The Role of the Senate in the Legislative Process

by Senator John Lynch-Staunton

In recent years the Senate has played an increasingly active role in the legislative process and has been subject to much criticism for its efforts. This article argues that the Senate has played this role at various times since its origin in 1867. It also points out some recent developments that have changed the way the Senate works and how it is perceived in the legislative process.

The Senate's rejection of the 1913 Naval Bill is perhaps the best known example of its playing an active and partisan role in the legislative process during the early years of Confederation. From 1922 to 1930 the Senate amended 25% of all bills – both public and private – brought before it, and rejected 7% of them. From 1930 onwards and for over fifty years after that, the Senate was compliant and passive and rarely challenged decisions of the other place. The Coyne Affair in 1961 stands out as one of the few times the Senate reverted to its pre-1930 mode when it voted to support a committee report that a Commons bill declaring a vacancy in the office of the Governor of the Bank of Canada be thrown out and that Mr. Coyne be declared innocent of misconduct.

All this changed in 1988 when the Senate majority refused to allow a vote on the enabling legislation confirming the Free Trade Agreement. As the Agreement was to be in force on January 1, 1989, the government met the challenge by calling an election which it won in November. The Senate dutifully passed the enabling legislation a few days later.

The next five years were marked by unprecedented challenges to House of Commons bills, culminating in the GST debate, a sad spectacle of deliberate obstruction. When the Conservatives formed the Senate opposition following the 1993 election, they had 58 members, a comfortable majority. There was a strong temptation amongst many PC Senators to give as well as they took – in other words, to obstruct for the sake of obstruction. In the end, this approach, attractive as it appeared, was abandoned in favour of one intended to return the Senate to what it was originally created to be: a chamber of sober second thought, respectful of the decisions of the elected house, conscious of its responsibility to improve on them or, as the case may be, to warn of any legal and constitutional flaws to the point of defeating such bills if not corrected.

What actually happened, however, is that the Senate's role after 1993 has gone beyond its traditional one as the official opposition in the House of Commons failed in its role as a government-in-waiting in order to gain the con-

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fidence of the electorate. This has not been the case since 1993.

That year, the official opposition was made up of members whose objective was and is to break up the country, while in 1997 it was replaced by another regional party whose commitment to the traditional responsibilities of opposition in a parliamentary system was no stronger than its predecessor's.

Just consider the treatment of major legislation by the opposition in the House since 1993. Overall, it has been motivated by narrow political objectives. One example of this is its treatment of the Nisga'a Bill. There was little questioning or debate on the content of the agreement, but when it came time to vote at report stage, the official opposition, in an unconscionably excessive use of the rules forced nearly five hundred votes without interruption over a three-day period.

The treatment of the Pearson Airport Bill is but the most prominent earlier example of the opposition in the other place ignoring the offensive content of the Bill as it preferred instead to thrive on the political difficulties of supporters of the previous government. The Bill not only cancelled a contract – which by itself is legally acceptable – but denied the right of those affected by the cancellation to seek damages in court. Any compensation was limited, to be fixed by the Minister and not subject to appeal.

The opposition joined the government in lambasting its predecessors over its interpretation of the contract and supported the bill without any regard to the fundamental rights which it denied.

I do not hide the fact that my initial reaction and that of my caucus colleagues was somewhat defensive and that our opposition to the bill was flavoured with irritation over the treatment of its targets. This being said, our major concern at all times was that the bill violated the rule of law. I will spare you more on this bill except to say that, after months of trying to get it through the Senate, the government failed. Ironically, the first to show great satisfaction was the spokesman of the Reform Party in the Commons, the one party which after the government was the bill's most enthusiastic supporter. He candidly admitted that information on the contract and the questionable constitutionality of the bill itself had not been properly brought before the House which had been taken in by the perverse satisfaction derived from bashing the previous government.

For the last thirty years, the House of Commons, wittingly or not, has ceded much of its authority to the Governor-in-Council which in reality means the Prime Minister's Office. The concentration of powers held in the Langevin Block by unelected members of the PMO is extraordinary. The House has only itself to blame. Repeatedly, major legislation is drafted more as an outline of an objective, with the details of its implementation delegated to the Governor-in-Council through regulations. These are regulations which are not always submitted to Parliament prior to publication. It has reached the point where the *Canada Gazette* is becoming the authority on legislation, not Hansard, a sorry state indeed.

This concentration of power combined with a Commons official opposition not fulfilling its traditional role has led to many bills being sent to the Senate which have not been given proper scrutiny in the other place.

