in the message to the Commons.

Private Members' Bills

The most problematic aspect of the Senate's legislative record lies in its inefficient handling of House of Commons private members' bills. In comparison to the Senate's treatment of government bills from the Commons, private members' bills are far less likely to be considered in detail or to be given third reading. Of 107 private members' bills sent from Commons, only 59 got royal assent (55.1%) and just 5 were amended (4.7%); two had completed report stage but died before third reading (both had been amended). The only direct defeat of a Commons bill in this study period involved a private members' Bill. In my view, an outright defeat of a measure passed by the Commons steps beyond the bounds of the Senate's accepted role to provide sober second thought; a veto irreparably substitutes the Senate's position in place of that of the Commons. The defeat involved the controversial Bill C-311 introduced in 2010, which the opposition parties in the Commons had succeed in passing against the wishes of the minority Conservative government. This measure would have required the government to provide reports on action to counter climate change. In November 2010, C-311 was defeated on second reading.

In contrast to the 41 days that successful government bills spent on average in the Senate, private members' bills averaged 168 days to secure third reading. The private members' bills which did not pass had spent an average of 210 days in the Senate prior to the end of the session.

A number of private members' bills were singled out for extremely lengthy delays, indirectly vetoing some of them. It is instructive to consider, by way of example, the 7 bills given first reading in the Senate on October 17, 2013. Four of these spent the remaining 654 days in the session without emerging from committee (one of which never completed second reading). The other remaining three bills from this day's introduction were eventually enacted, although they required an average of 430 days between first and third reading. The controversial Bill C-377 on reporting requirements for labour organizations took 622 days to complete its journey through the Senate. Bill C-290, introduced in March 2012 was another example of an indirect veto of a private member's bill. Despite spending 556 days in the Senate and completing the committee report stage unamended with 309 days left in the session, it never received third reading.

Clearly, the Senate needs to address its treatment of private members' bills already approved by the Commons. And it must remain sensitive of the autonomy inherent in the concept of private members' bills. It should not normally be a reason to shelve a bill simply because the government of the day is opposed to a measure approved by a majority of backbench MPs.

Areas for Improvement in Legislative Review

This discussion of the Senate's legislative review performance reveals some serious deficiencies which the Senate must address if it is to remain a viable part of Parliament. Revealing is the brief attention given to many government bills. Only a very small portion of bills is amended by the Senate, calling into question its value as a review chamber. Private member's bills are definitely treated as poor cousins in the process, despite being approved by a majority of elected MPs. There appears to be a logistical bottleneck in the committee stage faced by all bills that raises broader issues if it is to be resolved. Finally, party discipline has posed a significant obstacle to a more active role by the Senate in reviewing legislation.

Most government bills received scanty review, with an average of 41 calendar days between first and third reading. Surprisingly, almost a quarter of government bills are not sent to a standing or special committee for detailed discussion and testimony from outside witnesses. Only 6.4% of government bills emerged from third reading in the Senate with amendments intact. Some prolonged periods can be seen during which few, if any, government bills are amended. No amended government bill received third reading between December 2009 and March 2012, and none has been amended in the four years since. Overly strict party discipline is to blame for the low rates of amendment of government bills, although the remedies appear mostly cultural rather than procedural.

The Senate must find a better approach to handling the new reality of many private members' bills from the Commons. Changes in the House of Commons procedures have created greater opportunities for these bills to pass and to be concerned with more substantial areas of public policy than was the case in previous decades. In the 37th Parliament, 2000-4, only 15 private members' bills were sent to the Senate from the House of Commons. But by 2011-15, the Senate had to deal with a total of 51 of these bills. The disparity between the treatment of Commons government and private members' bills is most clearly seen in the difference between their failure rates; only 9.1% of House of Commons introduced into the Senate failed to receive royal assent between 2000 and 2015, while 44.9% of private members' bills died on the order paper. The length of time spent in the Senate by these two types of bills is also very different:

Table Two: Days Spent in the Senate by Type of Commons Bills

	1 to 7	8 to 30	31 to 90	91-180	181-365	366+
Government	25.9%	34.1%	29.9%	15.5%	2.4%	0.0%
Private Members	2.9%	9.6%	18.3%	25.0%	32.7%	11.5%

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.

