



Sober Second Thinking: How the Senate Deliberates and Decides

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Sober Second Thinking: How the Senate Deliberates and Decides

A. Future of Canada's Red Chamber in the Hands of its Senators

Change is afoot in Canada's Red Chamber. The currency of partisan motivated tactics is dropping very fast. With a large and increasing cohort of Independent senators, partisan tactics employed by some senators – particularly tactics of delay – are becoming inappropriate and awkward. Instead, the seismic shift in Senate membership has brought with it a spirited desire to proceed efficiently with the work that Parliament performs on behalf of Canadians and to make procedural obstruction a thing of the past.

This is good news for Canadians. They have made it clear that they want a Parliament that is less consumed by partisan vitriol and more focused on the substance of public policy. Transforming the Senate into a less tactical and partisan Chamber is a good start to meeting that expectation. To that end, I propose an innovative process that would both reduce obstruction that is driven by partisan interests and enhance substantive policy debate in the Senate.

Years of blows to its reputation have been a catalyst for change, and the Senate now has the opportunity to live up to the ideal promised by Canada's founders. Sir John A. Macdonald envisioned the Upper Chamber as a sober, responsible check on majority rule. The Old Chieftain himself said that the Upper Chamber should be an "independent House". George Brown proclaimed that "the desire was to render the Upper House a thoroughly independent body—one that would be in the best position to canvass dispassionately the measures of this House, and stand up for the public interests in opposition to hasty or partisan legislation". What the Clear Grit feared most about an elected Upper Chamber was "that a partisan spirit would soon show itself in the Chamber".

Delivering on the founders' promise is long overdue for Canadians who have witnessed the Senate fall into disrepute through a period of patronage appointments, excessive partisanship, assorted scandals and executive interference. My hope is that, with renewal underway, Canadians will come to see the Senate as a noble body that reinforces rather than undermines parliamentary democracy.

But there is no guarantee of success for a less partisan and more independent Senate. Former Senators Michael Kirby and Hugh Segal elegantly reminded us of this fact in the opening lines of their report entitled "A House Undivided: Making Senate Independence Work." They note that:

There is nothing in the altered appointments process introduced in January 2016 that automatically assures a positive outcome for an independent Senate. Nor is there anything that automatically condemns it

to failure. Success will depend on the wisdom and flexibility of the men and women who have been called upon to serve in the Senate: the objectives they pursue, the operational processes they choose, the goodwill they can muster in a house raised with partisan division and, increasingly in recent decades, dependent on direction from their party leaders in the House of Commons. Today's Senators have an historic opportunity to lift a weakened institution from its torpor and demonstrate its value to good governance in Canada.¹

Senators should heed this call to action. The success or failure of this experiment in Senate renewal will depend on the course that senators collectively chart for the Red Chamber. As I have mentioned time and again, the ultimate decision on the pace and shape of change in the Senate will not be directed by one Senator, but by all senators. The choice is *ours* and it carries great responsibility.

Will the appointment of Independent senators through a merit-based process become the historical norm or will a future Prime Minister revert to the appointment practices of the past? The answer to this question has major implications for how Parliament will function in the future, and the leaders of Canada's federal political parties will have to form a view. Whatever the future may hold, a large number of Independent Senators will hold their seats for many years, and will continue to play a significant institutional role.

Public support for an independent Senate will lie with Canadians' appreciation of the Senate's accomplishments in the next few years. Other influential factors will be policymakers' and journalists' assessments of the Chamber's handling of government legislation. Should the emerging consensus be that a Senate composed of Independent members has not proven capable of processing government business effectively and appropriately, then an eventual reversal to disciplined top-down control of the Senate will be more likely.

To refute the critics, a renewed Senate must build a record that speaks for itself in a time of upheaval. This begins with the constructive exercise of sober second thought over government legislation. As one of the two legislative bodies of Parliament, processing government business initiated on behalf of Canadians is by far the Senate's most important function. The public must see that the Senate, even in a time of transformational change, it is capable of exercising sober second thought in a vigorous, thorough, deliberative and timely fashion. Sober second thought ought not to be a part-time hobby; for it is the primary function of a Senator. We must determine how to best execute this task. All senators have a duty to review Government legislation, but also to decide in a reasonable timeframe, putting aside partisan gamesmanship and focusing on public policy. It is my hope that my thoughts will serve to stimulate a meaningful discussion across affiliation lines about these responsibilities.

In the present paper, I have chosen to tackle the process of legislative review from a procedural perspective. In particular, I will try to answer the following question: how can we work toward a thorough, consensual, orderly and less

tactical process of debate, deliberation and decision? In my opinion, the answer is the establishment of a new “business committee” mandated to map out debate and deliberation on items of chamber business. As a transparent forum for consultation and decision-making with respect to parliamentary processes, including the scheduling of parliamentary business, such a committee would enhance substantive policy debate in the Senate.

The theoretical physicist Stephen Hawking once said: “Intelligence is the ability to adapt to change.” Given the wealth of human capital in Canada’s Red Chamber, I am confident that senators will meet the challenge of demonstrating the public value of a more independent and less partisan Senate.

