The Senate's amendments to the Cannabis Act: Just a 'sober second thought' or high on power?

The Canadian Senate has long been the object of criticism from Canadians and lawmakers alike[1]. Since its inception, politicians have sought to reform the upper chamber, and Senate reform has repeatedly appeared in the House of Commons.[2] Others have wondered why we even have a Senate, regarding it as a rather useless institution, or one that rewards political loyalty. Under the Harper government, Canadians read about the infamous Senate scandal, reaffirming the chamber's negative stereotypes. However, under the Trudeau government, Canadians are reading about the Senate even more frequently, and for important reasons.

The Senate's significant involvement in Bill C-45, the *Cannabis Act*, has brought the chamber's role into the forefront. Following on his election promise, Prime Minister Trudeau's government has introduced Bill C-45, which will legalize cannabis in Canada. With over forty proposed Senate amendments to the bill, C-45 is the most amended bill the Senate has dealt with in this government. Some of the amendments touched on key features of the legislation, presenting the government with unexpected opposition from the upper chamber.

For years, the Senate was criticized for being a mere 'rubber stamp' on legislation. Now, the Senate is being criticized for being too involved in the legislative process, and for stalling or even obstructing legislation altogether. Is the Senate acting beyond its mandate? Could the Senate's recent actions be unconstitutional?

The Senate's Function, Design and Constitutional Mandate

For a bill to become law in Canada, it must be passed by both the House of Commons and the Senate, regardless of where it originates. A bill must be passed by both chambers in the same form for it to receive Royal Assent and subsequently become law.[3] Upon receiving and reviewing bills, the Senate has the option of passing a bill without amendments, proposing amendments to a bill, defeating it, or choosing not to proceed with a bill altogether. If it chooses not to proceed with the bill, "it dies on the order paper without ever being actually defeated[.]"[4]

Purpose of the Senate

The Senate performs an important legislative function, even though it is often overlooked. As the chamber of 'sober second thought,' the Senate was designed to "provide complementary review of governments bills before they become the law of the land."[5] The Senate's core function has been described as "*complement[ing]* the work of the House of

Commons through sober second thought" which reviews, analyzes and amends legislation. [6] It is also intended to serve as a counterweight to majoritarianism, providing checks and balances where needed.[7]

Interestingly, the purpose and function of the Senate is not mentioned anywhere in the *Constitution Act, 1867.* Despite its unwritten nature, the Fathers of Confederation had clear intentions for the chamber. George Brown, one of the founding 'Fathers', described the upper house as an independent body that "would be in the best position to canvass dispassionately the measures of this house [the legislative assembly] and stand up for the public interest in opposition to hasty or partisan legislation."[8]

The Supreme Court clarified the role of the Senate in making Canadian law in the *Reference re Senate Reform*. In this case, the government asked the Court a number of questions about the role of the Senate, the method of appointing Senators, as well as how the Senate could legally be reformed. The case established what amending procedures in the Constitution should be used to reform or even abolish the upper chamberIt also reiterated that the appointment of senators, rather than their election, was a very deliberate choice by the Fathers of Confederation which serves to "prevent Senators from overstepping their role as a complementary legislative body[.]"[9]

While it is crucial that the Senate be more than a 'rubber stamp' for legislation it is widely understood that it is also not its job to arbitrarily reject legislation either. Senators must fulfil their legislative duty of analysing and amending legislation, "with the recognition that the Senate does not have a democratic mandate to override the executive and the duly elected House of Commons."[10] The Senate does have the power to reject legislation, however this power is sparingly invoked. Since the Second World War, fewer than five bills have been rejected by the Senate. [11]

Senate Process for Approval of Bills

Bills that reach the Senate are read and voted on three times before being sent back to the House of Commons for final approval. Before the third reading, the bill also goes to a committee, where it is studied in detail. The committee can call on experts and those who may be more directly affected by the bill to provide input on the proposed legislation. It can suggest amendments to the bill before sending it back to the Senate, which can make further amendments before the final vote. If the bill passes this vote, it gets sent back to the House of Commons. The House may accept or reject the amendments made by the Senate. The bill then goes back to the Senate for approval.