The Senate should consider conducting more committee hearings into key government bills while they are still in the House of Commons. Pre-study has been a process only intermittently used over the years, with a concern that the Senate's role in amending legislation gets obscured. In the past, it has been most likely to be practical when the same party has controlled both the Commons and Senate, so Senate suggestions can be argued through caucus connections. However, it can help when large bills are known to be set for an extended period of committee study in the Commons. Only five bills were subject to pre-study in the period 2000 to September 2013. However, in the second session of the 41st Parliament, ten bills were sent to Senate committee for pre-study; this number included three omnibus bills which were each sent to multiple committees (seven in the cases of C-4 & C-43, and six for C-59). This spate of activity coincided with an extended period during which the Senate only formally amended one government bill while in the Senate. While pre-study can have an important benefit in spreading the timetable of legislative review, it should be conducted in a way that preserves the Senate's visible influence in the legislative process. Changes proposed during pre-study should be tallied and publicized, along with any implementation by the Commons; when those previously studied bills arrive in the Senate, committees should formally recommend any outstanding amendments from their pre-study report.

In order to become more efficient, the Senate should consider a reorganization of either its committee structure or of the committee stage of reviewing bills. As many other observers have pointed out before, the lion's share of legislative review is conducted by the Legal and Constitutional Affairs Committee, which examined 113 of the 381 government and private members' bills (30%) formally sent to committee during the period of study. The top four standing committees accounted for over 61% of all committee referrals, revealing a significant concentration of institutional resources that must in practical terms limit the amount of time and attention given to each bill those committees consider. That concentration may well explain some of the delay in reviewing private members' bills, as well, with government bills given priority in the finite schedule of the main committees. There is also considerable overlap in committee membership between the Finance, Energy, and Banking committees which may pose problems of scheduling simultaneous committee hearings. Taking these four committees together, just 33 Senators undertake the majority of committee work. The dominance of legislative work by these committees is further reinforced by their lead in substantive hearings and reports on matters not involving legislation. [1]

Table Three: Government and Private Members' Commons Bills referred to Committee, 2000-2015

Committee	Bills Considered
Legal and Constitutional Affairs	113
National Finance	48
Energy, the Environment and Natural Resources	37
Banking, Trade and Commerce	35
Aboriginal Peoples	25
Social Affairs, Science and Technology	24
Transport and Communications	23
Foreign Affairs and International Trade	22
National Security and Defence	14
Committee of the Whole	9
Agriculture and Forestry	8
Human Rights	7
Foreign Affairs	6
Rules, Procedures and the Rights of Parliament	5
Special Committees	3
Fisheries and Oceans	1
Official Languages	1

[1] See: Andrea Lawlor & Erin Crandall, "Committee Performance in the Senate of Canada: Some Sobering Analysis for The Chamber Of 'Sober Second Thought'," (2013) 51 *Commonwealth & Comparative Politics*, 549-568, at 557.

The need to spread the workload more equitably across Senate members and to provide more effective scrutiny of legislation is tied into another area of reform which has been long suggested, that Senators be required to treat their position as full-time employment. In order to ensure that all Senators are available for committee work throughout the parliamentary calendar, the Senate should consider a prohibition on members holding outside directorships or significant professional commitments. Part-time members are the norm in the House of Lords, where there are over 800 members and only modest daily stipends are paid; with that large a membership, the Lords actually depends on only a subset of members participating at any given time in order to function effectively. In contrast, the Senate has a maximum of 105 members who are all paid a respectable full-time salary. While the Senate remuneration is undoubtedly a step down in pay for many professionals, that is a tradeoff for the honour of participating in the heart of Canada's parliamentary process. Ensuring Senators are essentially devoted to its business full-time also counters public concerns about the entrenched "house of lobbyists" and the perception that a number of Senators have viewed their position as sinecures. A complete roster of full-time Senators is needed if the Senate is to fill committees to allow more effective simultaneous sittings and to provide more hearings on as many bills as possible.