B – Sober Second Thinking Must Lead to Decision-Making

Since Confederation, the Senate has operated with two organized party caucuses. One would represent the Government, and the other the Opposition. Conservatives and Liberals have always occupied both positions. In the context of this duopoly, successive Canadian governments have generally been able to advance their legislation in the Senate in a relatively orderly fashion through the party discipline of a whipped government caucus.

Over time, the Senate developed procedural tools to facilitate the timely review of government business and to countervail delay tactics. One such tool is “time allocation”, a measure that allows the Government to limit debate of a government item at a given stage of the legislative process. Time allocation is only available for government business. The progress of government bills has generally been ensured by leadership negotiation through the “usual channels” (i.e. informal weekly meetings between the leadership of the Liberal and Conservative caucuses) or, in rare cases, through the imposition of time allocation by the government caucus.

Largely as a result of its heavy-handed use by successive majority governments, time allocation is now seen as a procedural weapon to curtail debate and silence opposition. Canada is not the only jurisdiction in which time allocation has fallen out of favor. Indeed, British parliamentarians refer to time allocation as “the guillotine.”

But what tends to be lost in the heated debate over time allocation is that its original purpose was not only to allow a government majority to manage the finite time of the legislative chamber, but also to limit the use by opposition parties of tactics geared at deliberately delaying or impeding the progress of government legislation:

Parliamentary procedure provides opposition MPs with various ways to be heard, including when they wish to prevent a proposed government bill from being passed

quickly. Proposing countless motions and amendments and using all the speaking time available in the House and in committee are so many ways to slow down a bill's passage. When these tools are used in an orchestrated and systematic way, the word "filibuster" is applicable. This parliamentary strategy is based on using dilatory measures and can postpone the House's decision. However, the government majority possesses certain tools to speed up the proceedings.²

In other words, if excessive time allocation is to be reviled, so too should tactics of delay that stifle substantive policy debates. Time allocation and dilatory obstruction are two sides of the same coin. Unfortunately, under current Senate rules, absent time allocation, obstructionist senators can postpone votes by adjourning debate virtually indefinitely. Attempts to call for an immediate vote to move legislation forward can be filibustered, leading to stare-downs that can last for many days and monopolize the Chamber's time.

Notwithstanding the merits of time allocation, given that the duopoly of Conservatives and Liberals in the Red Chamber is over, there is a need to collectively rethink the process of debate and deliberation of Government legislation, and perhaps other items of business.

In Canada, mechanisms such as time allocation were designed in a context where the legislative process has been dominated by two parties: a government caucus and an opposition caucus. Time allocation was also intended as a tool to be possessed and wielded by the Government through strength in numbers. In the House of Commons, a majority Government's caucus necessarily holds the most seats, and can impose time allocation by commanding or convincing enough MPs to act. Similarly, in the Senate, save for a few historical exceptions, the Canadian government's caucus has nearly always held a majority of seats because, until now, the practice has been for prime ministers to appoint senators from their party.

Today, however, the Senate is a place in transition. It is undergoing a seismic transformation as its ranks fill with Independent members selected through a process designed to restore the Senate's credibility. As Conservative Senator Stephen Greene and his advisor Christopher Reed articulated in their paper entitled *The Senate's Brave New Reality*, "the Senate of Canada today is not the Senate it will be in the future, even the near future, and cannot return to the Senate of before."³

Currently, the Senate includes a Conservative Party-aligned opposition caucus (the "**Opposition**"). The Opposition comprises 39 of 105 Senate seats and has not shied away from employing delay tactics, which may be jointly planned and coordinated with Conservative House of Commons leadership at weekly meetings of the National Conservative caucus. However, there is no longer a government caucus that can impose time allocation with whipped votes. Instead, the Government is represented by three senators who, should they seek to impose time allocation under the current rules, must make their case through moral

suasion of a majority of senators. Relevant considerations for limiting debate would include a government item's policy contents and urgency, and the Senate's institutional obligation to respect Canadians' democratic will.

The current Senate rules favour delay of government business over expediency. The procedural balance must be restored, and to achieve this balance, the rules must evolve.

a) The Corrosion of Sober Second Thought

The Opposition in the Senate has taken advantage of the power vacuum left by the elimination of a government caucus. Rather than occupy the vacuum with substance and policy, it has too often filled it with time-wasting. Without a government caucus to counter the Opposition's obstruction, the Conservative Party of Canada practically has free rein to delay, delay, and delay further. The apparent strategy is to hinder the progress of government bills, even those that seek to enact clear election promises, for as long as possible. The Opposition leadership executes this strategy by stalling progress through the systematic adjournment of debate. Attempts at forcing votes to move legislation forward are met by the threat of filibuster.

In our democracy, Canadians must be assured of having their mandated legislation reviewed by the Upper Chamber in a reasonable timeframe. This principle is of such critical importance to the health of bicameralism that, at Westminster, the House of Lords is bound by a long-standing convention that government business should be considered in reasonable time. And in other countries, second chambers are disciplined by strict time limits for the review of government legislation. In those countries, if the upper house has not reached a decision within the set time, the bill is deemed to have passed automatically. The Canadian Senate is not bound by any similar rules. In theory, Canada's Red Chamber can delay the passage of a government bill practically indefinitely.

