

Senate Public Bills as “Excellent Policy Value” for Canadians

JULIE MIVILLE-DECHÊNE, Independent Senator from Québec
RATNA OMIDVAR, Independent Senator from Ontario
JÉRÔME LUSSIER, Director of parliamentary affairs, Senator Miville-Dechêne
PAUL FAUCETTE, Director of parliamentary affairs, Senator Omidvar

An Institution in Transition

The Senate of Canada is in transition. For many decades, while Senators produced thoughtful studies and impactful reports,¹ questions were regularly raised about their institution’s purpose and utility.

The 2015 decision of the Trudeau government to appoint non-partisan Senators was a watershed moment. The move enjoys broad and consistent support across the country. In 2019, a Nanos Poll commissioned by Senator Donna Dasko suggested that approximately 80% of Canadians support the new appointment process and do not wish to revert to the old partisan model.² A second poll, conducted in 2021, showed similar results.³

Even in this new Senate, however, some uncertainty remains about the appropriate role of Senators and their relationship with the government and the House of Commons. Over the years, various approaches have been put forward, including “bicameral bargaining”, “bicameral competition” and a “complementary role” for the Senate.⁴ Commenting on the history of the relationship between the Senate and the House, Professor Emmett Macfarlane writes:

It is somewhat remarkable that early studies of the Senate were every bit as concerned in how often the House amended and rejected Senate bills as vice versa. The idea that the House “has been more drastic” in

¹ Examples include the 2002 Senate report on the legalization of cannabis, led by former Senator Pierre Claude Nolin, and the 2008 and 2009 reports on poverty, housing and homelessness, led by former Senator Art Eggleton.

² Government Representative Office, *Canadians back new independent Senate appointment process: poll*, April 17, 2019. <https://bit.ly/3Jzaljo>

³ Samantha Wright Allen, *Poll shows public supports Red Chamber reforms, say Senators, but Conservative Sen. Plett dismisses results as 'skewed' and 'a waste of money'*, The Hill Times, May 17, 2021. <https://bit.ly/3ynKvbQ>

⁴ McCallion, E., *From Private Influence to Public Amendment? The Senate's Amendment Rate in the 41st, 42nd and 43rd Canadian Parliaments*, Canadian Journal of Political Science/Revue Canadienne De Science Politique, 2022, 55(3), 583-599. The “complementary role” approach was developed by Senator Peter Harder in an article that will be referenced later.

amending Senate legislation would likely be viewed as irrelevant to observers today. Such is the modern view of the Senate as a vestigial organ rather than an independent, active body of Parliament.⁵

Commenting on the 2021 poll, Senator Dasko wrote that “the reforms promoting independence are a bright light for the Senate, but more work needs to be done to convince Canadians of the value of the Senate. Strong appointments and consistent demonstration of the Senate’s non-partisanship will go a long way toward building positive views.”⁶

This document hopes to make a positive contribution to this important and ongoing discussion.

An Opportunity to Regain Legitimacy

At the heart of the modern Senate’s “vestigial organ” status is a perceived lack of legitimacy. Even though the Constitution grants the Senate powers that “allow it to go farther than any other unelected legislative body in the democratic world,”⁷ most Senators have been reluctant to wield them in practice. Many have come to accept the notion that, as unelected legislators, they lack the moral and democratic authority to participate in Canada’s legislative process as “an independent, active body of Parliament.”

There is no shortage of people who have worked hard to reinforce that sentiment. All governments hope to use their control of the House of Commons to pass legislation without worrying about Senate interference and often make it clear that Senators should keep to their place. Certain media commentators and political analysts have been openly hostile to the Senate. Some Senators have themselves expressed the view that, while the Senate can question or propose minor amendments to government bills, it should not alter the government’s legislative agenda in any significant way.

