

Tapping the Potential of Senate-Driven Reform: Proposals to Limit the Powers of the Senate

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In the immediate aftermath of the 2014 *Senate Reform Reference*,¹ there was considerable talk about the limitations that the Supreme Court had put on Senate reform. Some political leaders expressed frustration and declared that we are left with the status quo. But, that view both misunderstands what the Court said and underestimates what can be achieved through non-constitutional means. There is much that can be done simply with the political will to change the Senate situation without resorting to constitutional amendment; senators already have the power to effect some serious reform from within. This paper focuses on an unorthodox suggestion: that substantive reforms might be achieved through changes to the Rules of the Senate governing its legislative process. With some changes to both the legislative and appointment processes, substantial improvements to the Senate are both possible and achievable. The result would be a Senate better able to perform its intended function as a chamber of sober second thought. It would also answer the most serious concerns about an appointed Senate's role in a modern democratic system.

This paper will briefly review the perceived deficiencies of the current Senate before discussing the possible room for non-constitutional reform left after the *Senate Reform Reference*. Then, a detailed discussion of the potential of Senate-driven reform will highlight how changes to the Senate rules could effectively structure

how the Senate exercises its legislative powers and deals with bills already approved by the House of Commons; however, this reform may have to be coupled with other practical changes to the appointment process to ensure an effective and independent Senate. Taken together, these changes could produce meaningful reform without the need for constitutional amendments.

For many critics, the Senate lacks legitimacy. It is an appointed body that has powers almost equal to those of the House of Commons. A principled objection is that an appointed body should not thwart the will of the elected house, and Senate reform is thus needed to deal with severe erosion of public confidence in the upper chamber arising from a range of perceived problems: an appointed body imposing its will on elected MPs; the extent of patronage in appointments; a culture of entitlement, leading to truancy and expense scandals; the fact that many senators treat the job as a part-time endeavor; and, the close corporate ties of some senators.

We all fail if we simply accept the Senate as it is and allow corrosive cynicism to undermine its place in Parliament. It is unfortunate that some advocates of Senate reform are content in, even delighted by, Senate missteps. They cynically view these problems as serving their cause, to force Senate reform by fostering revulsion toward the current Senate. Other critics simply refuse to have anything to do with the Senate until it

becomes an elected body. But the ostracism of an appointed Senate also denies the enormous and legitimate roles of other appointed officials in our political process, from Supreme Court judges to civil servants and other advisors.

Many advocates of an elected Senate think there is a zero sum game involved, that to reform and improve an appointed Senate is to undermine the chances of achieving an elected Senate. However, seeing the benefits of an effective upper house can help spur on discussions for even more fundamental reform. One is less likely to see pressure to reform an irrelevant or powerless institution. More importantly, continued public disrespect for the Senate may pose a far bigger threat, and to more than just Senate reform. Cultivated disdain for one of the houses of Parliament undermines public confidence in our entire system of government.

Critics have to face the reality that our national parliament has two houses and the appointed Senate is here to stay for the foreseeable future. For the sake of our political system, it is important to see if there are ways to reform the Senate so it can fulfil its role in the policy process more constructively.

The beginning point in discussing reforms must be to consider what role an appointed Senate can play in a modern parliamentary democracy. A nutshell description of the Senate's most fundamental role was provided by the Supreme Court of Canada in the *Senate Reform Reference* where it repeatedly referred to the Senate as a "complementary legislative chamber of sober second thought." The Court said the Senate was not intended to be "a perennial rival of the House of Commons in the legislative process."² So, the main function of the Senate is to provide some independent assessment of measures approved by the House of Commons. Its central legislative role is to consider the merits and weaknesses of bills already passed by the House, and at times to suggest amendments and force the House to reconsider its proposals.

An appointed Senate may still have a valuable role to play in the legislative process, even in the modern democratic context, if its goal is

to refine legislative proposals while ensuring that elected MPs have the final say. Granted, our Senate's role has to be a limited one when compared to elected upper houses. But, the example of the UK House of Lords shows that a non-elected body with only a suspensive veto can have a constructive impact in the legislative process.³ An appointed chamber may legitimately participate in examining proposed laws if its suggestions for improvement force the elected chamber to reassess its decisions rather than face threats from unelected actors to veto or shelve measures MPs have already approved.