The Senate's Mandatory Deference to House

The Senate is one of the three branches of Parliament, the other two being the House of Commons and the Executive. Under the Canadian convention of 'responsible government,' the executive branch and the Senate are responsible to the House of Commons, which is in turn responsible to the Canadian people. The House governs on the people's behalf by introducing and passing legislation.

The Senate convention about not overriding the House is particularly important with bills that are part of an elected party's campaign. When presenting such bills the government can be seen as legislating on Canadians' behalf (as this is what the government of the day was elected on). As such, the convention is that the Senate should not stand in the way of the people's chamber. After all, the Senate is widely regarded as a complementary chamber, not a combative or competitive one.[12]

The idea of the Senate supporting legislation that was born out of a campaign promise forms a Westminster convention.[13] This convention holds that "senators do not defeat Bills implementing promises made in campaigns won by the government party."[14] The Senate should not defeat bills "or insist on amendments that would have the effect of gutting pledges made during an election campaign."[15] Senators have recognized the importance of maintaining a bill's 'core.' In 2014, Senator Joan Fraser reiterated that if the government has a mandate from the people to proceed with a measure, we may amend its technicalities, but we will not oppose it root and branch, however wrong we may think it is[.]"[16] In addition, Senator Jack Austin, former leader of the Government in the Senate, reiterated the importance of abiding by the wishes of the Commons. "Senators are keenly aware that, as a parliamentary institution which studies legislation originating in a house of elected representatives, senators must treat with respect the wishes of the government of the day as embodied in the other place."[17]

Trudeau's Reformed Senate: Legislative and Constitutional Implications

Senate Reform has been on the agenda of many Canadian governments, including the current and previous governments. Both the Harper and Trudeau governments vowed to make changes to the Senate, however, as the Supreme Court of Canada (SCC) confirmed in the *Reference re Senate Reform case,* many of Harper's proposed reforms required constitutional amendments and were therefore abandoned. The Trudeau government has succeeded in implementing a modest reform to the Senate, requiring no constitutional amendments. This came in the form of modifying the appointment process.

Previously, the Governor General would appoint a senator to the chamber, on advice of the Prime Minister. These senators took on the party of the sitting prime minister and subsequently voted with that party. Under the Trudeau government the process changed. An Independent Advisory Board reviews applications of interested senators, and provides its recommendations to the prime minister. The prime minister then makes his/her selections from these recommendations. In addition, appointments are no longer made on a partisan basis, as Prime Minister Trudeau has vowed to have an Independent Senate. New senators are brought on as an independent meaning they do not sit in any formal party caucus (like the Conservative senators, for example) and they are not considered loyal to any of the federal political parties. Taking on the name of the Independent Senators Group (ISG), these senators are not obligated to vote along any party lines.[18]

Following this model, the prime minister may appoint senators who are sympathetic to or even members of their political party. Questions arise as to whether that the upper chamber can really be independent, as voting along partisan lines continues. For example,

Conservative Party Leader Andrew Scheer was accused of encouraging the Conservative senators to do whatever it takes to sabotage the *Cannabis Act*.[19] In addition, some have accused Independent Senators of simply supporting the government on all its legislation.[20] However, senators' votes on legislations, regardless of their party affiliation, do not always adequately represent the dialogue and deliberations that take place in reviewing legislations pending before the Senate.

Before Trudeau's Senate reform, the Senate appeared to be less engaged in the amendment process. Across numerous Canadian governments, the average percentage of bills that the Senate amended was around 7%.[21] In the last two years of the Harper government, the Senate amended only one of sixty-one bills it received from the House. The reformed Senate has been far more active in its legislative amendments, leading some politicians to argue that the chamber is over involved and sabotaging the legislative process.[22] Of the forty-four bills it has received since the Trudeau reform, the Senate has "successfully" amended ten, and the number of amendments made to these bills is higher than ever. [23]

Looking beyond the antics of some senators and the final vote count on bills, the amendments being made to legislation in the Senate tell an important story.

