

Moving Toward a New and Improved Senate

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ABOUT THIS STUDY

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SUMMARY

The Senate of Canada has changed significantly as a result of the 2014 decision by Justin Trudeau, then leader of the Liberal party, to remove Liberal senators from the parliamentary caucus; and by his introduction, as prime minister, of a new procedure for the selection of senators. The Independent Advisory Board for Senate Appointments now proposes candidates from pools of interested Canadians who have applied. Almost all those appointed since March 2016 have joined the Independent Senators Group (ISG), which now has 58 members in the 105-seat second chamber.

The Senate has not been completely transformed, but enough change has occurred to allow us to contrast what author Paul Thomas refers to as the “old, partisan, government-controlled” Senate with a “new, non-partisan, independent Senate.” When it was a highly partisan body composed almost entirely of Liberal and Conservative senators, the Senate was constrained in the performance of its three main constitutional roles of representing regions, providing sober second thought on bills and upholding the rights of minorities. The “new” Senate has demonstrated a greater willingness to propose amendments to government legislation, but so far has stopped short of an actual veto. Whether intended or not, the Trudeau changes have meant that the Senate has become a curb on prime ministerial power and the use of majority power in the House of Commons.

Although the ISG has become the dominant presence in the Senate, it is not a caucus that takes direction from the government. The traditional clash between organized government and opposition sides has waned but not disappeared entirely because Conservative senators continue to act as an opposition. In addition, spontaneous coalitions in opposition to elements of certain government bills have emerged within the ISG.

The new Senate operates on the basis of a dispersed, horizontal and shared form of leadership that depends on “soft power” techniques such as consultation, persuasion and negotiation. The leadership skills of the Government Representative and his two deputies have become key to advancing Senate business. Senate rules, procedures and resource allocations have been gradually modified to reflect the new realities. As a result, a new institutional culture that is more collegial and constructive than the often-adversarial culture of the past is developing.

Thomas concludes that further changes are needed to carry forward the present renewal. These include the establishment of a business committee to plan and organize the work of the Senate and the development of a set of criteria, perhaps enshrined in the Senate’s rules, to guide it in determining whether to delay, amend or defeat a government bill.

RÉSUMÉ

Le Sénat du Canada s'est considérablement transformé depuis que Justin Trudeau a décidé d'exclure les sénateurs libéraux du caucus parlementaire en 2014, alors qu'il était chef du Parti libéral, puis d'instaurer un nouveau processus de sélection une fois élu premier ministre. C'est maintenant le Comité consultatif indépendant sur les nominations au Sénat qui propose des candidats, qui sont sélectionnés parmi ceux qui ont demandé à siéger à la seconde chambre. Et depuis mars 2016, presque tous les candidats retenus se sont joints au nouveau Groupe des sénateurs indépendants (GSI), dont les membres occupent aujourd'hui 58 des 105 sièges du Sénat.

La transformation du Sénat reste partielle, mais elle a occasionné suffisamment de changements pour qu'on puisse comparer, comme le fait ici Paul Thomas, l'« ancien Sénat partisan contrôlé par le gouvernement » au nouveau « Sénat indépendant et non partisan ». Du temps où il formait un organisme très partisan presque entièrement composé de sénateurs libéraux et conservateurs, le Sénat se trouvait entravé dans l'exercice de ses trois principales fonctions constitutionnelles : la représentation des régions, une « réflexion indépendante, sereine et attentive » des projets de loi gouvernementaux et la protection des droits des minorités. Le nouveau Sénat s'est montré plus actif en proposant des modifications plus nombreuses aux projets de loi, sans toutefois exercer son pouvoir de veto. Mais tout compte fait, ces changements ont amoindri le pouvoir du premier ministre et de la majorité à la Chambre des communes, que Justin Trudeau l'ait voulu ou non.

Car si le GSI occupe désormais une position dominante au Sénat, il ne forme en rien un caucus inféodé au gouvernement. Le conflit traditionnel entre gouvernement et opposition officielle s'est estompé, mais il n'a pas entièrement disparu en raison de l'attitude des sénateurs conservateurs, qui continuent d'agir comme une opposition. Sans compter, au sein même du GSI, les coalitions spontanées qui ont mis en cause des éléments de certains projets de loi.

En somme, le fonctionnement du Sénat renouvelé repose sur une forme de leadership dispersé, transversal et partagé qui privilégie la consultation, la persuasion et la négociation, propres au *soft power*. Les qualités de leader du représentant du gouvernement au Sénat et de ses deux adjoints sont devenues d'une importance clé pour la conduite efficace des travaux. Les règles, procédures et allocations de ressources ont aussi progressivement évolué en fonction de cette nouvelle réalité, ce qui a favorisé l'émergence d'une culture institutionnelle plus collégiale et constructive que la culture souvent antagoniste du passé.

D'autres mesures seront nécessaires pour mener à bien ce renouvellement, conclut l'auteur, notamment la création d'un comité des affaires chargé de planifier et d'organiser les travaux ainsi que la définition d'une série de critères – qui pourraient figurer aux règles du Sénat – visant à éclairer les décisions de report, de modification ou de rejet des projets de loi.

INTRODUCTION

It is time to revise the long-standing negative stereotype of the Canadian Senate as an institution populated by party hacks that has largely failed to perform its three main constitutional roles: providing sober second thought on legislation, representing regional concerns in the national policy process and promoting and protecting the rights of minorities.

Since 2014, the Senate has been moving incrementally toward becoming a more credible institution and a political force to be reckoned with. The government, the bureaucracy, interest groups and other policy actors must now anticipate and be prepared to accommodate the divergent perspectives represented in a second chamber that can no longer be relied upon to follow the will of the government and automatically defer to the House of Commons.

The Senate is changing as a result of decisions by Justin Trudeau, first in 2014 as leader of the Liberal Party, in third place in the House of Commons at the time; and then after he became prime minister following the 2015 federal election. Those decisions and their impacts on the national policy process are the main focus of this analysis. Unlike the critics who insist that the Trudeau changes were mainly cosmetic and limited, I will argue that their impacts on the Senate and its relationships with other parts of the political system have been greater and more enduring than anticipated. The Senate has not been completely transformed. However, enough change has occurred in the past five years that it is possible to contrast the “old, partisan, government-controlled” Senate with the “new, nonpartisan, independent Senate” that continues to take shape. Reversion to the former partisan institution is still possible, but this is becoming less likely as more features of the Senate are changed.

The next section of this study describes in general terms the partisan and largely compliant Senate that existed historically. It is followed by a discussion of the complications, uncertainties and political risks involved with seeking to change a Senate that performs multiple formal, intertwined constitutional roles, as well as a number of informal political functions. The study then looks at the Trudeau changes, which have led to a shift from unilateral top-down partisan leadership in the old Senate to a more shared, horizontal leadership approach involving consultation and negotiations in the new Senate.

I then turn to an analysis of how the new appointment process resulted in the emergence of the Independent Senators Group, which is rapidly becoming a dominant presence. Recognition and accommodation of the changing composition and dynamics of the Senate have led to a number of adopted and proposed structural and procedural changes. The culture of the institution is also changing in ways not easily identified.

One of the cultural changes taking place is that the Senate is becoming more independent and more prepared to challenge government legislation than in the past.

A case study of the Senate's handling of Bill C-45, the cannabis legalization legislation, illustrates the importance of the hidden dimensions of the parliamentary process that are missing in more aggregated empirical analyses of the legislative work of the Senate. I conclude by discussing four reform proposals.

This study is based on a number of sources: Senate Debates, committee reports and other official documents; academic and think-tank commentaries; media reports; and off-the-record telephone interviews with seven senators, including at least one from each of the Senate groups that existed from September to November 2018.

THE SENATE OF THE PAST

Almost since its creation in 1867, the Senate has been a target of criticism. The list of complaints about the historical Senate (and, to a lesser extent, about the contemporary institution) was long. The discontent started with the fact that the Senate is one of the few second chambers in major Western democracies that remain appointed¹ rather than elected, a structure seen by many as an anachronism in the twenty-first century.

There were many other accusations. Appointments were made on the basis of past and anticipated future service to the governing party. Regional representation was overridden by partisan loyalty. Senators on the government side refused to challenge the prime minister and cabinet on legislation, spending and other executive actions. The Senate and its committees did not provide adequate scrutiny of departments and programs. The Senate did little to uphold minority rights. In a 1978 book, Colin Campbell argued that the Senate was a "lobby from within"; the charge was based on the claim that senators with corporate connections regularly challenged, delayed or amended bills that were seen as harmful to the interests of big business (Campbell 1978). Enduring "overrepresentation" of the smaller provinces and regions, despite population shifts within the country, was another criticism. Other detractors pointed to the light workload, generous compensation and perks paid to senators.