The result has been a largely deferential and timid independent Senate majority.⁸ Eschewing meaningful legislative interventions, many Senators have embraced alternative roles and devoted themselves to other priorities. These include external activities, regional or identity promotion, and professional undertakings. The Senate’s traditional role as chamber of “second sober thought” has thus been interpreted narrowly, almost literally, to mean *sober* (reserved and devoid of bold or innovative movement), *second* (reactive and subordinated to government initiatives) and focused on *thought* (removed from concrete action). This approach has sometimes translated into a kind of administrative or judicial review of government legislation where Senators act like compliance officers or senior civil servants. The overall vision appears to be that of a Senate whose legitimacy and continued existence depend on deference to the government, political neutrality, and legislative restraint.

⁵ Emmett Macfarlane, *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament*, Vancouver: UBC Press, 2021, p. 16.

⁶ See <https://twitter.com/DonnaDasko/status/1391796449290117131>

⁷ Senator V. Peter Harder, *Complementarity: The Constitutional Role of the Senate of Canada*, May 2018, p.11. <https://bit.ly/3ymfl4x>

⁸ Samantha Wright Allen, *Say yes to the feds: voting patterns show group understands 'legislative responsibility,' says ISG*, The Hill Times, August 28, 2019. <https://bit.ly/42aMca6>

Under this view, it follows that Senate initiatives, and especially Senate public bills (SPBs), are generally disfavoured and seen as distractions or personal pursuits that deserve little time and attention.

Legitimate Legislators

But Senators are legislators. As such, they may legislate on any subject matter of federal jurisdiction, as long as they do not initiate spending or impose taxation. With the exception of money bills and constitutional amendments, the Senate's powers are "co-equal" with those of the House of Commons.⁹

While the Canadian Senate resembles the British House of Lords in many respects, "the Senate differs from the Lords in that its membership is fixed, and that it is not subject to such constitutional provisions as the Parliament Acts of 1911 and 1949 which severely restrict the power of the Lords regarding the length of time it can delay legislation."¹⁰ This in part explains Senator Harder's observation that the Senate's powers "allow it to go farther than any other unelected legislative body in the democratic world."

In *Reference re Senate Reform*, which focused on the constitutional process through which the Senate could be abolished or transformed, the Supreme Court commented on the Red Chamber's function and evolution:

The upper legislative chamber, which the framers named the Senate, was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide "sober second thought" on the legislation adopted by the popular representatives in the House of Commons. (...) However, it played the additional role of providing a distinct form of representation for the regions that had joined Confederation and ceded a significant portion of their legislative powers to the new federal Parliament.

Over time, the Senate also came to represent various groups that were under-represented in the House of Commons. It served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process.¹¹

Professor David E. Smith also commented on the Senate's evolution, as well as its special relationship to the public interest and to concerns often ignored by partisan electoral politics:

⁹ The Senate of Canada, *A Legislative and Historical Overview of the Senate of Canada*, Committees and Private Legislation Directorate, Revised May 2001. <https://bit.ly/3L7mvRH>

¹⁰ Ibid.

¹¹ *Reference re Senate Reform*, 2014 SCC 32. Though obvious, it's worth noting that the Supreme Court's opinion in *Reference re Senate Reform* is only authoritative insofar as it relates to the constitutional process by which the Senate could be abolished or reformed. The Court's description of the Senate's historical role and subsequent developments does not constrain its future evolution.

The Senate acts as a bridge to the public, whose concerns most often are not political so much as concerns about the workplace, family, religion, health, diversity and citizenship (...) Like the country it serves, the Senate has demonstrated a capacity for adaptation, and may still do so.¹²

Beyond the specific purposes, issues and constituencies enumerated above, it's clear that the Senate has played several roles in its history, and that these have become broader over time. There is no reason to believe that the Senate is prevented from further evolution, especially considering the "living tree" doctrine that guides Canadian constitutional interpretation.¹³

But what about legitimacy? Notwithstanding its formal powers, shouldn't the appointed nature of the Senate preclude it from playing a proactive role in Canadian society? There are several responses to this argument.