The Changing Role of the Senate: Bill C-45

Recently, the Senate was called upon to consider Bill C-45, the Cannabis Act. This bill, introduced in May 2017, would make cannabis legal for consumption and even allow for limited home growth. The bill was also an election promise made in October 2015. After all three readings at the committee stage, the Senate sent back Bill C-45 to the House with over forty amendments – an astonishing number.[24]Although most of the amendments were regarded as minor, and quickly accepted by the House, the House rejected a dozen significant amendments. One controversial amendment would have allowed the provinces to prohibit the home cultivation of cannabis. The subsequent Senate vote on keeping this amendment was very narrow: 45 to 35 senators decided against it.[25] It is worth remembering that this is only one of a dozen crucial amendments that the Senate made to the bill, all of which were rejected by the House. In addition, the passing of C-45 before the parliamentary recess was not a certainty. Some senators wanted to insist on keeping the amendments that were rejected by the House, and others wanted to stall the bill altogether.

Although many notable amendments were not accepted by the House of Commons, the Senate's work on C-45 was crucial. For example, upon Senate criticism about the lack of Indigenous consultation on the bill, the Minister of Indigenous Affairs promised to establish a dialogue with Indigenous communities on cannabis. [26] Having more agency since the reform, the Senate has raised more concerns about legislation, to which the House of Commons has answered.

The number and nature of the amendments made to the *Cannabis Act* indicate a more active and empowered Senate. This has important implications in both the political and legal context and presents the need for the chamber to recall what their role is and the importance of abiding by constitutional conventions that mandate its need for deference to

the House. Convention suggests that the House is the superior chamber, and it is the Senate's unwritten mandate to ultimately defer to the Commons. Further, in the *Reference re Senate Reform*, the Court felt that the lack of a textual procedure or resolution for deadlock between the two houses indicates that the Fathers of Confederation felt that the will of the people, manifested in the House of Commons, takes precedence over the will of the Senate.[27]

The Senate is not a fully independent chamber yet, as some senators continue to sit in party caucuses. However, the commitment to independence made by Prime Minister Trudeau has given more senators the ability to focus on crafting better legislation, rather than engaging in partisan antics in the upper chamber. Ultimately, the Senate should complement or enhance the work of the House, rather than impede it.

Conclusion

Although the Senate conceded on the *Cannabis Act* and voted with the government, the passing of C-45 reminds us that the new, Independent Senate is not taking its job lightly. The upper chamber is crucial to ensuring that the bills being passed are sound and free of constitutional loopholes. It appears to be taking its legislative duties more seriously since Trudeau's reform. However, the Senate should not forget where its mandate comes from, nor get carried away with its powers.

Recalling how one of our Fathers of Confederation described the upper chamber, the Senate should be "calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, *but it will never set itself in opposition against the deliberate and understood wishes of the people*."[28] It is important as the Senate moves into this new phase of independence and increased agency that it maintains its commitment to quality legislation, as well serving the government of the day, and in turn the Canadian people.

[1] Jason Fekete, "How to solve a problem like the Senate" 19 June 2015, online <https://ottawacitizen.com/news/politics/how-to-solve-a-problem-like-the-senate >

[2] *Reference re Senate Reform,* 2014 SCC 32 [2014] at para 17, 1 SCR 704 [Senate Reform Reference]

[3] Canada, The Senate, *How a Bill Becomes Law*, 14 June 2017, online <https://sencanada.ca/media/345985/com_7panel_howabill-web_2017-06-14_e_final.pdf> [How a Bill Becomes a Law]

[4] Paul G. Thomas, "Comparing the Lawmaking Roles of the Senate and the House of Commons" in Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew* (McGill-Queen's University Press, 2003) at 172-173.

[5] Senator Peter Harder, "Complementarity: The Constitutional Role of the Senate of

Canada" 12 April 2018 at 2, online <https://cdn.senate-gro.ca/wp-content/uploads/2018/04/Complementarity-The-Senates-Constitutional-Role-2018-04-12-Final_E.pdf > [Complementarity: the Constitutional Role of the Senate of Canada].

[6] *Ibid* at 4, Peter Harder, "On cannabis Bill Senate must defer to Canadians' democratic will" *Policy Options* April 2018, online <http://policyoptions.irpp.org/magazines/april-2018/cannabis-bill-senate-must-defer-canadians-democratic-will/>

[7] Harder, "Complementarity: The Constitutional Role of the Senate of Canada" supra note 3 at 2.