A growing problem in the Senate over the past four decades has been what many term "excessive partisanship," compared with a lower level of partisanship that prevailed in earlier periods. Excessive partisanship involves an almost automatic and unquestioning support for a party and/or a prime minister without giving adequate or fair consideration to the facts and other perspectives, along with an unwillingness to accept principled compromises with political opponents. Senate proceedings became more adversarial, negative and theatrical, resembling the permanent election campaign that has become the essence of what mostly happens in the House of Commons. When both houses of Parliament are dominated by the same style of severe partisanship, the Senate becomes a mirror image of the House of Commons, and its role as a more deliberative, complementary institution providing challenges to the government and

¹ Senators are appointed by the governor general on the advice of the prime minister. They are eligible to retain their seats until age 75.

whipped majorities in the House of Commons is weakened. The Senate was, and will always remain, a political body that should represent and accommodate the divergent perspectives within the country and hold the executive to account.

Historically, the mainly partisan basis for appointment to the Senate gave rise to the reality and the perception that the majority of senators owed loyalty to the prime minister who appointed them. Those on the government side would take directions from the government, especially after having their say in the privacy of the party's caucus. Opposition senators would seek to challenge, delay, modify or even defeat government bills and to find embarrassing information to use against the government.

In addition to appointing party loyalists, governments generally insisted on strict partisan control over politically sensitive matters that might come before the Senate. Senators representing the governing party were expected to voice their concerns about bills and other government matters by bringing them to the attention of the Government Leader in the Senate, who used to serve in cabinet, or by raising them in the privacy of caucus. Failure to limit their criticisms to these forums could lead to opprobrium from party colleagues and the loss of benefits such as places on prime Senate committees.

Governments also regularly took the Senate for granted by sending batches of bills over from the House of Commons, insisting on speedy passage just before a parliamentary break, thereby limiting the potential for the "sober second thought" assumed to be central to the Senate's role in the legislative process.

Some of senators' best, least partisan and most influential work has occurred in the standing and special committees, where bills and medium- and long-range policy issues are studied; here there was less publicity value in staging partisan fights. However, on contentious issues that involved potential damage to the reputations of the prime minister or individual ministers, governments typically used their majorities in the Senate to block or limit the scope of committee inquiries.

Past generations of senators from the two main parties have to accept their share of the blame for the poor reputation of the old Senate. On the government side, many senators allowed party loyalty and party discipline to take precedence over the constitutional tasks of reviewing legislation, protecting regional interests and defending minorities. Opposition senators, especially immediately after a change in government when they were still in the majority, would continue the electoral battle by mounting frontal and prolonged attacks on the policy agenda of the new government.

Partisanship provided the organization and drive of the internal affairs of the old Senate. The work of responding to government bills was divided up among senators in the two main party caucuses. Because the designated spokesperson for each party took her or his cues from their party's stance in the Commons, not a lot of background research was required. When the same party controlled both the Commons and the Senate, government bills were generally dealt with expeditiously, and there were few successful attempts to delay, modify or defeat them.

As a group, senators have not been held in high public regard, but the job held a number of attractions. Originally, they were appointed for life (since a constitutional amendment in 1965, senators serve until age 75). This meant no elections to contest, no designated constituency to serve, no constituency association to please and no fundraising to be done, unless it was on behalf of the party. Sessions of the Senate were shorter than those of the House of Commons; the number of sitting days in a year was typically under one hundred. To be fair, senators would be doing work even when the full Senate was not meeting. For an initial period of each session, the pace of Senate proceedings was leisurely, mainly because government business had yet to arrive from the House of Commons. Over the years, high-profile cases involving chronic absenteeism by a few senators also contributed to the public perception that the Senate was a cozy club of party faithful who were underworked and overpaid and added little of value to national political life.

In his 2014 book *Our Scandalous Senate*, J. Patrick Boyer, a lawyer and former MP, offered the following damning description of the Senate: “a time-trapped oasis of contentment, a body undeserving of a place in contemporary Canada, puzzling to us for even still existing, a hollow shell bereft of real purpose, a legislative assembly devoid of meaning, contributing nothing but costing us abundantly” (Boyer 2014).

For two reasons, I would argue that the many criticisms of the old Senate were incomplete, exaggerated and at times inconsistent.

First, few of the dismissals of the Senate were based on empirical studies of the actual activities of the institution, particularly the informal, often hidden dimensions of its multiple roles in the national policy process. A more thorough and balanced evaluation discloses that on occasion (admittedly not often enough) the old Senate adopted a more deliberative and less partisan approach to government legislation and non-legislative matters than did the more partisan House of Commons, where stricter party discipline and majoritarian rule prevailed (Thomas 2003). Through its much-praised committee system, the Senate produced inquiry reports containing policy analysis and ideas that led to future legislation or contributed to administrative change within government (Thomas and Pattee 1984).² On a number of occasions over the years, the Senate as an institution, and more often individual senators, promoted or defended the rights of minorities. Senators have always raised regional concerns, but often this was done in the privacy of caucuses and through personal interactions with ministers and bureaucrats. Measuring the impacts of such activities is very difficult.

Second, most of the critics of the old Senate failed to place sufficient blame on past Liberal and Conservative governments that used the institution to gain partisan advantage in pursuing their parliamentary agenda. Before 2016, prime ministers used Senate appointments, with occasional noteworthy exceptions, to reward “political friends” of the governing party. While these appointees did not necessarily lack merit, such partisanship created the appearance that gratitude to the prime minister and

² See Thomas and Pattee (1984) for an analysis of the role of Senate committees as “incubators” of fledgling policy ideas struggling to gain acceptance in the policy process.

party loyalty compromised the Senate’s constitutional role. Some such appointments involved paying salaries from public funds to organizers and fundraisers from the governing party.

Over the years, Canadians have expressed frustration and disillusionment with the Senate, with their anger rising in response to events such as the scandals involving expenses abuse, alleged fraud and sexual misconduct that rocked the Senate from 2013 to 2017. Negative public sentiments did not rest on a solid foundation of knowledge about the institution. For example, a 2014 survey found that “very few [respondents] could explain what senators did on a daily basis [or] what the Senate’s role is within the Canadian parliamentary system” (Beeby 2014).

As memories of the recent scandals have faded, the polls indicate there was a slow improvement in the image of the Senate. In November 2013, 50 percent of respondents in a national poll favoured abolition of the Senate; in April 2015, this percentage dropped to 41 percent, (Matthews 2013; Brean 2015), and by May 2016, support for abolition had fallen to 39 percent (Russell 2016). As support for abolition dropped, support for reform rose by a similar degree, which suggests that more Canadians believed the Senate could be made to work better.

This was the public opinion environment into which Justin Trudeau and the Liberal party introduced the idea of making the Senate more independent and nonpartisan. To achieve this goal, the Trudeau Liberals would have to confront the challenges of reform.

THE COMPLICATIONS OF CHANGE

During the second half of the twentieth century, there were numerous attempts to reform the Senate, most ending in failure. Lack of agreement on what role the Senate should play within the Canadian political system was one reason. The Senate performs formal constitutional roles, as well as a number of informal functions. Those roles and functions are intertwined with one another and with actions and responses from other parts of the political system.³

Debates over Senate reform have not recognized sufficiently that the institution is one of three parts of Parliament, the others being the House of Commons and the Crown. The constitutional and political relationships among these three institutions mean that changes to the Senate usually have impacts on the roles of the other two parts of Parliament.

There is also the fact that the Senate was part of the constitutional bargain that led to the creation of Canada’s federal system. So even if the Senate has not been seen as an effective defender of regional concerns, changing its role to correct this weakness involved amending the Constitution. In short, finding a consensus on the aims of Senate reform and how to achieve it has proven to be politically difficult.

³ On the various roles and functions performed by legislatures, see Thomas (2010).

Senate reform could consist of changes in a wide variety of areas:

- the *Constitution Act, 1867*, the *Constitution Act, 1982* and fundamental laws such as the *Parliament of Canada Act*;
- the method of selection of senators;
- the social, occupational and political makeup of the Senate's membership;
- the organization of that membership into different party and nonparty groupings;
- the formal rules and procedures of the Senate;
- the assignment of formal and informal leadership roles within the institution, along with the talents, approaches and skills of those leaders;
- the methods of conflict resolution used to make progress on the agenda; and
- the evolving culture of the institution, particularly informal norms to deal with changing circumstances.

The Constitution must be the starting point for thinking about potential changes to the Senate. The written constitution in the form of *The Constitution Acts 1867 to 1982* and a number of unwritten constitutional conventions combine to create the mandate of the Senate and prescribe its relationships with other parts of the political system. The need to achieve substantial federal-provincial agreement on constitutional amendments to accomplish fundamental changes to the Senate, such as making it an elected body, has been a major obstacle to reform.