First, unelected individuals have always played critical roles in Canada: judges, heads of crown corporations, business leaders, senior public servants, academics, and others actively participate in and influence Canadian society (including the legislative process) and benefit from significant legitimacy. Obviously, elected parliamentarians will always play a central and indispensable role in Canada's political system. But elections are not the only means by which responsibility, trust and legitimacy are conferred upon individuals.

Second, the long-term, unelected and non-partisan nature of Senate appointments is precisely what grounds Senators' legitimacy. It should be noted that, rightly or wrongly, one of the most persistent criticisms of politicians is that they are fickle, easily influenced by short-term electoral gains, and forever engaged in partisan bickering and tactics. This stands in contrast to what citizens everywhere consistently say they want from their leaders: less partisanship, less electioneering, and a clear focus on the long-term public interest. This is exactly the Senate's *raison d'être*. In fact, Senator Harder – acting as the government's representative at the time – specifically highlighted these features as the source of the Senate's credibility:

The Senate was designed to provide a complementary voice to Canadians in our bicameral system that is unfiltered by electoral and partisan calculus. It is this quality – a product of the appointive model – that the Senate ought to highlight in order to cultivate a respectful partnership with the House of Commons; gain the confidence of the public; and secure – ironically enough – a more consistently deferential outlook to the contributions of the Senate from governments.¹⁴

Third, because the executive branch effectively controls the legislative process in the House of Commons (especially under a majority government), one could argue that, from a separation of powers perspective, the Senate is the only truly independent legislative body in Canada. In this sense, Professor Smith has argued that, because the Senate is not concerned with "the confidence question," its relationship to the Canadian public is unique:

A core function of Parliament is debate, and the process of debate is as important as the decision taken. In this activity the Senate plays a major role, because greater freedom of debate occurs where the confidence

¹² Smith, David E., *The Constitution in a Hall of Mirrors: Canada at 150*, University of Toronto Press, 2017, p. 82.

¹³ Centre for Constitutional Studies, *The Living Tree Doctrine*, July 4, 2019. <https://bit.ly/3T1dnQB>

¹⁴ Supra, note 7, p. 50.

question does not prevail. The Senate is better situated than the Commons to connect with the public. While some senators have held elected office, many have not, and in that respect they are not professional politicians in the sense their opposite numbers in the Commons are. Instead of representing voters, they represent citizens, who also are not elected. In that important regard, senators and Canadians share common ground.¹⁵

The final source of legitimacy and credibility is to be found in the individuals that compose the Senate. Since 2016, Senators are appointed based on an independent evaluation of their merits and backgrounds. Senators bring a diverse set of expertise and accomplishments to the upper chamber and the length of their tenure enables them to develop a deep understanding of parliamentary processes and priorities. Limiting their ability to contribute to Canada's legislative process – particularly through amendments or SPBs – would seem to deprive the country of an important source of experience, wisdom, and vision.

The New Senate's Complementary Role

The Trudeau government's decision to set up an independent appointment commission for the Senate is likely to have many consequences, some yet unforeseen. One immediate and predictable impact should have been to make the Senate less partisan, more independent, and more proactive. As Senators Greene and Massicotte noted in their response to Senator Harder, "should Canadians not expect a less partisan and more credible Senate to contribute to the public debate by proposing more amendments than in the past?"¹⁶

Studies indicate that this has in fact happened.¹⁷ But even in the "new" Senate, debate continues over the appropriate role of Senators.

In his article on the Senate's "complementary role," Senator Harder adopted a generally deferential view of the Senate.¹⁸ Unsurprisingly, he wrote that the Senate should "adopt a stance of democratic deference to the Government's electoral platform when passed into law by the House of Commons, in accordance with the principles underlying the Salisbury Convention"¹⁹ (which does not preclude amendments that would improve the legislation).²⁰

But even Senator Harder, whose position favoured a limited and deferential role for the Senate, explicitly endorsed "amendments that would improve the legislation" and had high praise for SPBs:

¹⁵ Supra, note 12, p. 78

¹⁶ Senators Stephen Greene and Paul J. Massicotte, *Senate can't seriously play its complementary role of 'sober second thought' if Sen. Harder pigeonholes its power*, The Hill Times, May 21, 2018. <https://bit.ly/3ZTQ0KS>

¹⁷ Supra, note 4.