As noted earlier, some political actors and scholars believe that the *Senate Reform Reference* requires substantive reform to occur through the formal amending process. Indeed the Court declared that the "7 and 50" process under section 38 of the *Constitution Act, 1982* would be needed to alter the selection process and the powers of the Senate; unanimous provincial consent is required to abolish the Senate outright. Only rather insubstantial changes, such as the property qualifications or personal net financial worth requirements were cited by the Court as subject to unilateral amendments by Parliament under section 44.⁴ However, an important qualification should be put on these general statements. The Supreme Court's position on the necessity to involve provinces in Senate reforms applied when the changes would "engage provincial interests."⁵ And the key litmus test was put thus: "Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution."⁶ The Court clarified that unilateral legislative changes could be made to the institutions defined in the Constitution "provided that their fundamental nature and role remain intact."⁷ In short, changes that would not potentially alter the fundamental nature and role of the Senate need not require joint federal-provincial constitutional amendments.

Within these parameters, non-constitutional change may still be possible to address three areas of needed reform: appointments, standards of conduct for Senators, and the exercise of the Senate's legislative powers. Certain revisions can

be undertaken if they are intended to improve the quality of appointments, foster the independence of the chamber, and to ensure that the Senate is a complement to the Commons rather than a rival. These changes should still be achievable without constitutional amendments if they are aimed at fostering the accepted nature of the Senate as an appointed body that is to provide sober second thought in the legislative process.

Important changes might still be made to the appointment process if they are to ensure the original intent to create what the Supreme Court referred to in an earlier reference case on Senate reform as “a thoroughly independent body which could canvass dispassionately the measures of the House of Commons.”⁸ Justin Trudeau made headlines in 2014 by evicting senators from his caucus and challenging the Prime Minister to follow suit and set up a non-partisan appointment process.⁹ His proposal was to create a non-partisan nomination committee to advise on future appointments. A totally non-partisan Senate, however, may be neither desirable nor practical, especially in light of the evicted Liberal senators subsequently forming their own caucus. However, there is much to be said for drawing lessons from the UK House of Lords reforms, which established an independent nomination commission comprised of representatives of all parties represented in the Commons and some non-aligned members.¹⁰ Appointments are allocated between parties and cross-benches in a way to ensure that no single party has a majority of seats in the Lords. The net effect is to prevent any party from undermining the independence of the Lords in reviewing legislation coming from the House of Commons. A similar nominating committee could be instituted within the Privy Council of Canada to advise on Senate appointments; alternatively, it could be created administratively within the Privy Council Office.¹¹ It is doubtful that legislation would be needed to establish such a body, considering that Cabinet and its committees are established and frequently reformed within the Privy Council without legislation.¹² The Prime Minister could ensure significant change in the Senate if he agreed to be bound by an independent nomination committee’s recommendations and ensured that future

appointments were distributed among parties and independent cross-benchers in a way that prevented any group from controlling the chamber.

The Senate itself may also be the engine of reform in two key areas: regulating the behaviour of its members and limiting the exercise of its legislative powers to avoid imposing its will on the Commons. While the Senate has made significant changes in recent years to remedy the problems of truancy and conflicts of interest, recent scandals and extensive corporate connections indicate that considerable room is left for improvement. The Senate has full powers to stipulate rules to tackle nonparticipation, abuse of expenses, non-residence of senators in the province they are appointed to represent, and corporate or professional activities which occupy significant amounts of time for many senators. Such changes would go a long way to establishing public faith in the Upper House and its members. On a less formal basis, individual senators could assert their own independence, and that of the chamber in which they serve, by refusing to bow to their Whip’s direction or by refusing to read scripts prepared by party officials.¹³

The main contribution of this paper, however, is to propose that the Senate can revise its internal rules to self-limit its legislative powers and define a clearer relationship with the House of Commons. The intent of these reforms is to address the biggest deficit in legitimacy that the Senate faces in the modern era: it is an appointed body which may and sometimes does impose its will on the elected House of Commons. A self-limitation on its powers may ironically result in a more vibrant and effective Senate. The Rules of the Senate — the equivalent of the Standing Orders of the House of Commons — provide fertile ground for effective reform of the Senate’s powers. There are limitations to what can be done, but it may surprise some to realize just how much could be achieved.