Though the Opposition leadership would contend that their members are merely exercising their rights in accordance with parliamentary practice and procedure, rights may be exercised irresponsibly. In this case, the Conservative Party of Canada is leveraging a Senate that is transitioning to non-partisanship to score partisan points, alleging that the Government is unproductive. Any skilled trial lawyer would concede that legal procedure can be subverted to preclude substantive progress in proceedings. The same holds true for parliamentary procedure.

But don't take my word for it. Let us look at the facts.

In the current Parliament, time allocation has not been moved in the Senate, and government business has been proceeding at a snail's pace. By contrast, during the 41st Parliament, the Conservative Government used time allocation in the Senate over 20 times.

It is instructive to examine the treatment that specific government bills have received in the Senate since the 2015 election.

Bill C-6 has remained in Senate limbo since June of last year. The bill seeks to implement an electoral promise to repeal provisions of the *Citizenship Act* that increased barriers to achieving citizenship and created two-tiered citizenship for dual nationals. The Bill idled at Second Reading from September to December 2016.* Within that time-frame, only four Opposition senators took to the floor of the Senate despite having had the entire summer break to prepare for debate. That's one speaker per month. This is despite being able to rise to speak on virtually any sitting day, and despite insisting on the primacy of Opposition speakers in structuring debate. Ironically, the controversial provisions of the *Citizenship Act* that Bill C-6 seeks to repeal – Bill C-24 – were expedited through the Senate under the previous government and adopted with only two sitting days of debate.

In the previous Parliament, there were many additional examples of government legislation moving forward with brevity of debate. For example, Bill C-18 (*Marketing Freedom for Grain Farmers Act*) had four sitting days of debate; Bill C-44 (*Helping Families in Need Act*) had five sitting days; Bill C-23 (*Fair Elections Act*) had six sitting days; and Bill C-41 (*Canada-Korea Economic Growth and Prosperity Act*) had two sitting days.

The pace of consideration of Bill C-16 is another prime example of Opposition obstruction in the current Senate. This legislation seeks to recognize and reduce the vulnerability of transgender Canadians, and to affirm their equality in our society. It would notably see gender identity and gender expression join age, religion and race on the *Canadian Human Rights Act's* list of prohibited grounds of discrimination, thereby making it illegal to discriminate on the basis of gender identity in the workplace. It would also extend criminal law protections against hate speech to transgender Canadians. Bill C-16 arrived in the Senate in November 2016, but has remained in Senate limbo ever since. It took, for example, three months and considerable public pressure before a Conservative opposition member spoke to the bill, despite there being ample opportunity for senators from all sides to join the debate. In the meantime, transgender Canadians are kept waiting for basic equality rights. In my view, each day a bill like this is delayed, justice is denied. Reviewing legislation is not a game, and obstruction may have moral consequences.

These tactics have not been limited to government legislation. Indeed, adjournments of debate have also been zealously deployed to preclude meaningful progress on Senate modernization efforts aimed at conferring full and equal rights to Senators who choose to organize along non-partisan lines. A

* By comparison, in the UK House of Lords, Second Reading debates usually last for as little as a few hours and no longer than a couple of days.

report of the Senate Modernization Committee tabled in October 2016 has recommended that the Senate acknowledge non-partisan parliamentary groups as equal to party-affiliated caucuses. Yet, not an iota of progress has been registered on this front in the Chamber, a state of affairs that is not lost on the forward-looking Chair of the Senate Modernization Committee, Senator Thomas McInnis. As he stated in the Chamber, “The modernization project is an urgent one, reflecting both the desire of the Senate and the Canadian public for a chamber of sober second thought that is effective, responsive and lives up to its intended purpose”. But some senators would prefer for the Senate to remain stuck in time, available as a platform to advance partisan interests. So we wait, delay, and delay further.

By and large, progress has generally been registered: when the delays have attracted negative media attention for the Conservative Party; when a majority of senators have shown a readiness to forcefully challenge Opposition stalling; when the policy articulated in a bill is a carry-over from the previous government; and – most successful of all – when it has been signalled that non-sitting periods were at risk of being abridged, particularly going into the summer and holiday season. In short, sober second thought has become a game of procedural cat-and-mouse. A notable exception, however, was our Chamber’s excellent and substantive debate on C-14, the medically-assisted dying bill, when we debated potential amendments according to a special motion that organized our deliberations. It also “packaged” the debate into a concentrated period with multiple speeches occurring in close succession rather than being divided and spread out over weeks or months. This made the process a true debate, one speech responding to and/or building upon another, exploring each idea and issue in “real time”. It also “packaged” the debate into a concentrated period with multiple speeches occurring in close succession rather than being divided and spread out over weeks or months. This made the process a true debate, one speech responding to and/or building upon another, exploring each idea and issue in “real time”. The debate on C-14 was the Senate of Canada at its best, and we need to make that kind of debate the rule, not the exception.

In addition to slowing down debate, the Opposition has adopted the practice of ambushing Committees and the Chamber with unannounced last-minute amendments to government legislation, leaving Senators with little to no time to study the proposals and otherwise react in a sober fashion. The most egregious example of this conduct was the Opposition majority on the Senate’s National Finance committee rewriting Bill C-2, the middle class tax cut and a central campaign commitment, with no advance warning. The Speaker of the Senate ruled the amendment out of order because the Senate does not have the power to tax Canadians. However, it is a sorry state of affairs to have protracted debate with little actual debate, coupled with complex, surprise amendments followed by rapid votes.