Multiple attempts to pass constitutional amendments respecting the Senate have mostly failed (Hughson 2015; Stillborn 2003).⁴ The most recent was the introduction by the Conservative government of Prime Minister Stephen Harper in June 2011 of legislation that would have created consultative provincial elections for the selection of senators and set term limits for senators. The legislation was challenged and rejected by the courts, first by the Quebec Court of Appeal in October 2013 and then in April 2014 by the Supreme Court of Canada. In an advisory opinion, the Supreme Court declared that the proposed reforms exceeded the authority of the Parliament of Canada to make changes alone. In the case of abolition, it must have the consent of all provinces; to adopt consultative elections and term limits, it needs the consent of seven of the provincial legislatures representing at least half of the national population (Fine 2014; MacCharles 2014).

Even before the court ruling, in March 2013 Harper had announced that he would cease to fill Senate vacancies, a move that seemed designed to renounce what he regarded as an illegitimate second chamber; some of its members were mired in spending and other scandals at the time (Whittington and Campion-Smith 2015). By the general election of October 2015, in which the Conservatives were defeated, the Senate had 23 vacancies.

Meanwhile, in January 2014, Liberal Party leader Justin Trudeau announced he was excluding his party's senators from the national caucus (Cudmore 2014). There had been

⁴ In 1965, senators' term was reduced from life to age 75 as a result of an amendment to what is now the *Constitution Act, 1867*.

no advance consultation with the senators; some were initially bitter, whereas others welcomed the freedom from the informal norm of caucus solidarity and the pressures from the leader's office. The expulsion also meant the loss from the national Liberal parliamentary caucus of experienced political talent, including voices from regions where the Liberals were underrepresented in the House of Commons.

It is unclear how much Trudeau and his team thought about the potential immediate and long-term consequences of dropping senators from the national parliamentary caucus. At the time, the Liberals were in the unaccustomed position of being the third party in the House of Commons and were anxious to distinguish themselves from the highly partisan and strictly controlled approach to governing being followed by the Harper Conservative government. No doubt the Liberals also wanted to distance themselves from the scandals swirling around the Senate.

Later, as part of the 2015 election contest, the Liberals offered voters an extensive package of promised democratic reform initiatives, including replacement of the first-past-the-post electoral system. A less high-profile promise was to create a new selection process that would supposedly make the Senate nonpartisan and more independent.

Early in 2016, the Trudeau government created an advisory board to recommend potential Senate appointees on the basis of a public application process (Independent Advisory Board for Senate Appointments 2018). Appointments continue to be made by the governor general on the advice of the prime minister. As of October 2018, 49 appointments had been made under the new procedure, and for the first time in eight years there were no vacancies in the second chamber (IRPP 2019).

Included in the first group of Senate appointments under the new procedure, in March 2016, was Peter Harder, a distinguished former federal public servant. Trudeau named him to the position of Government Representative in the Senate, replacing the former position of Government Leader. Until 2011, the Government Leader had been a member of cabinet.

Initially many commentators described the Trudeau changes to the Senate as limited and cosmetic. Such incremental changes, they argued, might correspond to what was constitutionally and politically feasible, but they would do little to improve the performance, increase the influence and enhance the credibility of the Senate.⁵

In my view, enough has changed as a result of the Trudeau reforms that it is possible to compare the "old, partisan, government-controlled" Senate with a "new, largely nonpartisan, independent" Senate. These phrases are used advisedly as general descriptions to capture the fairly dramatic changes, by Senate standards at least, that have occurred since 2014 when Trudeau removed senators from the Liberal caucus. The institution has not been totally transformed, but its membership, internal dynamics and relationships

⁵ See Armitage (2014) for an elaboration of the claim that we must elevate debate to a higher conceptual level to gain agreement on more meaningful Senate reforms.

with other institutions have definitely been changed. Both active and passive resistance have nevertheless limited the scope and slowed the pace of change.

Divergent value-laden models of the ideal Senate are partly the cause of the resistance. Even more importantly, there are ongoing internal political struggles over how particular concrete changes will affect the power of individual senators and groups, and how they will change the Senate's relationships with other parts of the political system.

FROM UNILATERAL TO SHARED LEADERSHIP IN THE SENATE

A legislature cannot operate as a free-for-all. Legislative bodies require leadership in the form of direction, planning, management and methods of conflict resolution in order to move bills forward and to complete their other business.

In the old Senate, partisanship provided the motivation, drive, direction and execution of the agenda of government. Leadership was concentrated in the hands of the Government Leader in the Senate, his or her deputies and the party whip. Senators were loyal to the prime minister who had appointed them. Many senators, on both the government and the opposition sides, took the view that the party that won the last election had a mandate to govern and that on most matters it was inappropriate for the Senate to thwart the will of a majority in the House of Commons.

For government senators, who until 2015 had participated and voiced their opinions in the confidential meetings of the national parliamentary caucus, there was an extra onus to approve government bills and to support the government on procedural issues. The notion of "team play" was central to the culture of the institution, so there was informal peer pressure for senators to go along with their party's positions. As a last resort, there were both inducements and sanctions to deal with independent-minded senators who broke party ranks.

In short, leadership and direction in the old Senate were mainly unilateral and top-down, resulting in usually automatic and reliable majority support for the government's positions.

When Trudeau replaced the former position of Government Leader in the Senate with the new position of Government Representative, there was more than symbolism involved. Before 2011, the Government Leader served in the cabinet, and this ministerial status provided leverage with cabinet colleagues who wanted their legislation expedited in the Senate. Today, Government Representative Peter Harder is a member of the Privy Council and attends cabinet meetings as appropriate to discuss the legislative agenda and Senate renewal, but he is not a cabinet minister.

The Government Representative, an unaffiliated senator, represents the government to the Senate and the Senate to the government. He is responsible for ensuring that the planning, coordinating and decision-making needed to advance the government's

parliamentary agenda takes place. He is also expected to play a leadership role in the Senate modernization process, which has been under way for several years. Along with two other unaffiliated senators, he directs the Government Representative Office.

The second member of the government leadership team is the Legislative Deputy to the Government Representative (formerly the Deputy Leader), who works with leaders of other Senate groupings to structure debate in the Senate chamber and to handle procedural motions. The third is the Government Liaison (formerly the whip), who is responsible for working with all Senate groupings to manage the flow of Senate business and to ensure that senators have the information they require in anticipation of votes.

The Government Representative Office must perform its several roles with limited formal authority and few sources of political influence. There is no longer a contingent of government senators who have participated in a parliamentary caucus where concurrence in government plans for legislation is obtained. There is no whip who can use “carrots” and “sticks” to bring senators into line with government positions.

In the old Senate, assignment of responsibility for leading the consideration of government bills occurred within the caucus of the governing party. In the new Senate, the Government Representative Office is responsible for finding sponsors for bills who may be members of any of the party or nonparty parliamentary groupings. With a few exceptions, sponsors have been drawn from the ranks of the Independent Senators Group (ISG). Only one Conservative senator, Stephen Greene, agreed to serve as sponsor on an innocuous Canada-Taiwan tax bill. However, after attending a dinner for all sponsors hosted by the prime minister, he was dropped from the Conservative caucus. After briefly sitting as an Independent Reform member, Greene joined the ISG (Wells 2017).

In identifying sponsors, the office works to match individual senators’ expertise and policy positions with the content of bills. Senators might accept the sponsor role for several reasons, including how it affects the regions they represent. The work of the sponsor includes background research, delivering a major speech when a bill reaches second reading and participating in the detailed review of the bill by a Senate committee. Sponsors are supported with advice and information from the Government Representative Office.

The leadership role of the sponsor is evolving within the new Senate. Without whipped majorities on the government side, the commitment, knowledge and political skills of the sponsor can be crucial to working effectively with ministers responsible for bills and with the Government Representative Office, identifying allies in the Senate, deflecting opposition criticism and eventually gaining passage of contentious bills. Communication and relationship building are central to the role of the sponsor. Undoubtedly, some sponsors will be more equal than others to the challenges involved.

In the new system, the top-down direction and control of the old Senate has been replaced by shared power and the need for negotiations among several groups of senators. The negotiations can be over the substance of bills, as well as over the procedures

for how individual bills are handled. To be effective, the Government Representative and his deputies must be skilled at acknowledging and understanding different perspectives, and at bargaining to find a basis for compromise and cooperation.

Not surprisingly, given the disagreements over the new model of the Senate, the lineup of parliamentary groupings and the changes in the procedures of decision-making, the performance of Harder and his team has drawn mixed reviews both inside and outside of Parliament.