¹⁸ In their response to Senator Harder's article, Senators Greene and Massicotte challenged his "pigeonholed" view of the Senate's powers.

¹⁹ The Salisbury convention "provides that the upper house does not oppose the Second or Third Reading of bills which have been put before the electorate and approved, and the unelected body should not insist on amendments that would defeat the bill's intent".

²⁰ Supra, note 7, p. 5.

In considering the Senate's complementary role in Parliament, as well as its value to Canadians, I further note the innovative and thoughtful contributions to public policy frequently made by way of Senate public bills, which often address the policy gaps unaddressed by the Government in complementary fashion. (...)

Senate public bills may have significant influences on public policy by simply being proposed and debated. (...) Senators' long tenure and appointed status, both key features of complementarity, undoubtedly help shape their Senate public bills. Their length of tenure allows senators' work to continue on a bill over the span of several Parliaments where necessary, affording the time for groundbreaking policy proposals to change hearts and minds, and for senators to shape a bill to balance competing interests and eventually earn majority support. (...)

Further, senators' appointed status affords them greater institutional liberty to explore policy areas that may not be top of mind for a Member of Parliament working, quite understandably and appropriately, to advance the direct and pressing interests of an electoral constituency. For my part, Senate public bills offer Canadians excellent policy value.²¹

In fact, SPBs and their equivalent in the House of Commons, the Private Members' Bills (PMBs), have a long history in Canada. While the new Senate appointment process has revived interest in SPBs, the figures below show that these legislative initiatives were also popular before the election of the Trudeau government in 2015. As the graphs indicate, the number of SPBs has increased since the government began naming independent Senators, but current figures remain in line with historical precedent (in fact, there were more proportionally more SPBs introduced during the 40th Parliament, 2nd Session, than in the current Session).



Note: The dotted line marks the 2015 election of the Trudeau government. While the graph on the left shows the total numbers of SPBs per legislature/session, regardless of their duration, the graph on the right indicates the number of SPBs introduced per month of legislature/session, making historical comparisons more relevant.

Recent examples of SPBs and PMBs that received royal assent include:

- Bill S-231, the *Journalistic Sources Protection Act*, introduced by Senator Claude Carignan on November 22, 2016, which received royal assent on October 18, 2017;
- Bill S-201, the *Genetic Non-Discrimination Act*, introduced by Senator James Cowan on December 8, 2015, which received royal assent on May 4, 2017;

²¹ Supra note 7, p. 26, 27.

- Bill S-226, the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, introduced by Senator Raynell Andreychuk on May 4, 2016, which received royal assent on October 18, 2017;
- Bill C-210, the *Act to amend the National Anthem Act (gender)*, introduced by MP Mauril Bélanger on January 27, 2016, sponsored in the Senate by Senator Frances Lankin, and which received royal assent on February 7, 2018; and
- Bill C-210, the *Act to amend the Canada Revenue Agency Act (organ donor registry)*, introduced by MP Len Webber on September 23, 2020, sponsored in the Senate by Senator Leo Housakos, and which received royal assent on Jun 21, 2021.

Other SPBs and PMBs were passed in one chamber and sent to the other, where they did not receive royal assent but influenced the legislative process. Examples²² include:

- Bill C-204, *An Act to amend the Canadian Environmental Protection Act (final disposal of plastic waste)*, introduced by MP Scot Davidson on September 23, 2020, passed by the House of Commons on June 2, 2021, and sponsored in the Senate by Senator Linda Frum; and
- Bill S-203, the *Protecting Young Persons from Exposure to Pornography Act*, introduced by Senator Julie Miville-Dechéne on September 30, 2020, and passed by the Senate on June 28, 2021.