Moreover, due to the backlog generated by the delays, the final weeks of each Senate sitting – in June and December – are quite chaotic, as the Senate pulls out

all the procedural stops to expedite government legislation, trying to do in two weeks what it could have done in two months. Government bills should not be rushed through the Chamber *in extremis* following a successful round of horse-trading, but rather be given thorough and timely sober second thought. Our Chamber must debate and deliberate, but we must also decide. Canadians expect us to do so year-round, not only in June and December. They expect us to work as hard and diligently as they do, to speak on these matters and to move business forward.

Ultimately, to use such delay tactics to impede legislative review is not sober second thinking. Senators engaging in such practice do not showcase the “complementary” legislative role that the Canadian Constitution requires the Senate to perform. At a pivotal time in the Senate’s history, such practice is also damaging to the institution’s culture, encouraging needless conflict and distracting the Chamber from its public purpose.

The evolving Senate must reconcile its practices and procedures with its increasing independence. It needs to solidify its position as a complementary, more deliberative and less tactical Chamber of Parliament. It needs to find a way to safeguard debate but also assure Canadians that the Chamber will actually come to informed decisions. In other words, the Senate needs to collectively rethink the process and pacing of sober second thought.

Procedural experimentation and innovation will be required as the Senate adapts to a more independent and non-partisan framework. The review of government bills must be part and parcel of this innovation.

I would also venture to say that the Opposition caucus could benefit from a rethink. Instead of relying on stalling tactics as their principal means to challenge the Government, senators opposed to the Government’s agenda could turn to substantive and focused debate in making their case. If anything, a renewed focus by the Opposition on the merits of government legislation and constructive debate would be conducive to more successful policy advocacy. Currently, the tactical approach of the Opposition undermines the credibility of well-intended Conservative senators’ substantiated policy arguments. It does their political creed no credit. Delay hardens hearts, but debate can change minds.

Should the Opposition, and particularly its newly minted leadership, focus on substance rather than obstruction, the need to change the process of debate would become far less immediate. I would encourage them, in their reflections, to draw upon Westminster, where the House of Lords is bound by the long-standing convention that government business should be considered in reasonable time. Together, we could develop a practice that would make that convention our own.

b) Choosing the Path Ahead

As outlined below, I take the view that while the *status quo* is not sustainable, time allocation does provide a workable interim solution for the chamber in cases of egregious delay. Looking forward, serious consideration should be given to the creation of an all-grouping Senate business committee mandated to structure debate.

Some Senators will express alarm at the procedural suggestions I make below. However, I would remind them that I am only one Senator with no caucus, and my power is limited to contributing to the marketplace of ideas. The Senate, as a body, must decide how to proceed. To do so, new approaches must be considered.

Certain key principles should govern this search. A new approach should:

- ❖ Safeguard thorough and vigorous debate;
- ❖ Ensure the careful scrutiny of legislation;
- ❖ Be conducive to tailored treatment of every bill;
- ❖ Be flexible and adaptable;
- ❖ To the extent possible, address the problem of accumulation of Senate business in June and December;
- ❖ Reflect the principle of a shared-power structure in the Senate;
- ❖ Cultivate a collaborative and collegial approach to legislative review; and
- ❖ Guarantee to Canadians that Senate decisions are on the horizon.

c) What to Do Now? An Unsuitable but Workable *Status Quo*

The first option to consider is obvious. It is the *status quo*, to keep time allocation as it exists and to invoke it on a case-by-case basis. The Senate would continue to muddle forward with this game of cat-and-mouse. I am convinced that the *status quo* is neither viable nor sustainable for a more independent and less partisan Senate.

That said, in the short term, time allocation, the only tool at the Government's disposal, provides a workable solution that ought to be considered by senators. Although a somewhat blunt instrument, it could be pragmatically adapted through compromise and agreement and judiciously invoked on a case-by-case basis.

Under the current rules, time allocation can occur with or without the agreement of the Government Leader (to use the terms in the current rules) and

representatives of the recognized parties (i.e. the Conservatives and the Senate Liberals). With agreement, the Senate may adopt a motion specifying the number of days or hours for consideration of a government item. With consultation from the Facilitator of the Independent Senators Group (ISG), or any groups that may yet emerge, this approach would be workable in the immediate term. Time allocation with agreement could also allow for adjournments and amendments during the agreed to period of debate on an item. In addition, the agreed to number of days or hours of debate need not run consecutively, but could still be subject to an overall limit (for example, a certain number of days of debate to take place within a certain number of weeks).

Without agreement, the Government Leader or Deputy may, with notice, move a motion to allocate time. If the motion is adopted, time allocated debate on the item may then proceed when the Government determines. Furthermore, time allocation without agreement could be made more flexible by resorting to provisions in the rules which allow time allocated debate to extend over days rather than the minimum of six hours. In addition, the Senate could also agree with leave to allow amendments to the time-allocated item, something that the rules do not currently permit. This would be useful especially in cases when debate occurs over an extended period of time. In this way, time allocation could reconcile the flexibility of deliberation with the certainty of decision-making.

I would urge Senators to consider this approach.