In January 2018, after two years of the experiment with the Senate, the Trudeau government was impatient with the progress of government bills through the second chamber and summoned Harder to attend a cabinet retreat to provide an update on what bills might be passed by the summer recess and which senators needed to be lobbied by ministers and bureaucrats to gain their cooperation (Tasker 2018a). Delaying tactics by Conservative senators were identified as the main cause of the backlog, along with the fact that Harder was loath to invoke closure, also called time allocation, the procedural device used to cut off debate.

Not surprisingly, Conservative senators rejected the claim that they were serial obstructionists. They accused Harder of arrogance and an unwillingness to negotiate over the Senate agenda. In broader, more conceptual terms, they claimed he was attempting to replace the essential government-versus-opposition dynamic by turning the Senate into a polite debating society that fails to enforce accountability. No doubt there was some resentment behind these accusations, as the Conservatives had been in charge of the second chamber only three years earlier.

Criticism of the agenda management of the Government Representative Office has to recognize that the Trudeau Senate reforms were the main source of the leadership challenges. The Government Representative is not meant to be in cabinet, and his team does not direct a disciplined caucus. When Harder and his two deputies took over, there was no playbook or precedent for the type of leadership philosophy and operational style required to move an agenda forward in the new Senate.

THE NEW PRESENCE IN THE SENATE: THE INDEPENDENT SENATORS GROUP

In the estimation of most observers, the quality of appointees under the new procedure has been impressive; many of the new senators can claim substantial achievements in a wide variety of fields. As of December 2018, there were only four new senators who had Liberal party affiliations in their recent past (Tasker 2018b). The membership of the Senate is more diverse than in the past, with the highest proportions ever of female (43.8 percent) and Indigenous senators (10.5 percent) (Seidle 2018). There has been criticism that the new process favours urban professionals, who are perhaps more likely to apply and be considered favourably by the advisory board than individuals who are in occupations such as farming or fishing or who are retired armed forces personnel (Lum 2018).

Once dominated by a duopoly of Liberal and Conservative members, the new Senate has a number of party and nonparty groupings. As of March 2019, there were 58 members in the ISG, 31 senators representing the Conservative Party of Canada, 9 senators in the Liberal Senate caucus and 7 nonaffiliated senators, including the Government Representative, his two deputies and the Speaker.

The ISG began in the spring of 2016 with informal meetings involving just a handful of members. In the ensuing three years, it has undergone rapid growth and matured as a parliamentary organization (McCoy 2017). By December 2018, it held a majority of Senate seats. The ISG has nevertheless rejected the title, status and resources of “official opposition” under the *Parliament of Canada Act* and the rules of the Senate. However, it has a set of eligibility criteria for membership.⁶ Senators who wish to join must apply and receive 60 percent of the votes cast by ISG members. Membership in a parliamentary caucus or direct involvement in outside partisan activities disqualifies a senator from belonging to the ISG. All but four of the senators appointed under the new procedure have joined the ISG (Seidle 2018). A number of formerly partisan senators have also joined.

The ISG’s leadership team comprises the Facilitator (Senator Yuen Pau Woo), who is elected by ISG senators, and two deputy facilitators appointed by the Facilitator. There are procedures for dividing up the work of responding to bills, for assigning members to Senate committees and for the development of positions on Senate modernization issues. There is no whip, but there is a liaison senator who coordinates activity with the whips from the partisan groupings.

With the budget it has negotiated through the Senate Committee on Internal Economy, Budgets and Administration, the ISG has created a secretariat consisting of professionals who were hired not because of their past political connections but for their policy expertise. The chief of staff of the secretariat previously served as a director of Indigenous affairs in the Treasury Board Secretariat. She leads a staff of nine professionals with specialties in policy, communications, administration and procedure (Evelyn 2018b).

Another step in the creation of a more organized parliamentary grouping was the release in October 2018 of the group’s charter. The 13-page document sets forth the purposes of the ISG, the principles that are meant to guide the behaviour of its members and the protocols and practices of the group (ISG 2018). The charter asserts that ISG senators are free to vote as their judgment and conscience dictate.

Many of the ISG senators are new to the parliamentary process, so there has been ongoing debate over the extent to which the ISG should organize and behave as a cohesive grouping. According to an ISG senator interviewed for this study, in the early days of the group, some ISG senators subscribed to a “radical autonomy” approach as a way to demonstrate their freedom from government control. Another ISG member who had left a partisan caucus claimed, “All the aspirations of growth and control are

⁶ The information on the ISG was obtained from its website at <https://www.isgsenate.ca/>. Additional information was obtained from the interviews with three ISG senators.

taking hold in the ISG,” along with a culture of “groupthink” and “stigma” toward colleagues who are not part of the ISG consensus.

In February 2018, Senator Marc Gold, then liaison for the ISG, sent a document to his colleagues explaining that failure to be responsible in the performance of their senatorial duties would jeopardize the modernization process in the Senate. He also suggested that they must balance their role as legislators in a chamber designed to be “complementary” to the House of Commons with their desire to deserve the independence the Liberal government promised them.

The leader of the Conservative Party, Conservative senators and some outside critics allege that Trudeau’s new appointment process has resulted in mainly “Liberal-friendly” senators being appointed.⁷ This complaint is probably overblown. The government announcements of new appointments usually leave out information on the past partisan involvement, if any, of appointees. Some well-known Liberals have been appointed, but so too have a former NDP cabinet minister from Ontario and a defeated Conservative candidate from PEI. Partisanship and former service in public office should not disqualify individuals from serving in the Senate. It is important to have political experience, understanding of the parliamentary process and awareness of the realities of electoral politics contained within the membership of the Senate.

Conservative senators also argue that the structural arrangements for the ISG indicate it is becoming a de facto caucus like the Conservative and Liberal caucuses. They insist that, as a result of the government’s “Liberal appointments and caucus pressures, ISG senators are too quick to endorse bills from the Liberal government.”⁸ They predict that the new Senate would be more critical, even hostile, toward bills presented by a Conservative government. Some evidence on these claims is presented in a later section of this study on the Senate’s handling of government bills.

MODERNIZATION: STRUCTURES, RULES AND RESOURCES

Historically, the structural arrangements, rules and parliamentary traditions of the Senate presumed a two-party competition between the Liberals and Conservatives, and between government and opposition, depending upon which party was in office. The emergence of the new Senate required a departure from the traditional assumption that one of two parties would control the institution while the other party provided scrutiny and, to some extent, a check on the use of majority power. The process of adaptation has been slow and incremental, reflecting the need for tough negotiations among the several groups that now make up the membership of the Senate.

The adaptation process has involved studies and recommendations from three committees: the Special Committee on Senate Modernization, the Standing Committee on Rules,

⁷ See, for example, the remarks by Len Housakos, a former Speaker of the Senate during the Harper era and current chair of the Senate Rules, Procedures and Rights of Parliament Committee (Housakos 2018).

⁸ Interview, October 9, 2019.

Procedures and the Rights of Parliament and the Standing Committee on Internal Economy, Budgets and Administration. The work of the three committees has been related.

Senate Conservatives like to point out that internal reform of the Senate was under way for several years before the Trudeau changes (Plett 2016). They point to the modernization committee, which grew out of a series of informal meetings that Senators Paul Massicotte (a Liberal) and Stephen Greene (then a Conservative) organized in September 2013, resulting in a consensus on 11 resolutions for reform. On May 8, 2014, Conservative Senator Pierre Claude Nolin⁹ proposed a motion to establish the Special Committee on Senate Modernization. After Nolin's death in April 2015, Greene (since May 2018 a member of the ISG) and Massicotte took up the cause, and in December 2016 the committee was established. By June 2018, it had submitted 12 reports. Recommendations were made on numerous topics, including the regional representation role of the Senate, the recognition of the non-caucus parliamentary groupings, the speakership, the handling of so-called omnibus bills, broadcasting Senate proceedings, Question Period and the operation of committees.

Some of these recommendations would require amendments to the *Parliament of Canada Act*, which defines a number of fundamental features of the Senate. In an interview, a senator who was a member of the modernization committee referred to a future report (still not released) on amendments to the Act, adding that this might be the last word from the committee. Conservative senators, he suggested, had initially frustrated its work. Now that a number of reforms have been accepted and the ISG is gaining dominance, the ISG increasingly sees no need for the committee.

Some recommendations from the modernization committee have been adopted by resolution of the full chamber and sent to the rules committee for implementation. In light of the new Senate realities, rule changes will have to balance the following considerations: adequate opportunity for all perspectives to be heard; ensuring review (not necessarily approval) of government bills within a reasonable time period; provision of enough time to alert public opinion of government actions and inactions; and the need to uphold the rights of individual senators.