Finally, several substantive SPBs and PMBs introduced in the current legislature²³ are progressing and have already had, or promise to have, a meaningful impact on Canadian public policy, including:

- Bill S-206, *An Act to amend the Criminal Code (disclosure of information by jurors)*, introduced by Senator Pierre-Hugues Boisvenu on November 24, 2021, which received royal assent on September 28, 2022;
- Bill S-211, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, introduced by Senator Julie Miville-Dechéne on November 24, 2021, and currently at the Third reading in the House of Commons;
- Bill S-216, the *Effective and Accountable Charities Act*, introduced by Senator Ratna Omidvar on November 24, 2021, which was incorporated in the government's *Budget Implementation Act* of 2022;
- Bill S-217, the *Frozen Assets Repurposing Act*, introduced by Senator Ratna Omidvar on November 24, 2021, which was also incorporated in the government's *Budget Implementation Act* of 2022; and

²² See also Bill S-204, the *Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking in human organs)*, introduced by Senator Salma Ataullahjan on September 30, 2020, and passed by the Senate on May 6, 2021; Bill S-222, the *Effective and Accountable Charities Act*, introduced by Senator Ratna Omidvar on February 8, 2021 and passed by the Senate on June 17, 2021.

²³ A total of 60 SPBs were introduced in the present legislature (44th Parliament, 1st session): 23 by the Independent Senators Group, 20 by the Conservatives, 8 by the Progressive Senate Group, 7 by the Canadian Senators Group and 2 by non-affiliated Senators.

- Bill S-223, *An Act to amend the Criminal Code and the Immigration and Refugee Protection Act (trafficking in human organs)*, introduced by Senator Salma Ataullahjan on November 24, 2021, which received royal assent on December 15, 2022.

Other SPBs and PMBs, currently at various stages of the legislative process, are also proposing to tackle substantial public policy issues and make meaningful contributions to Canadian society.²⁴ Senator Harder certainly agreed when he opined that SPBs are an excellent way for Senators to make “innovative and thoughtful contributions to public policy” by tackling “policy gaps unaddressed by the Government.” He further wrote that SPBs “may have significant influences on public policy by simply being proposed and debated” and added that SPBs “offer Canadians excellent policy value.”

Expanding on these different contributions, it’s possible to identify at least three policy objectives that SPBs can effectively pursue:

- Actualizing or accelerating the realization of specific government proposals included in electoral platforms or ministerial mandate letters;²⁵
- Tackling policy blind spots and emerging issues that the government fails to address; and
- Drawing attention to, and initiating public debate on, novel ideas, long-term legislative evolution, or politically difficult topics to expand the “Overton window” in Canada.²⁶

SPBs also have other, less visible benefits. Because they are individual initiatives that operate largely outside the structures of party politics and government legislation, SPBs provide an excellent opportunity for Senators to develop personal relations and work together in a non-partisan manner,

²⁴ One important example is Bill S-243, the *Climate-Aligned Finance Act*, introduced Senator Rosa Galvez on March 24, 2022. This substantial piece of legislation, developed in consultation with national and international experts, seeks to align Canadian financial activity with our climate commitments and is supported by over 80 NGOs. See: <https://bit.ly/3mRRG9y> Other examples of substantial SPBs and PMBs currently being studied include: Bill S-233, the *National Framework for a Guaranteed Livable Basic Income Act*, introduced by Senator Kim Pate on December 16, 2021, currently at Second reading in the Senate; Bill S-222, *An Act to amend the Department of Public Works and Government Services Act (use of wood)*, introduced by Senator Diane Griffin on November 24, 2021, which completed Second reading in the House of Commons on February 15, 2023; Bill S-245, *An Act to amend the Citizenship Act (granting citizenship to certain Canadians)*, introduced by Senator Yonah Martin on November 24, 2021, which completed Second reading in the House of Commons on November 16, 2022; Bill C-228, the *Pension Protection Act*, introduced by MP Marilyn Gladu on February 3, 2022, passed by the House of Commons on November 23, 2022, and which completed committee consideration in the Senate on March 7, 2023; Bill C-233, an *Act to amend the Criminal Code and the Judges Act (violence against an intimate partner)*, introduced by MP Anju Dhillon on February 7, 2022, passed by the House of Commons on June 1, 2022, and currently at Third reading in the Senate; and Bill C-242, the *Reuniting Families Act*, introduced by MP Kyle Seebach on February 8, 2022, passed by the House of Commons on October 26, 2022, which completed Second reading in the Senate on December 14, 2022.