The Senate's inability to amend more than a very low percentage of Commons bills is undoubtedly tied to the role party discipline has played to structure what business is attended to and how Senators vote. Senators have historically been thought of as less partisan and more independent in their voting records than MPs, and in many ways this is true. A study I previously conducted of Senators' voting patterns in the period 2001-6 revealed that 62.4% of recorded votes in the Senate included at least one Senator voting against their party position, and that almost 60% of individual Senators had dissented from their caucus colleagues at least once.[2] But it was also true that most Senators voted with their colleagues most of the time. A party with a majority is usually able to count on an outcome consistent with the preferred caucus position. Even so, there have been a number of occasions in the past when a Liberal majority in the Senate confronted a Liberal majority in the House, as with Bill C-10B in 2003. Data from my earlier research, however, showed that Conservative Senators at the time were less likely than their Liberal counterparts to vote against the Whip's lead. This trend crystalized some years later with almost iron-clad discipline among party ranks in the 2011-15 sessions. While occasional dissent still occurred, discipline was strongly enforced and Senators were removed from committee assignments in order to preserve unity. In the end, party discipline is a function of both caucus structure and political culture within the Senate. Because of the behavioral basis of party cohesion, there are limits to what can be done procedurally to encourage further autonomy among existing caucus members. However, some changes could

[2] See: Andrew Heard, "Assessing Reform through Bill C-19: The Effects of Limited Terms for Senators," in Jennifer Smith (ed.), *The Democratic Dilemma: Reforming the Canadian Senate*, Montreal & Kingston: McGill-Queen's University Press, 2009, 117-139.

be made to loosen the control caucus groups have over committee assignments and the ease with which members may be replaced by caucus leaders.

However, I also believe that the current government is misguided in its attempts to transform the Senate into a fully non-partisan institution through the continued appointment of non-aligned Senators. Granted, the introduction of an initial number of “crossbench” appointees is a very positive development. Their presence will help move the Senate away from the entrenched temptation for either Liberal or Conservative governments to ensure the Senate simply facilitates its legislative agenda. In my view, it will be a very positive development for no group to be able to direct the Senate.

While 30 to 40 independent Senators may be a positive influence in the Senate, however, I remain skeptical that a fully non-partisan Senate is either practical or desirable. When it becomes clear that the Senate is controlled by a majority of Senators acting as independent agents, then certain new realities must be acknowledged, accommodated, and even regulated. First, individual Senators will need significantly more staff and research resources in order to assess how they should vote on the wide range of issues which come before the chamber. To expect the nation’s public policy to be refined and approved by uninformed decision-makers is a recipe for disaster, no matter how well intentioned they are. In my view it is not a coincidence that crossbench Lords reportedly do not participate in votes as often as party-affiliated Lords, as their lack of knowledge and interest in the full range of policy issues cannot be compensated for by caucus support. Second, the reality of collective social action means that like-minded Senators will negotiate and cooperate for mutual advantage - and try to thwart their perceived competitors. Some of that coordination will be publicly acknowledged, but much may be left to unseen backroom dealings; hopefully, new organized groupings could emerge to bring the politics into the open. A third related development is that individual Senators will become clear targets for intensified lobbying. The work the Senate is engaged in is highly political, in the sense of being a competition over which values are enshrined in public policy and how benefits or duties are spread across the population and corporations. With politics comes strategic maneuvering and attempts to influence and coerce participants.

Conclusion

As an appointed body in the modern democratic era, the Senate must work hard to claim and sustain public confidence. The public has faith in appointed judges, but principally because of the belief that judges interpret and enforce established legal rules, principles, and rights. Even with an awareness of the broad discretion individual judges have to develop and reshape the law, the central decision-making context for judges is very different from the patently political basis of decision-making in either chamber of Parliament. Legislative decisions are and should be made over which values, principles, and emotions prevail on the day. While evidence, logic,

and analysis are also inherent components of good policy development, most policy choices are contestable, some are divisive, and a few even inflammatory. Thus the long-term prospect for public support for the appointed Senate's role in Parliament must rely on how constructive its role is seen. The Senate must provide clear and visible suggestions to improve legislation, and to a large enough number of bills to justify its value in the system. It must not be seen as an unaccountable entity obstructing or vetoing choices endorsed by the people's elected representatives. Neither should the Senate be seen principally as a forum for some interesting committee discussions over bills that seldom get improved through amendment. Over time, the same slowly-renewed group of Senators should provide constructive and positive suggestions for ways to improve the policies of a government of any party stripe. Their role is to provide a brake on the policy process with a chamber unlike the Commons, to confirm both that elected MPs are sure about the most controversial of their decisions and that they have written the most effective version of bills to achieve their goals. Having offered suggestions for improvement or forced a reconsideration, the Senate's job is done. And it is a valuable role, well worth trying to protect and refine.