For most of its history, the Senate conducted its business with a great deal of flexibility under a parliamentary device called suspension of the rules. However, as the volume and complexity of legislation increased, there was a drive for greater government control over the Senate's proceedings. This included new rules and stricter enforcement of existing rules. The last major overhaul of the rules took place in 1991, in response to the parliamentary upheaval over the passage of the goods and services tax legislation. Those rule changes were controversial because they put limits on the length of speeches and eliminated opportunities for the opposition to slow the progress of government business. The changes included the introduction for the first time of a provision for time allocation for government bills (Hays 2004).

⁹ Nolin was elected Speaker *pro tempore* on November 20, 2013, and a year later was appointed Speaker of the Senate by Prime Minister Stephen Harper, effective November 27, 2014.

Even after the 1991 changes, the Senate rules still allow all senators to speak on any matter, with the potential to delay important government business. There are time allocation rules, but their use is controversial. Only the Government Representative can propose a time allocation motion, but majority support for such a procedural motion can no longer be guaranteed, as was typical in the old Senate.

Since the current session of Parliament began in December 2015, the rules committee has issued nine reports, covering such topics as dividing omnibus bills, the recognition of party and nonparty groupings, and the broadcasting of Senate proceedings. In December 2016, the previously underrepresented ISG senators were given a proportionate share of seats on Senate standing committees, the real working units of the Senate.

In May 2017, the Senate voted to update the rules to recognize a caucus as a group of nine or more senators, additionally removing the requirement that a caucus must consist of members of a political party. As a result, the ISG had the same right to funding as the recognized party caucuses. In the same month, the rules were changed to replace references to the Leader and Deputy Leader of the government and the opposition with the phrase “Leader or facilitator of a recognized parliamentary group.” This change resulted in funding for the office of the leadership team of the ISG.

For the Senate to conduct an informed review of legislation and to provide scrutiny of the executive, it must have an adequate budget and staffing. In 2018-19 the budget of the Senate was approximately \$109 million.

Within the Senate, the Standing Committee on Internal Economy, Budgets and Administration oversees the budget and recommends to the full Senate the allocation of funds to the party and nonparty groupings. During 2016, the ISG was funded under provisional arrangements. Then, in December 2017, the Facilitator of the ISG complained in an open letter to the committee that the existing allocations did not reflect an equitable distribution of resources, given the current and projected numbers of the ISG. He argued that the administrative policies of the Senate, which contain a formula for allocations, needed to be revised – not to establish strict proportionality, but in order to ensure fairness, transparency and accountability.

At a May 2018 meeting involving tough negotiations, the internal economy committee, by a vote of 10 to 4, boosted the ISG’s allocation for 2018-19 (Evelyn 2018a). The result was that for 2018-19 the following amounts were allocated to the officially recognized parliamentary officers:

Government Representative: \$1,500,000
Legislative Deputy: \$76,350
Liaison: \$101,800
ISG Facilitator: \$1,200,000
Leader of the Conservative Caucus: \$1,294,955
Leader of the Liberal Caucus: \$460,000¹⁰

¹⁰ On June 21, 2018, the Senate voted to allow the Liberals to maintain their \$460,000 budget until March 2019, even though their numbers would be falling below the threshold of 11 members. I am grateful to

Despite at the time having 11 fewer senators than the ISG, the Conservatives were granted a somewhat higher allowance, because they constitute the official opposition in the Senate and because the ISG declined to accept more money, on grounds of fiscal responsibility.

A CULTURE IN FLUX

Culture is an elusive, multidimensional and dynamic phenomenon that is difficult to define, measure and modify in a planned way. Researchers, including me – and I have studied the Senate for several decades – think they know how it works. But our understanding of its culture is necessarily impressionistic and incomplete.

As used here, the term “culture” refers to how senators envision the mandate of the Senate, the values they see as underlying its activities and the informal norms they follow in their individual behaviour, especially in those defining moments when key values clash. At any time, there is likely to be more than one culture within the Senate. Because the Senate is inherently a political body, cultural differences will exist along partisan, regional and ideological lines and with regard to different conceptions of how the institution ought to perform its multiple roles. Part of the Senate culture might be described as the informal, unwritten rules of the game that new senators are socialized to understand and accept as a basis for their behaviour as they settle into their new role.

In the old Senate, partisanship was the main cultural divide. Especially in recent decades, party competition spilled over from the House of Commons, making the Senate more intense and discordant in its culture. Too often in the old Senate, which was meant to be more deliberative and less partisan than the House of Commons, gratitude to the prime minister and party loyalty prevailed over the mandate of the Senate to voice regional concerns, critically review legislation and hold the executive accountable.

The culture of the new Senate is in transition, a reflection of its changed membership and its changed internal dynamics. There are still two party caucuses – Conservative and Liberal. Conservative senators in particular lament the loss of their status (as the Senate government caucus) and the adversarial dynamic of the past. The Senate will always remain a place for politics, but its culture is becoming less partisan, more restrained and more respectful of differences of opinion. The approach to issues and the methods of operation are becoming more consensual, deliberative, collaborative and constructive.

When bitter partisanship prevailed, it was difficult to identify a group of senators who were prepared to promote long-term independence, vitality and greater influence for the institution in the national policy process. New senators are making an emotional investment in the institution, even to the point where there is talk of crafting a mission

Alison Korn, Issues Management and Media Relations Advisor, Senate Standing Committee on Internal Economy, Budgets and Administration, for information about the allocations of funding among recognized parliamentary offices.

statement for the Senate similar to documents produced by corporations. A uniform culture that shapes all behaviour should not be the goal, but an interpersonal climate of respect, civility and reciprocity among senators from all backgrounds would enable the Senate to become a more effective and credible institution.

THE SENATE'S HANDLING OF GOVERNMENT BILLS

I now turn to how the changes described above are affecting the performance and influence of the “new Senate” in carrying out review and “sober second thought” of government bills that have passed the House of Commons. Based on my earlier studies of the Senate lawmaking process (Thomas 2003; Thomas 2016), I would argue that the new Senate is giving closer attention to bills than it did in the past and has been more prepared to question provisions in bills.

How the Senate handles bills is only one aspect of its overall performance. The law-making function is intertwined with its other functions, such as conducting policy studies, overseeing the executive and providing a public forum for the expression of the varied needs, concerns and opinions that exist within a diverse country.

Under the Constitution, the Senate is coequal to the House of Commons in that both houses must approve all bills. The only limitation on the authority of the Senate is the requirement that all money bills must originate in the Commons. Most bills begin their parliamentary consideration in the House of Commons.

Under “normal” political circumstances, most bills do not cause deep partisan disagreement within either house and are usually passed expeditiously. This pattern reflects the fact that only a small minority of bills represent completely new policy. Most reflect lessons learned from applying existing law, are technical in content and are relatively narrow in the scope of their impacts; hence they give rise to little or no controversy.

A procedural device used to increase the effectiveness of the Senate is pre-study of bills (also known as the Hayden formula, in honour of Salter Hayden, a long-time senator who promoted its use). Pre-study involves the referral of the subject matter of a bill, especially highly technical bills, to the appropriate Senate standing committee for review and often testimony by expert witnesses, before the actual bill reaches the Senate. Sometimes the Senate has proposed amendments to such bills before they leave the Commons, so that once they arrive in the second chamber, nearly all the work of scrutinizing the bills has already been done (Hodgetts 2000). Excessive partisanship and tight government control over Senate affairs during the Harper majority government from 2011 to 2015 led to limited use of the pre-study device.

The Senate can pass expeditiously, delay, modify or defeat bills. With the exception of bills that amend the Constitution, the Senate's veto is absolute, not a suspensive veto as exists in the UK and that applies to the veto of government bills by the House

of Lords (Heard 2015).¹¹ In the UK, if the House of Commons passes a bill in three successive Parliamentary sessions over at least two years, the bill then becomes law without the agreement of the House of Lords. In Canada, despite its absolute veto authority, the Senate has usually deferred, eventually if not initially, to the policy positions represented by government bills that have already been adopted by the House of Commons.

The Senate has used its power to veto bills relatively rarely. In modern history, it has mainly occurred when, after an election, a new governing party has faced a hostile Senate dominated by its political opponents. In the 1990s, the Conservative-dominated Senate defeated four bills: Bill C-43 on abortion; Bill C-93 on the reorganization of federal boards, agencies, commissions and tribunals; Bill C-28 on contracts for the operation of Pearson Airport in Toronto; and Bill C-220 on profiting from authorship with respect to a crime. Most often the Senate will request that the House of Commons make changes and will acquiesce if the House passes a bill a second time.