²⁵ See for example Bill S-211, sponsored by Senator Miville-Dechéne, which introduced legislation “to eradicate forced labour from Canadian supply chains,” as specified in the Minister of Labour Mandate Letter dated December 16, 2021 <https://bit.ly/3Ubg240> and Bill S-217, sponsored by Senator Omidvar, which introduced legislation to “build on the Magnitsky sanctions regime to ensure increased support for victims of human rights violations by developing a framework to transfer seized assets from those who commit grave human rights abuses to their victims,” as specified in the Minister of Foreign Affairs Mandate Letter dated December 13, 2019 <https://bit.ly/3zxqvUy>.

²⁶ From the Mackinac Center for Public Policy: “The Overton Window is a model for understanding how ideas in society change over time and influence politics. The core concept is that politicians are limited in what policy ideas they can support — they generally only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window. Other policy ideas exist, but politicians risk losing popular support if they champion these ideas. These policies lie outside the Overton Window.” <https://www.mackinac.org/OvertonWindow>

including with Senators from the official opposition and other groups. Beyond their substantive policy value, SPBs can thus contribute to a more collaborative, collegial, and constructive legislative process.

For all these reasons, it would be a little disconcerting – not to say demoralizing – for independent Senators to adopt an even more limited view of their legislative role than that put forward by the official government representative. How can the Senate credibly defend its newfound independence if it claims an even narrower and deferential view of itself – including on SPBs – than that suggested by the government? As Professor Smith writes:

If it is the function of the Senate to detect and communicate the views and opinions that the representative system in the Commons fails to detect adequately, how may silencing or limiting the upper chamber in the performance of its (non-elected) mandate be defended? ²⁷

Senate Public Bills and Independent Senate Groups

How then should groups of independent Senators, including the Independent Senators Group (ISG), handle SPBs? In approaching this question, it may be useful to briefly consider what the ISG is and what it stands for.

The ISG is a diverse group of Senators with different backgrounds, interests, personalities, and political leanings. ISG Senators hold different views of their legislative and public roles, and they have different ways of balancing Senate business and external activities. Preferences for policy and legislative interventions vary, with some favouring more active participation and others a more discreet role. Clearly, the ISG cannot adopt a one-size-fits-all approach to its members' activities. Provided that their actions are proper, all ISG Senators should feel that their group accommodates and supports their work, however they wish to approach it.

Still there are, or should be, a few orientations common to all ISG Senators. One is the importance of Senate reform, whereby legislation, regulations and other rules pertaining to Senate business should be updated to reflect the new reality of independent Senators and multiple groups. Another point of agreement, flowing from the non-partisan nature of the ISG, should be the priority given to substantial debate over procedural delay. ISG members do not all agree on policy issues and do not vote in unison, but they should agree to prioritize substantive discussions and policy work over procedural tactics that obstruct progress. Senators are named and paid to study legislation on its merits and that is what they should do, out of respect for themselves, for the institution of the Senate, and for Canadian citizens and taxpayers.

Senator Harder also makes this point:

²⁷ Supra, note 12, p. 85.

In my view, all bills (government bills, PMBs and Senate public bills) deserve fair and timely consideration, and ultimately a democratic vote. I do not imply that all PMBs should be rubber stamped and given the green light. I merely state that these bills should be studied and voted on.²⁸

SPBs in an Ideal Senate

In an ideal world, procedural obstruction would not exist, and political debates would focus exclusively on substance. This should be the principled approach of a truly independent, non-partisan group of Senators: that all bills be studied and voted on in a fair and timely manner, regardless of their nature or provenance.