First, it may be necessary to review what the Constitution says about the Senate’s powers. The *Constitution Act, 1867* provides that the Senate is the equal to the House of Commons in all but one respect: money bills must originate in the

House. All bills presented for royal assent must have the consent of both Houses of Parliament. But, beyond these stipulations, the Constitution is silent on the legislative powers of the Senate. Each House is left to decide for itself how proposals are considered, which particular procedures are followed, and how consent to bills is ultimately given.

It is a fundamental principle of parliamentary privilege that each house has the right to determine for itself its constitution and procedures. In general, the whole body of *lex parliamenti* is part of the law of the land. And, particular aspects dealing with parliamentary privileges and immunities have a constitutional status. It is important to note that the Supreme Court has recognized that parliamentary privilege is a part of the formal Constitution.¹⁴ Only those matters considered necessary to parliament's functions are to be counted among these privileges. But, there is nothing more fundamental to a legislative body than the procedures to be followed in considering legislative proposals. The Standing Orders of the House of Commons and the Rules of the Senate must enjoy a special constitutional status. Because these privileges to determine internal procedures are part of the formal Constitution, they are immune to some of the *Senate Reference* strictures.

The Rules of the Senate have been overlooked as a potential vehicle for Senate reform. Changes could be made to the Rules that are aimed at refining a complementary role for the Senate in the legislative process and limiting or eliminating the occasions when it poses as a rival to the elected chamber. These goals are consistent with the Supreme Court's boundaries on reforms that may be achieved without resort to joint federal-provincial constitutional amendments. They are intended to allow the Senate to express its fundamental character and role more effectively, not to transform it.

The Senate's prime contribution to the legislative process is to provide sober second thought to measures already considered in the House. The Senate, of course, has other important roles, such as initiating its own legislation and conducting policy hearings to propose future legis-

lative measures. But, its central legislative role is to consider the merits and details of bills already passed by the House. Senate advocates list the Senate's less-partisan atmosphere, historically looser discipline, and its accumulation of expertise as key reasons why it can provide valuable suggestions to improve Commons bills.

However, the Senate has also managed to stall or defeat Commons bills on occasion. It has explicitly defeated a Commons bill five times since 1990. A far more frequent tactic the Senate uses to thwart the Commons is through an "indirect veto." By simply delaying consideration or extending the time in committee, it is possible to effectively shelve a bill until it dies at the end of the session. At other times, there is a conscious decision to stall a bill, but without the formality of a vote not to proceed with it (which is actually an explicit veto).¹⁵ The most famous example was the Free Trade bill in 1988. Other high profile examples include Bill C-69 in 1995 dealing with the redistribution of federal electoral ridings, and the 2008 shelving of Bill C-10 which would have changed some tax policies.

The Senate and House of Commons can also be pitted against each other as adversaries when they disagree over the fate of amendments made by the Senate. After a Commons bill has been amended and has passed a third reading in the Senate, it can only be presented for royal assent once both Houses agree on a final wording for the bill. Most often, the House of Commons agrees to the Senate's amendments. Even in the heady partisan confrontations during the Harper minority governments, the government accepted the amendments made by the Liberal-controlled Senate to 8 out of 12 Commons bills initially amended by the Upper House.

However, the Commons may reject some or all of the Senate's amendments and insist on the version it had approved. In that case, the Senate must reconsider the matter; it usually bows to the Commons, but the Senate does sometimes insist on its changes, occasionally delaying matters further by sending the matter back to committee before deciding on its position. There is no limit to the number of times a bill can be passed back and forth between the two Houses. In the past, it

has happened several times, over a period of up to a year.

Clearly, there are opportunities for Senate obstruction in the legislative process and there is a need for changes concerning how the Senate functions in that process. Perhaps surprisingly, there is potential to change the Senate Rules to speed up the passage of legislation, focus attention on possible amendments, eliminate the indirect veto for many bills, and limit the period of disagreement between the two Houses over Senate amendments.

The Senate Rules and the Standing Orders of the House of Commons govern how business is conducted in each House of Parliament, including how many readings are required and how votes are held. A frequent parliamentary procedural device in the modern era is to deem that certain events have occurred, even though they have not. After returning from a prorogation, for example, the government often introduces a motion in the House of Commons to reintroduce a range of bills at the stage they were at prior to prorogation; a bill may be deemed to have had second reading, concurrence in the committee report, and can proceed directly to third reading.¹⁶ The technique of deeming an event to have occurred may prove a useful lever in Senate reform.