At times the Senate has used its power of delay to force a showdown with the government and the Commons. In the 1980s, the Liberal-dominated Senate sought to block bills from the government of Conservative Prime Minister Brian Mulroney to implement a controversial free trade deal and changes to the drug patent laws. Chaos involving filibusters and bell ringing was ended only when the prime minister called an election. Once the Conservatives were re-elected, the bills were passed expeditiously.

Less dramatically, the Senate has sometimes used a “pocket veto,” meaning that it has without much fanfare delayed (either intentionally or inadvertently due to scheduling problems) consideration of a bill until a session ends. The bill is not formally defeated, but the pocket veto forces the government to decide whether it will reintroduce the same bill at the next session.

In addition to rejecting and delaying bills, the Senate can seek to amend. When the Senate amends a bill, it informs the House of Commons through the procedural device of a message, which is printed in the *Journals* of the Commons. Depending upon how the government and the Commons react to the proposed Senate amendments, the process for reaching agreement between the two houses on a final version of a bill can be simple or complicated (Marleau and Montpetit 2000). Because Senate amendments usually involve corrections to drafting errors or improvements to administrative details, governments and the Commons are inclined to accept them. When disagreements between the two houses arise, there are two possible paths to a resolution: an exchange of messages (which is normally the first step and usually resolves the disagreements) or a conference between the two houses (which has not happened since 1947).

¹¹ For a discussion of the powers of the second chamber in the UK, compared with Canada, see Heard (2015). The suspensive veto in the House of Lords dates from 1911, was shortened in 1949 and has been debated periodically over the years.

Understanding the significance of statistics on attempted and successful amendments by the Senate during various time periods requires knowledge of the wider political context in which the Senate was attempting to modify a given bill – for example, whether the same party controlled both houses. It must also be recognized that not all bills have the same potential impacts. Nor are all amendments the same; some are technical and minor, whereas others are fundamental to the purposes of a bill. Some amendments are presented mainly for their publicity value, with little prospect of success. Amendments made in the Senate do not always originate with senators; they may reflect demands from pressure groups or last-minute changes from the government. We must be cautious, therefore, in drawing conclusions about the independence and legislative creativity of the Senate based on aggregate statistics that hide a lot of contextual information.

The Parliamentary Information and Research Services Division of the Library of Parliament has produced two valuable (unpublished) quantitative analyses of Senate's handling of government bills covering the periods 1980 to 2015 and 2001 to 2015. Noteworthy for this study, both studies stop before the Trudeau changes to the Senate were fully in place. One of the studies found that, between 1980 and 2015, the Senate rejected only 3 of the 1,724 government bills it examined. A second study, for 2001 to 2015, found that, of 629 government bills, the Senate sought to amend 25 bills involving 241 amendments. The total number of amendments accepted by the House of Commons was 143.¹²

During the present parliamentary session, which began in December 2015, the Senate proposed amendments to 14 bills that originated in the House of Commons, all but one of which were government bills. In contrast, during the entire 2011-15 Parliament, the Senate attempted to amend only one government bill.

The Conservatives claim that, when it comes to responding to government bills, ISG senators are actually "Liberal wolves in sheep's clothing." Evidence on this charge is incomplete, mixed and open to different interpretations. An analysis by Jean-François Godbout found that on recorded votes from 2015 to 2018, ISG senators supported the position of the Government Representative 82 percent of the time, whereas Liberal senators voted for government positions 77 percent of the time (Godbout 2018).

Again, such statistics have to be interpreted cautiously. Many uncontentious bills are approved at second reading on a voice vote rather than a recorded standing vote. The real work of studying bills is usually done in the standing committees, where expert witnesses can be heard and amendments can be proposed and accepted. The relative frequency of the use of pre-study – in which the Senate conveys observations before a bill passes through the Commons – will also affect the statistics on attempted amendments.

In the past, government senators used confidential caucus sessions and private meetings with ministers to raise concerns about bills. The fact that ISG senators do

¹² I wish to thank the relevant officials of the Library of Parliament for providing these statistics.

not attend the national caucus of the governing party does not completely remove the opportunity to lobby ministers and bureaucrats behind the scenes to support or oppose legislation.

In summary, to reach a comprehensive and balanced assessment of the actual independence of the new Senate and individual senators, we need to move beyond counting aggregate votes on bills to identify what was at stake in the various votes and to gather qualitative evidence on the less public dimensions of the parliamentary process, including the ways that senators employ various techniques of “soft power” to gain direct and indirect influence on government thinking and actions.

BILL C-45, THE CANNABIS ACT

The new Senate is not the deferential and predictable institution of the past. Over the past two years, it has amended bills dealing with important topics such as citizenship, labour rights within the RCMP, medically assisted dying, transportation modernization, gender equality and Indigenous rights.

Government Representative Peter Harder has argued that the manner in which the Senate dealt with Bill C-45, on the legalization of marijuana, provides a model for how an independent, nonpartisan, modernized Senate should work in the future (Harder 2018). Harder points to these positive features of the C-45 process:

- appearances by key ministers before the full Senate at second reading, allowing more senators to have an opportunity to ask questions;
- detailed scrutiny of the bill that drew on the expertise of five committees and involved hearing 235 witnesses;
- eight ministerial appearances in front of various committees;
- a six-day third reading debate organized around themes to encourage coherent discussion;
- early sharing of amendments by senators, allowing for a more informed debate; and
- a deadline for completion of all stages of debate (June 7, 2018) arranged in advance.

The cannabis bill attracted uniquely intensive scrutiny that probably will not be repeated on many bills, given the limits on the Senate’s capacity. It has only 105 members and meets on average about 130 days a year.

An important factor in moving the bill forward to eventual passage was the role of the sponsor, Senator Tony Dean, a distinguished former public servant who had been head of the Ontario Public Service. He volunteered for this role and developed a research file on the issues. He provided information to all senators regardless of affiliation. Within the ISG, he arranged for seven senators to take the

lead on such hot-button issues as the constitutionality of the bill, Indigenous issues, mental health impacts, the legal age of possession, the five-gram limit for personal possession of fresh cannabis, the THC levels of products and the limit on the number of homegrown plants.

A crucial breakthrough in the process came when Harder achieved a negotiated deal with the Conservatives, the ISG, Liberal senators and nonaffiliated senators that a final vote would occur on a fixed date in return for detailed study of the bill by multiple committees. The Conservative caucus remained unalterably opposed to the pot bill throughout the process. Presumably, it accepted the deal because the Government Representative had threatened the use of closure; perhaps some Conservative senators also saw Bill C-45 as falling under the Salisbury convention (see below) because the Liberals had clearly campaigned for pot legalization.

Busy ministers, supported by public servants, spent an unprecedented amount of time before the whole Senate and various Senate committees so that senators from all parliamentary groupings had a significant opportunity for questions, debate and learning. Unfortunately, during some of the hearings, opposition to the principle of the bill produced more political theatre than constructive discussion.

In referring Bill C-45 back to the House of Commons, the Senate proposed 41 amendments, most of them technical. Many of these were last-minute amendments that originated with the government. In the end, 27 were accepted, 1 was amended, and 13 were rejected (Senate 2018a). Of the 14 substantive amendments, only 5 were accepted by the Liberal government – a disappointing result for many senators, some of whom complained publicly that this response amounted to a dismissal of all their evidence gathering and hard work.

The issue of whether to respect the prerogative of provincial governments to ban domestic production (as Manitoba and Quebec wished to do), rather than accept the federal government limit of four homegrown plants, was particularly frustrating for a number of senators.

When the Senate debated the second version of the bill approved by the Commons, Senator André Pratte, an ISG member from Quebec, made cogent arguments on the relationship between the elected and appointed chambers of Parliament:

Honourable senators...we have been heard. We have discharged our duties to the people we represent. We are not here to represent provincial governments...The Senate has, at times, insisted on its amendments, and that may happen again in the future. However, when I consider all of the competing viewpoints on the government's message, I have to conclude that this is not an attack on provincial jurisdiction, an attack on vulnerable minorities, or a case of the government's plan being unreasonable or irrational. It is a disagreement with some provincial governments...

I do not see this as enough of a challenge to trigger our constitutional duty to stand firm against the elected house's strategic decisions. The Senate's job is to provide an objective review of the legislation and, if necessary, improve it... That is what we did. In my humble opinion, it is now time to accept the House of Commons' legitimate decision. (Senate 2018a)

There were other impressive contributions by senators on features of the bill that reflected the individual and collective learning that had gone on through the parliamentary approval process.