While time allocation can be adapted to resolve the immediate and pressing challenges Senators collectively face in the current dynamic, the Senate should begin working toward a more progressive approach to the legislative process. Time allocation is such that it is likely to be successfully invoked only in cases where substantial and unwarranted delay has already occurred. It would be best, in my view, to consider options that are flexible, collaborative and prospective in nature. Time allocation is a remedy. I would prefer a vaccine.

From both a domestic and international perspective, the use of diverse time management tools in the legislative process is uncontroversial. Modern legislatures, particularly those modelled after Westminster, have adopted a wide array of practices and procedures quite apart from time allocation to streamline the legislative process. Some of the policies in other jurisdictions provide a sound basis for a discussion about potential reforms that may be in tune with the Senate's new identity.

d) The Questionable Wisdom of Uniform Time Limits

One option to consider would involve building into Senate rules and procedures overarching time limits for the consideration of all government business, a

common feature of upper chambers.[†] For example, the rules might state that government legislation must be considered and decided upon by the Senate within a specified number of calendar months or sitting weeks, after which time passage of the bill would become deemed. Shorter time limits would be considered for budgetary measures, money bills and emergency legislation.

While I mention the notion of time limits for discussion purposes, it is not an option that I believe to be desirable. Given that every bill is different, a one-size-fits-all solution is inflexible and unwise. Moreover, rigid deadlines similarly involve the potential for abuse from both the supporters of a given bill and its opponents. For example, there is a risk that the ceiling would become a floor, thereby defeating the very purpose of the time limit. Senators may ultimately, as a matter of practice, delay the consideration of the bill until the last minute. This would not be conducive to sober second thought. Another risk would involve abuse by the government of the day and the supporters of a bill. Though unlikely, the government's representatives, the bill's sponsor and supporters of the legislation could seek to run out the clock in order to avoid Senate defeat or amendment. While safeguards could be adopted to avoid such mischief, it remains that I do not believe that one-size-fits all time limits would merit serious consideration for the Canadian Senate.

e) An Ill-Suited Completion Day

Drawing from the practice of the Saskatchewan legislature, another option would be to consider integrating within the Senate's rules a "Completion Day". A Completion Day marks the point at which certain bills must be processed by the legislature. In Saskatchewan, legislative sessions are fixed at 65 days spread out over two periods in the fall and spring. Under the rules of the Legislative Assembly of Saskatchewan, "Completion Day" is the Thursday before Victoria Day, or the 29th sitting day after the Budget motion is moved, whichever is later (under the current sessional calendar of the Assembly, Completion Day is May 18, 2017). Specified bills that must be passed by the day prior to the Completion Day are:

- ❖ Government bills introduced during the fall period, which have received at least 20 hours of debate;
- ❖ Budget-related bills, which have received at least five hours of debate; and
- ❖ The final Appropriation bill.

The adoption of a sessional calendar with a Completion Date in Saskatchewan has led to greater focus and efficiency in legislative review and a decrease in delay

[†] Many bicameral systems provide limited time for the second House to consider legislation. Examples include: Poland (30 days), Belgium (60 days), Austria (eight weeks), Ireland (90 days), and Spain (two months).

tactics, as noted by Gordon L. Barnhart, a former Clerk of the Senate and of the Saskatchewan legislature:

The sessional calendar was certainly a huge change for the Legislative Assembly. Gone are the days when the opposition can threaten to hold up the proceedings of the House for days until certain concessions are squeezed from the government. The call of "we will sit here through Christmas or through the summer!" was common from the opposition over the years. There is little evidence that these threats actually did convince the government to make certain changes but they added a certain sense of drama for the proceedings. [...]

The sessional calendar has changed all of that. There is now a prescribed time for considering certain business with an end date in mind. On the one hand, there seems to be more cooperation to get the work done according to a certain schedule. On the other hand, it does seem, to the traditionalists, that the opposition has given up some of its power or influence. Gone are the days for the expression that the "Opposition controls when the session will end." The Rules set a number of conditions that must be met before items of business can be brought to a vote, unless the opposition lets them go sooner. The Rules take away the ability of the government to manipulate the legislative agenda purely to its advantage. The Rules guarantee that bills and estimates must meet very specific thresholds of hours of debate before a vote is forced at the end of the session. These thresholds force the government to put forward its agenda sooner rather than later or there would not be enough hours in a session to get its business through. The Rules also require that bills be introduced (for the most part) in the fall and the budget in the middle of March. It is necessary to meet these deadlines if the government wants its business to come to a vote before the end of the calendar period. So the opposition is protected by a guaranteed number of hours on each item of business and they get to see the legislative agenda early because of the deadlines. ... In the Saskatchewan model, there are conditions in the calendar for the passage of business that try to balance the needs of government and opposition. The Saskatchewan calendar is set in the Rules and is enforceable by the Speaker and not dependent on agreements between the government and opposition whips which can sometimes break down. In any case, for better or worse, the days of high drama with threats to drag out the session are gone. The opposition so far has not complained publicly about losing the right to delay the business of the House.⁴ [Emphasis added.]

While I find the notion of a Completion Day more appealing than mandatory time limits, particularly as it presupposes that a minimum amount of debate has been conducted on each item, I do not see it as a practical option in the Senate, at least for the time being.