The government's attempt during debate on the Clarity Bill to limit the number of amendments to any bill was understandable, but still wrong. If it had succeeded, it would only have diminished even more the House opposition's participation in legislative scrutiny and increased that of the Senate.

Let me also refer to the government's attempt to delay the electoral boundary redistribution process which is required following every ten-year census. The legislation passed the House with little debate except for individual concern regarding its impact on the next election. The Senate in turn raised serious objections to it because it did not meet the constitutional obligations regarding redistribution.

It and the Pearson Bill failed, and they are the only two pieces of legislation which have come before the Senate in the six years that I have been Leader of the Opposition where a deliberate attempt was made to defeat legislation. Why? Simply because they did not meet basic constitutional tests, a view supported by many witnesses before the committee studying these two bills. The Senate succeeded where the House failed.

I can sympathize with the difficulties a minister encounters in moving along a major piece of legislation. Many hurdles must be overcome: the department itself, caucus, Treasury Board, the Prime Minister's Office and the various stages a bill goes through before a House of Commons vote. When this last step is taken, usually many months later, too often the Minister and his office feel that the battle is over and that the Senate will confirm the elected chamber's decision with little or no question.

At one time, this may well have been the case, but no longer because, to put it in blunt terms, the House is not doing its job properly when it comes to assessing a bill.

Too frequently, bills come to the Senate which have drafting and translation errors and are missing important clauses. I speak here not of policy, only of the fundamental mechanism of drafting and the constitutionality test. The fact is that it is difficult to draft legislation today. Ministers sit around the cabinet table each with ideas competing for legislative form. When one is given the green light, usually only the germ of the idea is conveyed

to the drafters who are then under extreme time pressure to produce legislation which when given first reading, sometimes shows too many signs of hasty preparation.

In the House, both in committee and in chamber, the opposition parties are not so much interested in improving legislation, as they are in scoring political points – and the Minister, because of growing impatience in getting to a final vote, is rarely receptive to amendments unless they are presented by the government itself. What too frequently results, is that many bills are simply not getting the thorough examination they deserve which allows for major and minor flaws getting through. Ironically, it is an appointed body – much maligned and ridiculed – which in recent years has by its own diligence substituted for the official opposition in the other place. This claim applies to all senators, not just to those who sit to the left of the Speaker.

So if there is an unwelcome delay in responding to a House decision, or if a Bill is returned with amendments, the Senate should be commended for doing its work properly and the House faulted for being delinquent. Many ministers do not appreciate what they consider irresponsible interference by unelected busybodies, but at the end of the day, they have to recognize that the Senate acted in their best interests.

Witnesses who appear before House and Senate committees on the same legislation are struck by how different the environment is one from the other. In the House, questions to the witness are a thinly disguised way of promoting a party's political agenda. A questioner has but a few minutes to ask anything, seldom is there a good exchange as too many members want to participate in the short period available. In a Senate committee, time is a factor, but not a straight-jacket. Senators go to the heart of the matter, and usually in a collegial way. Both witness and Senate profit from the exercise, unlike in the House where a witness often leaves in frustration.

As I mentioned earlier, the best recent example of this came with the Nisga'a Bill - C9. The Minister for Indian Affairs appeared before the Senate Committee which is examining C-9 and here are part of his remarks at the end of his testimony.

> "...we had a lot of difficulty in the other place in getting down to the facts of the treaty. We were very annoyed about the fact that we did not get to talk about the particular clauses and the chapters and what they mean in the other place. I think that was a disservice to Canadians and British Columbians."

What struck the Minister is that the Senate committee wanted enlightenment on the Bill itself, and he left impressed and I daresay somewhat taken by the fact that Senators not only had a good grasp of a most complex and controversial issue, but were able to engage in an exchange of views beneficial to all.

That, in a nutshell, is how the role of the Senate in the legislative process has evolved, not through any ideas of self-aggrandizement, but because of a lack of purposeful, thorough study and analysis of legislation by the official opposition in the House of Commons. It is not a task the Senate sought, it is one it had no choice but to take on. Otherwise, our statute book would be replete with seriously flawed, even constitutionally faulted legislation.

I cannot resist pointing out, in closing, that anyone accepting the basic premise behind these remarks has to be struck by the fact that it is the appointed body which is being more diligent in the legislative process than the elected one. Would the same be true were the Senate elected?

You can expect the Senate to continue to assess legislation critically. This will mean upsetting sponsoring ministers who anxiously await Royal Assent. More important, however, it will mean better legislation, and fulfill the Senate's original purpose as set out by John A. Macdonald in 1865:

> "There would be no use of an Upper House, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people."

I like to think that were John A. with us today, he would be more than satisfied with the way the Senate is carrying out its responsibilities.