A relatively hidden dimension of the process on Bill C-45 was the role of the informal collective of Indigenous senators within the ISG. Among a number of informal policy groupings that are gradually emerging within the new Senate, this collective is at this point the most active and influential.¹³ The collective has a clear focus, strongly committed members and a moral claim on the attention of policy-makers based on the history of mistreatment of Indigenous peoples.

With respect to Bill C-45, Indigenous leaders, both outside and inside Parliament, complained of too little advance consultation with Indigenous people. In May 2018, the 11-member Standing Senate Committee on Aboriginal Peoples called for a one-year delay in the passage of the legislation to allow time for meaningful consultation, including over the handling of revenue to Indigenous governments from cannabis produced on reserve and the provision of federal funds for mental health and addictions programs (Senate 2018c). For a time, it appeared that Indigenous and some other senators would support a Conservative amendment to indefinitely postpone implementation of the bill until the government reported on its plans to address the concerns of Indigenous communities. Just before the final debate, however, Health Minister Ginette Petitpas Taylor and Indigenous Services Minister Jane Philpott sent a letter to the committee, promising a full report to Parliament in September 2018 and another within 12 months (Barrera 2018).

It would take more than one relatively brief case study of a particularly high-profile bill to make valid and reliable generalizations about how the Senate will perform its lawmaking duties in the future. However, the case of Bill C-45 illustrates the opportunities and obstacles to constructive Senate study and amendment of complex and contentious bills.

FURTHER POSSIBLE REFORMS

In this section, I briefly examine four proposals that, according to their advocates, would carry forward the process of Senate renewal.

¹³ This observation is based on two interviews, one with an ISG senator and another with a senior Senate staffer.

An elected Speaker

The first proposal is to allow the Senate to elect its Speaker. Currently the Speaker is appointed by the governor general on the recommendation of the prime minister. There is overwhelming support among senators for allowing senators to vote by secret ballot to choose their presiding officer. It would be the next logical step in making the Senate truly independent. It is also recognized that an elected Speaker would bring a greater sense of impartiality to the role of managing the proceedings of the Senate. The problem is disagreement over what is constitutionally required and what is politically feasible.

The position of the Speaker of the Senate is covered by section 34 of the *Constitution Act, 1867*, but the specific duties of the position are not specified. The appointment system is in accordance with UK parliamentary tradition. The Senate is not formally involved in the appointment process, although the prime minister may consult senators informally. Historically, Speakers were partisan actors; some even attended the national caucus of the governing party.

Attempts to change the appointment process have occurred fairly regularly, but studies and debates on an alternative selection process have gained momentum since the Senate modernization process began.

In 2016, Senator Terry Mercer sponsored a bill that would amend the Constitution to provide for the election of the Speaker and Deputy Speaker and to provide that the Speaker would vote only in the event of a tie. Following the advice of constitutional experts, Mercer argued that this change could be accomplished under section 44 of the *Constitution Act, 1982*, which would require approval by only the House of Commons and the Senate; provincial approval would not be needed.

In a hearing before the modernization committee, Senator Serge Joyal, an acknowledged constitutional expert, disagreed, arguing that adoption of an election process would affect the constitutional prerogative of the governor general to appoint the Speaker (Canadian Press 2018; Senate 2016). And for such a bill to pass would require royal consent at third reading, consent that can be provided only by an active member of the Queen's Privy Council – in other words, a current cabinet minister. He saw no indication that the Trudeau government was at that time prepared to move to an elected Senate Speaker.

In addition to this hurdle, the constitutional amending formula provides that any change to the office of the governor general requires the consent of Parliament and all the provinces. In practical political terms, it is hard to imagine that provincial governments would object to an amendment creating an elected speakership. However, there is no guarantee that they would agree to proceed with such an amendment without addressing other, more fundamental reforms.

These constitutional complications, along with the likelihood that the federal government would be reluctant to open constitutional negotiations, probably explain why the modernization committee recommended in its *Sixth Report* on October 4, 2016,

that the rules committee develop a procedure whereby the Senate would vote to approve a list of five potential appointees to the speakership. The prime minister would be encouraged, but not required, to submit the name of one of these five senators to the governor general. This proposal may be more constitutionally and politically feasible than embarking on an amending process, but because the prime minister would not be obliged to choose from the Senate's list, it falls short of fulfilling the principle that an independent Senate should be the master of its own internal affairs.

Guiding criteria for government legislation

A second idea involves the creation of a set of criteria that would guide the Senate in determining whether to delay, amend or defeat a government bill.

Both Harder and Senator Diane Bellemare, the Deputy Representative, have argued that the elusive notion of “complementarity” used to describe the constitutional role of the Senate should be given more precise meaning through the development of a checklist for the review of legislation (Bellemare 2017; Harder 2018). A checklist would involve such criteria as whether a particular bill

- conforms with the Constitution, including the Charter of Rights and Freedoms;
- has negative impacts on the fundamental interests of one or more provinces and territories; or
- is potentially damaging to linguistic or minority rights.

Other criteria have also been suggested: for example, whether bills conform to international obligations, respect gender equality and follow from appropriate consultations.

The idea of a checklist, especially a list enshrined in the Senate rules as Bellemare suggests, reflects the increasingly prevalent view that we need to codify norms of behaviour to guide politicians, including senators, rather than trusting them to use principled, informed judgment in particular situations. The checklist, it is argued, would help the Senate to avoid repeating the ideological debates that have taken place in the House of Commons. However, in many instances, applying criteria to particular bills would involve divergent value judgments that lead to political debate. The Senate will (and should) always be a political body, just not one that is dominated by extreme partisanship. A listing in official Senate documents of the considerations that have guided past challenges to government bills would solidify a convention but not transfer the issues from the political to the legal domain.

The Salisbury convention

Harder has also examined the suggestion that Canada's Senate should adopt a practice that originated in the British upper chamber after the Second World War (Harder 2018). The Salisbury convention provides that the House of Lords should not block or significantly amend any government bill that is based on a key commitment in the manifesto of the winning party at the previous election. Instead of rejecting a contentious bill, the Lords should instead send it back to the House of Commons with only “reasoned”

amendments, not so-called “wrecking” amendments (McHarg 2008; Parkinson 2008). Harder noted that even if the Senate accepted the convention as binding, this would not preclude it from seeking to improve bills by introducing technical amendments.

The Salisbury convention has always been contested in the UK, especially in recent years when coalition arrangements have been used to establish a government. In this country, Conservative senators have generally opposed the idea of a constitutional or politically binding convention that would require approval of a bill because the governing party linked it to a preceding election promise (Reed 2017). In my opinion, there are serious enough conceptual and empirical problems with the Salisbury convention that it should not become a legally binding rule.

Conceptually, the convention is inherently majoritarian in its implications. It implies that if a winning party links a government bill to an election commitment, pushes that bill through the House of Commons using a disciplined majority and perhaps relies upon time allocation to achieve speedy passage, then the Senate should be prohibited from exercising its deliberative role or – in extreme circumstances – vetoing the bill, thereby forcing a government to think again (Parkinson 2008). The Senate should not surrender its coequal authority to scrutinize bills because they originated in a party platform. In contrast to the partisan exuberance of the Commons, the Senate is meant to provide more moderate and deliberative review of bills.

Empirically the Salisbury convention is also on shaky ground. It assumes that the winning party has obtained a well-defined strong mandate from voters to adopt certain policies. However, elections are seldom decided on well-defined policy issues. Voters are generally ill informed about the policy positions of the various parties (Stockemer and Rocher 2017). Votes are cast mainly on the basis of leadership images and/or recent political scandals. Parties target their messages to narrow segments of the electorate. Majorities in the House of Commons are often obtained with less than 50 percent of the popular vote. It is unclear what sort of mandate a governing party possesses when it is able to form only a minority government and counts on the support of other parties to move forward with its legislative agenda. With either a majority or minority government, drawing a clear link between campaign rhetoric and the specifics of bills that are themselves drafted in general language can be highly problematic.

For these two reasons, and because formal legal adoption of the Salisbury convention would require an amendment to the *Parliament of Canada Act* and might even necessitate a constitutional amendment, the convention is best left to the informal, political realm. Senators should decide in a responsible fashion on a bill-by-bill basis how far they will go in opposing bills that governments claim are central to their electoral mandate.

A business committee

The fourth reform proposal is a mechanism to plan and execute the business of the Senate in a timely manner, while allowing reasonable time for senators to consider government bills and to propose amendments. In March 2017 the Government Representative released

a discussion paper along these lines titled *Sober Second Thinking: How the Senate Deliberates and Decides* (Harder 2017). In it, Harder reviewed several options for structuring Senate business before declaring his preference for a business committee to plan the Senate agenda and to negotiate a timetable for all stages in the consideration of individual bills.