Of course, this does not mean all bills will be supported. It simply means that draft legislation will be considered, approved, or rejected on its merits. Some bills will pass, others will fail, but all will be given a chance. This approach would also appear to be the only one compatible with the nature of non-partisan groups of independent Senators, who should be allowed to approach their work as they see fit, without artificial bottlenecks or the subordination of their initiatives to the preferences of their colleagues.

Concretely, adopting such an approach to SPBs means that independent Senate groups would support the swift procedural progress and good faith substantive consideration of all SPBs, including those of other groups. In his 2018 article, Senator Harder wrote that this was, in fact, the policy of the government representative:

The GRO has abolished the practice of the Government sitting on Senate Public bills to horse-trade by upholding the principle that every bill is worth debating and worthy of a vote.²⁹

Once again it is worth asking: why should Senators show less respect and consideration for their own bills than the government is prepared to give them?

SPBs in the Current Senate

Unfortunately, the presently existing Senate does not typically work this way. Under the current system, where procedural progress requires consensus and where, as a result, each group holds an effective veto, groups often manoeuvre to block or “pair” bills to favour their political preferences: allowing progress on one group’s SPB is conditional upon that group’s agreement to allow progress on another group’s SPB, etc. Such pairing negotiations can become complex grouping exercises involving several bills of different nature and at different legislative stages.

Until the system is (hopefully) changed, independent groups have no choice but to play along and determine which bills they will horse-trade with other groups in these negotiation marathons. How then should groups go about identifying which bills they will offer to pair?

While different approaches are possible, non-partisan groups of independent senators should always respect one clear principle: the chosen method cannot focus on the substance of bills and cannot

²⁸ Supra note 7, p. 48.

²⁹ Ibid. p. 35 (note 59).

involve the subjective personal preferences of group members. To respect the diversity of perspectives within groups and avoid unnecessary conflict, the process of identifying and prioritizing bills subject to pairing negotiations should be transparent, predictable, and mechanical. Ideas and options for consideration include:

- prioritizing SPBs in accordance with the date on which they were introduced at First reading (first come, first served);
- implementing a lottery system to determine priority; or
- any other non-substantive mechanism that provides clear and non-discretionary guidance to the Scrolls and facilitation team.

In the context of SPB negotiations, the role of facilitation and Scrolls teams should be to support the procedural progress of all SPBs following a clear, simple, and non-substantive process. While this does not relieve SPB sponsors of their responsibility to promote, discuss, and attract support for their initiatives, the responsibility for ensuring that SPBs do not languish indefinitely in legislative limbo should at least be shared between the sponsor and the facilitation/Scrolls teams.

Final Considerations: The Senate and the Canadian Public

Amendments to government legislation, Senate studies and SPBs are among the most visible, substantive, and impactful ways that Senators can intervene in the Canadian political and legislative process. These contributions encapsulate a specific policy proposal that can be studied, debated, and easily communicated to the media and the public. SPBs, in particular, are an effective way of drawing the attention of civil society actors and of the government to an issue and spur policy changes. As Professor Smith writes:

The opportunity exists to help empower civil society, for unelected though it is, the Senate stands as an ally and not an opponent of the popular will. (...) Under a system of parliamentary government, the Senate must never replace the Commons and hold government responsible, but it may make government more responsive – and responsible – and, in that respect, help moderate public cynicism about politicians and the constitution.³⁰

We believe the role of SPBs should only be greater in an independent, non-partisan Senate made up of individuals with significant expertise and long involvements in a variety of causes. In this sense, limiting or stalling SPBs through internal vetting processes or procedural horse-trading would appear to run counter to the spirit of a reformed Senate and defeat the hopes placed in it. It would also be a missed opportunity to show Canadians what the Senate can do: improve legislation, initiate debate, and accelerate change.

³⁰ Supra note 12, p. 81, 86.