The Senate must maintain a fair degree of flexibility in the exercise of legislative review. As a complementary Upper Chamber, the Senate has no control over the timing of the legislation that is sent its way by the Government and the House of Commons. The Senate is often at the receiving end of last-minute legislation that it is expected – perhaps unfairly – to process very rapidly. Further, the Senate

must work within the confines of sessions that are of an arbitrary duration. Given this, an annual “Completion Day” is an ill-suited proposition. Because the role of the Senate is that of a complementary body of sober second thought, it would be more desirable to adopt a case-by-case approach that is more forward looking, flexible and collaborative.

f) A Promising Way Forward: Case-by-Case Scheduling & Creation of a Senate Business Committee

The Senate could consider scheduling deliberations on a bill-by-bill basis, a practice that has been adopted in other jurisdictions because it provides a sound alternative to the overly tactical parliamentary behavior that often stifles true debate. This is an avenue that I consider to be both desirable and appropriate for the Senate.

The idea would involve the implementation of tailor-made schedules for a bill’s progress through the legislative Chamber at each stage. For example, a schedule adopted prior to or immediately following First Reading of a government bill would provide the number of days or sitting weeks to be spent at each stage: Second Reading debate, Committee Stage, Report Stage, and Third Reading, along with the period of time required for Senators to prepare for each stage.

A culture of scheduling could be flexible and – most importantly – designed to safeguard, rather than silence, substantive policy debate on government legislation. The goal should not be to hasten the passage of a bill, but rather to establish a sound framework for sober second thought. While the approach may seem rigid because it sets the schedule for each stage of the process, much flexibility (both in terms of timing and process features) can be incorporated into the process.

To illustrate this point, consider the following:

- ❖ Each bill is different, and so each schedule would likely differ.
- ❖ In a more independent and non-partisan Senate, decisions relating to time management would necessarily have to be taken collaboratively, and would ideally involve the input of the leaders of each caucus or group, the bill’s sponsor and critic, as well as the Chair of the committee to which the bill would likely be referred for study.
- ❖ Scheduling provides the opportunity, where appropriate, to organize debate around themes, thereby ensuring that all important aspects of a bill are subjected to vigorous discussion.
- ❖ Periods of time between each stage will have to be sufficient to allow for senators to prepare adequately and to reflect in sober fashion.

- ❖ Each schedule would have to explicitly remain open to amendment in the event that legislative scrutiny was to reveal an issue requiring supplementary debate time.
- ❖ Bill-centric question periods with Ministers of the Crown or other Government representatives could be considered on a case-by-case basis.
- ❖ It is a certainty that the Chamber would become more deliberative and less tactical, in line with the fundamental role of the Senate as Parliament's complementary body of sober second thought.

Further, this approach presents the Senate with an opportunity to establish a more transparent and open alternative to the 'usual channels' for the timetabling of legislative review. Currently, securing the progress of government legislation is accomplished through back-room negotiation among the leaders of the Senate caucuses. Bill sponsors, critics and committee chairs are on the receiving end of the *fait-accompli* yielded through these negotiations. As part of the shift toward an increasingly non-partisan and independent Senate, the approach to time-management should reflect the principles of a new culture of cooperation and polycentric power-sharing.

As a starting point, Senators could initiate this new approach on an experimental basis by way of bill-centric informal meetings between representatives of all groups, the sponsor and critic of the legislation, and the chair of the committee most likely to receive the bill for in-depth study. The procedure should be such that decisions on each schedule motion would be the product of a common sense approach.

In time, a significant innovation would be to create a formal body mandated to organize chamber processes, streamline debates and provide a forum to try and seek agreement on schedules before they are put to a vote in the Senate.

Many legislatures have created bodies that provide a forum for consultation and decision-making with respect to parliamentary processes, including the timetabling of parliamentary business. Such bodies are frequently used in proportionally elected legislatures, where the sheer diversity of political actors calls for a more collaborative planning of Chamber affairs than do two-party systems. Such bodies are often referred to as "business committees" and generally have "two broad areas of responsibility: agreement on timetable, and appointment of committees."⁵

In this respect, the New Zealand Parliament model could inform change in Canada's Senate. There, a formal cross-party body – the Business Committee – was established in the 1990's as part of sweeping institutional change.

In 1996, New Zealand's electoral system transitioned from the traditional first past the post (**FPP**) to mixed member proportional representation (**MMP**),

thereby weakening the duopoly of New Zealand's two main parties in the 120-member House of Representatives, National and Labour. To better adapt to the change, Members of Parliament reviewed the House's Standing Orders, "travelling to European countries to seek ideas and learn from the experiences of other proportionally elected legislatures."⁶ Under FPP, with its frequent single-party majority governments, the business of Parliament had been managed through a backroom process similar to that of the 'usual channels'. But National and Labour would now have to share their power with minor parties. To expand the House's decision-making tent and reflect the new diversity of voices, a European-inspired Business Committee was created to organize the business of the House of Representatives. In this respect, research conducted about the origins of the New Zealand Business Committee provides additional insight:

A review of parliamentary Standing Orders was conducted in anticipation of the change and recommended the establishment of such a body. Its purpose would be to deal with the 'greater complexity in party arrangement in an MMP Parliament', and to introduce more 'forward planning' into the proceedings of the House. [...] The Standing Orders review noted that national assemblies in the Netherlands, Denmark, Norway and Germany had all successfully used a form of business committee to keep parties informed of the business of the House and to enable them to contribute to decisions on the legislative programme.⁷