Harder expressed the hope that reliance upon a business committee to organize Senate deliberations would reduce political gamesmanship as well as the need to use time allocation. He hoped that, together with other changes, it would lead over time to a more constructive and collaborative culture in the Senate. Harder identified some options for how the business committee might be constituted and operate, but he presented these as starting points for discussion, not as final proposals.

There was a backlash from Conservative senators who claimed that the business committee, in combination with the Trudeau reforms, would undermine the Westminster model of parliamentary government by removing the adversarial component and diminishing the role of an organized opposition within the second chamber (Smith 2018; Tkachuk 2017). But this argument that a business committee is alien to the Westminster tradition ignores the flexibility and diversity of that tradition and the fact that business committees operate in the UK House of Lords, the Scottish Parliament and the New Zealand House of Representatives.

Senator Marc Gold of Quebec made an impressive speech endorsing the concept of a business committee that stressed it was not foreign to parliamentary systems and had been proposed in the past in the Senate, including by Conservative senators. He finished with the following observation:

The key is to imagine a set of standing rules that would provide a structured road map for the passage of a bill through the Senate and that would guarantee that all relevant perspectives be brought to bear upon our debates, our deliberations and our decisions. These rules would be administered by a committee of senators drawn from all parliamentary caucuses and groups, a committee not unlike that suggested by Senator Harder in his paper, or by Thomas Hall in his testimony before the Modernization committee, or, if we may return to history for a moment, to Senator Raoul Dandurand who, writing in his memoirs some many decades ago, promoted the idea of a Senate management committee to oversee the legislative work of the Senate. (Senate 2018b)

The constitutional suitability and the political acceptability of a business committee for the Canadian Senate depend on how it is constituted and operates. Here are some of the operational issues that would have to be decided:

- What should be the powers of the business committee? Would it be authorized to set timetables for bills and assign bills to particular committees?
- Who should chair the committee? Using an elected Speaker of the Senate as chair would be helpful in endowing the business committee with greater legitimacy and impartiality.

- How should the committee be composed? Should it include the Government Representative, representatives of each of the recognized parliamentary groups and lead critics for a particular bill? Should regional representatives be included, as has been demanded by some senators who want to strengthen the regional role of the Senate?
- Should meetings of the business committee be open or closed?
- Would it decide matters by recorded votes? Would the Speaker be a voting member, if only to cast a tie-breaking vote?
- If decisions were made on a consensus basis, should there be provision for majority and minority reports?

I favour a time-limited experiment with a business committee. In the absence of organized, disciplined and cohesive parliamentary caucuses that allow for top-down direction, the new Senate needs another basis for organizing its affairs. Over time, through the operation of a business committee, precedents for handling different types of legislation may emerge. Good-faith bargaining and principled accommodations would hopefully produce greater trust among the various party and nonparty groups. A culture of constructive engagement with real issues, rather than theatrical gamesmanship, may gradually develop.

CONCLUSION

Reforming the Senate through constitutional amendments that require substantial provincial assent has proved impossible. Although modernizing it through more incremental nonconstitutional reforms has been politically contentious, significant changes have occurred as a result of the decisions made by Justin Trudeau, first as party leader and then as prime minister. They were made without constitutional amendment or changes to statutes such as the *Parliament of Canada Act*. Yet the impacts of the Trudeau changes have been far-reaching and, I would argue, positive overall.

Change to a political institution like the Senate is complicated, uncertain and risky because it is difficult to forecast with precision how particular changes will reverberate throughout the cabinet-parliamentary system involving the Crown, the House of Commons, the prime minister, the cabinet and the bureaucracy. There are potential impacts on the federal system. Also, outside organizations and groups may have to adjust their approach to getting their viewpoints across within the national policy process.

Given their significant impacts, the Trudeau changes can hardly be described as “tinkering” or “cosmetic.” The components of that change process include a new appointment procedure and new selection criteria leading to a membership that is quite different in composition from the Senate that existed prior to 2016. After membership turnover, a different configuration of partisan and nonpartisan parliamentary groupings has emerged. With the steady increase in the membership of the ISG, the traditional clash between organized government and opposition sides has declined but not disappeared entirely. The Conservative caucus of senators continues to adopt a

traditional opposition approach. At times, an informal coalition among senators from all the groupings can arise in opposition to certain provisions of government bills.

The ISG has become the dominant presence in the Senate, but it does not constitute a formal caucus that accepts direction from the government. Leadership that was once centralized, top-down and unilateral has become more dispersed, shared and horizontal – relying on communication, persuasion and negotiation. The three unaffiliated senators who, along with their staff, constitute the Government Representative Office play a crucial role in planning and managing the Senate agenda. As the experience with Bill C-45 made clear, designated sponsors can make an important contribution to the passage of government bills.

Senate rules, procedures and resource allocations have been gradually modified to reflect the new political realities of the Senate. As a result of these changes to the more material features of the Senate, a new institutional culture is emerging in the form of a drastically different set of informal behavioural norms. Cultural change is a slow and uncertain process, however, and there is still resistance – mainly from the diminished ranks of Conservative senators – to the development of a more collegial and constructive culture. This resistance reflects the persistence of elements of the adversarial, partisan culture of the past.

When the Senate was a highly partisan body, it was constrained in the performance of its three main constitutional roles of representing regions, providing sober second thought on bills and upholding the rights of minorities. Whether this outcome was intended or not, the Trudeau changes have meant that the new Senate has become a curb on prime ministerial power and the use of majority power in the House of Commons to advance government agendas. More anticipation of and planning for reactions to bills and other government measures by the ISG and the partisan caucuses has become a requirement of the national policy process.

The new Senate is a work in progress. Many conceptual and empirical questions regarding its future remain unanswered:

- Given job security, freedom from party discipline and growing opportunities for influence on public policy, will the role of senator come to hold more attraction than that of MP?
- How do ISG senators understand their representational role? Do they have a sense of loyalty to the prime minister who recommended their appointment? Do they represent provincial societies or provincial governments? Or do they see themselves as freelance policy entrepreneurs?
- How will the dynamics of the Senate further evolve without the traditional adversarial clash of government versus opposition that drove its functioning most of the time in the past?
- How will leadership approaches and techniques of the Government Representative, the ISG and the leaders of party caucuses change as the new Senate evolves and new parliamentary traditions emerge?

- Will the ISG develop a strong shared culture, which would promote cohesion and thereby place its members under pressure to follow its declared positions?
- Will a Senate dominated by the ISG regularly use the “hard power” techniques of delay, amendment or even defeat of contentious government bills? Or will it rely mainly on “soft power” techniques of scrutiny, publicity and persuasion to challenge the stance of the government and the House of Commons? Will it pursue both?
- In the absence of party discipline, which formerly provided a buffer against the demands of pressure groups, will independent senators become more exposed and susceptible to the demands of lobbyists? (IRPP 2019, 11).
- How will the dominance of the ISG affect the operation of the standing committees that are the main working units of the Senate? Will ISG senators chair all the committees? Will the ISG use its majority position to control the agenda of committees?
- Will the emergence of specialized policy groups and the evolution of the role of sponsor for government bills become a new source of policy initiation and evaluation?
- With just 105 senators (when all seats are filled) and with the full Senate meeting fewer than 100 days a year, is there enough capacity and commitment to complete all the tasks the new Senate is being urged to perform?
- What is required and how long will it take for the Senate to gain a reputation and image as a relevant, constructive and credible institution in the national policy process?

In a December 2018 interview, Prime Minister Trudeau declared he was pleased with the way the new Senate had operated, even though senators were more prepared than in the past to amend government bills (Bryden 2018). This tendency has slowed down the legislative process somewhat and occasionally sparked fears – unrealized thus far – that the Senate could defeat legislation outright. To solidify his changes, which were accomplished on a political, nonlegal basis, he indicated that, before the next election (in October 2019), the government would introduce amendments to the *Parliament of Canada Act* that would put the changes on a more permanent footing.

Such amendments would make it more difficult, but not impossible, for Andrew Scheer, current leader of the Conservative Party, to act on his promise, if he becomes prime minister, to return to a partisan basis for both the appointment of senators and the functioning of the institution. Scheer would have to have Parliament pass a bill to remove the changes, and then he would have to wait for probably a decade before a sufficient number of voluntary departures or forced retirements allowed him to create a Conservative majority in the second chamber.

Debates over the Senate are a hardy perennial of Canadian political life, and they will continue. However, the long-standing, almost uniformly negative stereotypes of the Senate are due for revision. The Senate is moving in a positive direction even though further improvement is needed. It is now time for ingenuity in developing further practical reforms to make the renewed Senate work better. It is also time for new academic research that better explains how and why the new Senate is changing. It is hoped that this analysis will contribute to more informed discussion on these questions.

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