One possible change to the Senate Rules could state that a bill emanating from the House of Commons shall be deemed to have received third reading in its original form 6 (or 12) months after its introduction.¹⁷ Such a rule would prevent many cases of indirect vetoes causing bills to die on the order paper.¹⁸ It would also allow the Senate to consider and amend a bill that completed all three readings within that window.

An ongoing dispute between the Senate and the House of Commons is whether the Senate has any right to amend important budget bills which are normally a matter of confidence in the House. The Senate rules could be amended to say that third reading on Supply and Budget Implementation Bills is deemed to be given 30 days after the bill's introduction.¹⁹ The rules could also stipulate that no amendments may be made to

these bills. As these are all subject to confidence votes in the House of Commons, I can see no principled reason for the Senate to alter or defeat these measures.

Explicit defeats of Commons bills could be made much more difficult through changes to the Rules. Votes on procedural devices to bury a bill might be prohibited by the Rules. Votes on amendments to ordinary Commons bills might be decided by simple majorities, while the final votes for approval at report stage, as well as second and third reading of Commons bills might require a supermajority or even unanimity to be defeated.

Finally, it should be possible to end the ping pong between the two Houses over Senate amendments. The Senate Rules could be amended to stipulate that the Senate's agreement shall be deemed to be given to a Commons bill in the form in which it is returned to the Senate by the House. If the Senate's basic role is to force sober second thought on measures, then that function is fulfilled by the Commons having to formally consider Senate amendments. I see no principled reason to allow repeated volleys between the Houses.

The result of these changes would be to encourage the Senate to effectively and expeditiously propose amendments that the Commons must consider. Indirect vetoes would be largely eliminated and direct vetoes made more difficult. The Commons would be faced with clear proposals for amendments and be forced to consider their merits. Without the prospect of having to deal harshly with threatened vetoes, the Commons might consider the Senate's amendments more on their merits.

Some have argued that the veto power is necessary for the Senate to influence the House of Commons. Without the possible threat of defeating a bill, so the argument goes, the Senate would not be able to force the Commons into accepting many of its amendments. Senator Serge Joyal has put it quite plainly: "Without the power to veto legislation, the Senate would be nothing more than an advisory chamber, and little more than an upscale focus group."²⁰ Thus, the possibility of

an occasional veto is thought to be necessary to the much more frequently exercised and widely accepted power of amendment.

However, this argument appears to be disproved by the evidence of the substantial policy influence enjoyed by the House of Lords, even though it only possesses a suspensive veto. About 400 government defeats were recorded in the Lords between 1999 and 2007, and about half of the Lords' amendments to bills were ultimately accepted by the House.²¹ The Canadian Senate, by contrast, amended only 36 out of 391 Commons bills between 1997 and 2008, far less than the House of Lords did in the UK.²² Since 2011, the Senate has not amended a single government bill sent from the Commons.²³ Clearly, the possession of an absolute veto has not given the Senate any consistent leverage over the House of Commons.

Meaningful non-constitutional reform of the Senate is very possible. The suggestions raised here are offered as illustrations of some of the opportunities. Regardless of whether such changes would be supported in the Senate at this time, they are nonetheless offered as food for thought. They demonstrate that where there is a will, there is a way.

Some necessary caveats should be voiced before leaving the topic. Reforms grounded in the Rules are vulnerable to change by a new majority in the Senate. And the devil would be in the details — how one would actually translate these suggestions into workable rules. More importantly, there is the risk that a majority in the Senate could use these proposed changes to pass legislation without serious consideration; all one needs to do is wait out the clock after a bill's introduction and it would be deemed to have been approved. For that reason, these suggested changes to limit the exercise of the Senate's legislative powers would be most effectively coupled with other non-constitutional reforms. If enough senators simply chose not to follow the majority party's Whip on votes, or if the appointment process was revamped to ensure no single party would have a majority of seats, then the Senate would be more likely to follow the reformulated Rules. The Senate could then fulfill its intended

constitutional role to assess Commons bills effectively and independently on their merits, and to propose amendments in a timely fashion.