In New Zealand, the Business Committee is convened and chaired by the Speaker and consists of the Government House Leader as "primary conduit between the legislature and the political executive"⁸, the Opposition House Leader, and the party whips. The Business Committee was notably charged with determining "the order of business to be transacted and the time to be spent on it in the coming week's sittings."⁹ As such, it can determine when and how the debate of a particular item of business will proceed¹⁰, which can include:

- ❖ Allocating the amount of time to be spent on an item among the various parties;
- ❖ Setting the number of speeches and speaking times for particular debates;
- ❖ Agreeing that a particular bill may progress to later stages faster than usual;
- ❖ Deciding when an extended sitting will occur, and the business to be considered during that sitting; and
- ❖ Agreeing to a roster allocating oral questions and speeches in the general debate.

The Business Committee has many powers above and beyond time management. It can notably determine the size and membership of each committee and whether to allow, on a case by case basis, an omnibus bill to proceed.

Also useful, the Business Committee regularly discusses the upcoming business of the House, with the Government House Leader outlining the Government's intentions with respect to legislation so that members can look forward and prepare for debate.

New Zealand is not an outlier. Many other jurisdictions have business committees.

For example, the Council of Elders of the German Bundestag, which dates back to Prussian times, is tasked with bringing about a consensus and making proposals to the House. Scotland, The Netherlands, Denmark and Norway are other jurisdictions that have similar bodies.¹¹ It is important to note that these jurisdictions tend to have coalition governments, or a history of coalitions. These are contexts from which a more independent Canadian Senate can draw upon as it transitions from a duopoly of Conservatives and Liberals to a more diverse and polycentric membership.

As British parliamentary experts Meg Russell and Akash Paun have noted, business committees can improve access to negotiation, decision-making and enhance information-sharing:

One of the clear benefits of business committees is that they provide some access to decision making, and certainly to information, for all or most parties within a parliament. The existence of the committee makes it potentially more difficult for the two main parties to 'stitch up' business to the exclusion of others, and for government to divide and rule. In both Scotland and New Zealand the new business committees have become significant forums for the exchange of information and the negotiation of parliamentary matters (often beyond their formal powers).¹²

In light of the evolution toward an increasingly non-partisan and independent Senate, the creation of a "business committee"-like body for a non-partisan Senate should be given serious consideration. ‡

This could be done through the creation of an entirely new committee or by building on existing Senate processes. For example, the role of the Senate Selection Committee could be expanded to undertake the timetabling mandate that is typically given to business committees. In other jurisdictions, business committees typically have responsibility over membership in the legislature's committee structure. So why not optimize the usefulness of the Selection Committee, a body that is generally left idle for months on end? From the

‡ The model of a business committee would be ill-suited to the House of Commons, which is more partisan and tactical. Procedures and practices that would work in a non-partisan Senate would not work for the partisan House of Commons and vice-versa. In the House of Commons, the Government remains squarely in the driver's seat and opposition behavior will continue to be motivated by partisanship. In the Senate, given the absence of a Government caucus and only one truly partisan caucus left, control will rest squarely with the Senate and be shared among its members.

perspective of comparative parliamentary studies, to bring the timetabling of parliamentary business within the scope of the Selection Committee's mandate would constitute a natural evolution. Alternatively, one could adapt and optimize the practice of "Scroll", a meeting each sitting morning where representatives of the Senate groups discuss and plan the day's likely proceedings. A more inclusive weekly forum concerned with long-term planning of Chamber business (a "Scroll Committee") would likely constitute an apt complement to the daily "Scroll" meetings.

At a minimum, I would urge the Special Senate Modernization Committee to study the issue.

One issue to resolve would be whether such a body should be granted formal power over parliamentary time or not. From the standpoint of Senate traditions, it would be more appropriate for the business committee's decisions to be subject to adoption by the full Chamber. Another question for the Modernization Committee to study would be the threshold of support required for the adoption of business committee decisions. The threshold may not be the same for every issue. But whatever that threshold may be, in a context where partisan gamesmanship will not be a factor, groupthink will likely generate frequent consensus and common sense will tend to prevail. And in any event, should a business committee decision not be reached, the issue could then be shelved by the committee and referred to a plenary debate and vote, where a simple majority vote would win the day.

A business committee for the Senate could be chaired by the Speaker, particularly if the Senate's input becomes a factor in the Speaker's appointment process. Membership could consist of the Government Representative (or his/her Legislative Deputy) and at least one designated representative for all Senate groupings. A proportionality formula would have to be adopted for the balance of the membership.

Each bill could be considered by the business committee following First Reading in order to establish a speakers list[§] for Second Reading and seek agreement on scheduling for each stage of review. Further, for scheduling purposes, on a bill-by-bill basis, the Senate Business Committee could accommodate temporary voting membership for the bill's sponsor and critic, as well as the Chair of the committee to which the bill would likely be referred for study.