[8] Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate" in Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew* (McGill-Queen's University Press, 2003) at 5.

[9] Senate Reform Reference *supra* note 2 at 59.

[10] Chris Montgomery, "Senators should be careful about how the dissent," *Policy Options* March 2018, online <http://policyoptions.irpp.org/magazines/march-2018/senators-careful-dissent/>

[11] Harder, "Complementarity: The Constitutional Role of the Senate of Canada" supra note 3 at 37.

[12] Paul G. Thomas, "Comparing the Lawmaking Roles of the Senate and the House of Commons" in Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew* (McGill-Queen's University Press, 2003) at 189.

[13] Harder, "Complementarity: The Constitutional Role of the Senate of Canada" *supra* note 3 at 4.

[14] Harder, "On cannabis Bill Senate must defer to Canadians' democratic will" supra note 4.

[15] *Ibid.*

[16] Debates of the Senate, 41st Parl, 2nd Sess, Vol 149 Issue 131 (4 February 2014) at 1700 (Speaker Noël A Kinsella)

<https://sencanada.ca/en/content/sen/chamber/412/debates/031db_2014-02-04-e#34 > [Debates of the Senate 2014]

[17] Debates of the Senate, 37th Parl, 3rd Session, Vol 141 Issue 11 (18 Feburary 2004) at 17 (Speaker Dan Hays) < https://sencanada.ca/en/content/sen/chamber/373/debates/011db_2004-02-18-e>

[18] Senator Mary Jane McCallum, "Modernizing the Senate: the benefit of partisanship taking a backseat," *Hill* Times 11 June 2018, online <https://www.hilltimes.com/2018/06/11/modernizing-senate-benefit-partisanship-taking-back-seat/146506>

[19] Kyle Duggan, "Trudeau accuses Sheer of playing Senate games to try to slow down pot bill," *iPolitics*13 June 2018, online <https://ipolitics.ca/2018/06/13/trudeau-accuses-scheer-of-playing-senate-games-to-try-to-slow-down-pot-bill/> [Trudeau accuses Sheer of playing Senate games to try to slow down pot bill]

[20] Rachel Aiello, "Trudeau says Senate reform 'on the right track,' blames Conservatives senators for delays" *Hill Times* 27 June 2017, online <https://www.hilltimes.com/2017/06/27/trudeau-says-senate-reform-right-track-blames-conservative-senators/112040>

[21] C.E.S. Franks, "The Canadian Senate in Modern Times" in Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew* (McGill-Queen's University Press, 2003) at 172 [The Canadian Senate in Modern Times].

[22] Duggan, "Trudeau accuses Scheer of playing Senate games to try to slow down pot bill," *supra* note 17.

[23] Senator Grant Mitchell, "Key Senate Changes to the Transportation Bill Possible Under new Independent Model" *Senate of Canada* 13 June 2018, online <https://sencanada.ca/en/sencaplus/opinion/key-senate-changes-to-transportation-bill-possible-under-new-independent-model-senator-mitchell/>

[24] Kyle Duggan, "Cannabis bill sails through crucial Senate third reading vote" *iPolitics* 07 June 2018, online <https://ipolitics.ca/2018/06/07/cannabis-bill-clears-crucial-senate-third-reading-vote/>

[25] Kyle Duggan, "Homegrow battle left independent wondering if Senate position on post taken seriously" *iPolitics* 20 June 2018, online https://ipolitics.ca/2018/06/20/homegrow-battle-left-independent-wondering-if-senate-position-on-pot-taken-seriously/

[26] John Paul Tasker, "Will the Senate pass the cannabis bill tonight? No one knows for sure" *CBC* 07 June 2018 online <http://www.cbc.ca/news/politics/senate-vote-legal-cannabis-bill-third-reading-1.4694512 >

[27] *Senate Reform Reference* supra note 10 at 59.

[28] Confederation Debates, *1865 Debates*, February 6, 1865, quoted in *Reference re Senate Reform*,supra note 7 at 58.