The vision offered in this paper is one where non-constitutional measures can provide meaningful reform for the rehabilitation of the Senate. Measures are already underway to tackle fraud and chronic absenteeism, but even more could be done to suspend or remove senators who bring the chamber into disrepute. Misbehaviour of individual members has done immeasurable harm to the Senate in the public's eyes. But, more damaging has been the collective failure of the Senate to properly police its members in the past. The Senate can and should set high standards for its members in matters of integrity, conflict of interest, and full-time engagement in the work of the Senate. Similarly, the Prime Minister has it within his power to reform the appointment process to replace the ruling party's partisan exploitation of appointments with an independent committee charged with selecting nominees and ensuring that no party may control a majority in the Senate. These matters are the stuff of frequently suggested grounds for reform.

It is less widely appreciated that senators may also be able to reform how their legislative powers are exercised. Senators can, if they wish, redefine their legislative processes to ensure that the Senate acts as a complementary chamber with streamlined procedures for reviewing and revising Commons legislations. A reinvigorated Senate, with self-defined changes to its legislative processes and better-delineated relations with the House of Commons, could go a long way to public acceptance of the Senate's place in our democratic system. Senators might legitimately play a more targeted and active role in revising legislation, without threatening to impose their will on elected MPs.

Notes

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- 1 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*].
- 2 *Supra* note 1 at para 58.
- 3 The UK House of Commons can ensure the passage of legislation sent to the Lords by repassing it 12 months later, but with the requirement that the second approval of the bill occur in a second session. The necessity to reintroduce it in a second session is not a major hurdle in Britain, since parliament is usually prorogued each year. By contrast, sessions in Canada can be as short as a year but usually last about 2 years.
- 4 The Supreme Court noted that the agreement of Quebec would be needed to amend the requirements to hold property in that provinces senatorial divisions; *Senate Reform Reference*, *supra* note 1 at para 86.
- 5 *Ibid* at paras 29 and 67.
- 6 *Ibid* at para 48.
- 7 *Ibid*; see also para 75.
- 8 *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House* [1980] 1 SCR 54 at p 77, 102 DLR (3d) 1.
- 9 Justin Trudeau, “Major announcement: Ending partisanship and patronage in the Senate,” (29 January 2014), *Justin Trudeau*, online: <<http://www.liberal.ca/newsroom/blog/major-announcement-partisanship-patronage-senate/>>.
- 10 For further information see: <<http://lordsappointments.independent.gov.uk/>>.
- 11 While it may be prudent to create the nomination committee to advise the Prime Minister rather than the Governor General directly, it should be noted that the Prime Minister’s prerogative to advise the Governor General on senatorial appointments is a matter of constitutional convention, and not law. See: Andrew Heard, *Canadian Constitutional Conventions: the Marriage of Law and Politics*, 2nd ed (Toronto: Oxford University Press Canada, 2014) at 141.
- 12 A notable exception is the Treasury Board, which is established by legislation; see: *Financial Administration Act*, RSC 1985, c F-11, s 5(1).
- 13 At the time of writing, the Liberal senators’ caucus enforces no single position in votes and allows its members to vote as they wish.
- 14 See: *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, 1993 CanLII 153; *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, 1996 CanLII 163.; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, 1 SCR 667.
- 15 Sometimes, Commons bills simply arrive in the Senate without enough time to deal with them before the end of the session.
- 16 For an example of a general measure to permit this see the motion of the Government House Leader, Mr Van Loan: House of Commons, *Journals*, 41st Parl 2nd Sess, No 4 (21 October 2013), online: <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=2&DocId=6259936>>.
- 17 Of course, this period could be any reasonable length such as 6, 9, or 12 months, but the House of Lords seems to function effectively with a 12-month suspensive veto over most legislation, and one month over financial matters.
- 18 Note that the time limits on dealing with a bill will have no practical effect for bills introduced in the final months of a session; they could still die on the order paper.
- 19 Again, this could be another period, such as 45 or 60 days.
- 20 Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen’s University Press, 2003) p 302.
- 21 See: Meg Russell and Maria Sciarra, “Why Does the Government Get Defeated in the House of Lords?: The Lords, the Party System and British Politics” (2007) 2:3 *British Politics* 299 at 299; Meg Russell and Maria Sciarra “The Policy Impact of Defeats in the House of Lords” (2008) 10:4 *British Journal of Politics and International Relations* 571.
- 22 Heard, *supra* note 11 at 146.
- 23 Canada, Senate, *Progress of Legislation*, 41st Parl 1st Sess, (26 June 2013) online: <<http://www.parl.gc.ca/Content/SEN/Chamber/411/Progress/progress-e.htm>>.