[§] This would be consistent with the practice of the UK House of Lords where, before a second reading debate takes place, members who would like to speak add their name to a list – the 'speakers list'. For example, in the debate over the "Brexit" bill (the European Union Notification of Withdrawal Bill), which was ongoing at the time of writing, it was already established that a record-breaking 187 peers would speak on Second Reading prior to the introduction of the bill in the House of Lords. Further, in the House of Lords, amendments are gathered together and placed in order, then published in the 'marshalled list' prior to Committee Stage and Report Stage.

One of the clear benefits of a business committee is it would provide a foundation for the organization of parliamentary business as the Senate moves away from the structural comfort of the two-party system. While a Senate business committee would provide a forum for agreement to be reached on time management, one can anticipate that it would undertake other duties related to timetabling of Private Members bills, Senate Public Bills and committee recommendations.

In my opinion, the Senate can innovate by drawing upon New Zealand and other jurisdictions. Just as the New Zealand legislature did in the 1990s, the Senate is undergoing fundamental institutional change by moving from a bi-polar system to a polycentric dynamic. In addition, the Government's control over the management of Senate business has been greatly diminished, leaving a void that should be filled by an inclusive and collegial approach. Rather than remain at the mercy of dilatory measures, key decisions about the management of time in the Senate would be handed to all senators. This would represent a major step toward the type of cultural change that is likely to restore the Senate's battered reputation.

The result will be better policy outcomes for the country, and the Senate will have moved closer to realizing its potential as a complementary body of sober second thought.**

CONCLUSION

If the current Senate appointment process endures over successive governments, tactics of delay will have become outdated and have little currency. The Red Chamber will not use delay as its principal means to challenge the Government. Nor will it be a rubber stamp for the Government, as has sometimes been the case. Instead, the Senate will review Government legislation on the substance, with a sense of its complementary role as an appointed chamber. The Senate will decide whether to support or to amend. But decide it will.

** Readers will note that this paper does not consider in detail the scheduling practices of the House of Lords. No practice of programming or time allocation exists in the UK House of Lords because there is no need for it. The Lords are bound by convention that Government business be considered in reasonable time. No such convention exists in Canada, meaning that alternative procedures must be considered. Further, while the House of Lords has a limited power to delay, it does not have a culture of dilatory tactics similar to that which is currently impeding the work of the Canadian Senate. Rather, the Lords' principal means to challenge the government is substantive amendment and potential back-and-forth with the House of Commons. As a result, the Lords tend to debate and decide at a reasonably good pace. By contrast, the Canadian Senate has inherited the tactical approach of the Commons and must now work toward reasserting itself as the deliberative complementary chamber of sober second thought envisioned by Canada's founders. However, there are practices found in the Lords that could inform Senate renewal, including the establishment of a speakers list prior to Second Reading and the organization of amendments to be considered in a "marshalled list" prior to Committee Stage, Report Stage and Third Reading.

Despite a promising start, the Senate remains a distance from the ideal Canada's founders promised. The reality is that today's Senate is midway between the partisanship of the past and the independent era of the future. It will remain this way for some time.

But all Senators have a responsibility to make this institution in transition work for Canadians. Senate renewal is not about "the way we *do* things", but rather "the way we *should* do things". I think that most senators would agree that debate as currently conducted in the Senate is not always the way it ought to be. The Senate was applauded for the quality of the vigorous debate over the medical assistance in dying legislation, Bill C-14. One should not forget that Senate deliberations on Bill C-14 were held under the aegis of a special motion to streamline Senate deliberation, a framework that did not silence opposition, but rather enhanced the quality of the debate.

The question before the Senate is this: How can we modernize, adapt and strengthen the role of the Senate to meet the expectations of Canadians in the 21st Century? It is my view that a Senate business committee responsible for time management and scheduling would result in a better Red Chamber, more focused on the merits of legislation and less concerned with partisan tactics. In other words, precisely the type of change that Canadians have asked of their parliamentarians.

¹ Michael Kirby and Hugh Segal, "A House Undivided: Making Senate Independence Work", Public Policy Forum, September 2016, p. 5.

² Réjean Pelletier and Manon Tremblay (Eds.), *Le parlementarisme canadien*, Third Edition, St Nicolas, Les Presses de l'Université Laval, 2005, pp. 304-5.

³ Stephen Greene and Christopher Reed, "The Senate's Brave New Reality", 2016, p. 1.

⁴ Gordon L. Barnhart, "The Saskatchewan Legislative Assembly: A Major Push for Change", Canadian Study of Parliament Group (CSPG), Studies of Provincial and Territorial Legislatures, 2014, pp. 20-21.

⁵ Meg Russell and Akash Paun, eds., "Managing Parliament Better? A Business Committee For the House of Commons", Constitution Unit, University College London, August 2006, p. 35.

⁶ Elizabeth Mcleay, "Parliamentary Committees in New Zealand: A house continuously reforming itself?", *Australasian Parliamentary Review*, Spring 2001, Vol. 16(2), 121-39, p. 132.

⁷ Russell and Paun *supra*, p. 13.

⁸ *Ibid*, p. 15.

⁹ Mcleay, *supra*.

¹⁰ Website of the New Zealand Parliament, "What Does the Business Committee Do?". Available at: <https://www.parliament.nz/en/pb/sc/scl/business/news-archive/what-does-the-business-committee-do/>

¹¹ Mcleay, *supra*.

¹² Russell and Paun, *supra*, pp. 32-33.