

The Renewed Canadian Senate: Organizational Challenges and Relations with the Government

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ABOUT THIS STUDY

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SUMMARY

The Senate of Canada's relationship with the government and its functioning have evolved considerably since 2015, when the Liberal government announced it would implement a new "non-partisan, merit-based" process for Senate nominations. With the elimination of patronage as a key criterion for appointment, senators in the Independent Senators Group (ISG) are now a majority of the Senate's members (58 of 105 seats as of May 2019). In the process, the Senate has become more independent. In contrast to concerns expressed by some critics of the reforms, Emmett Macfarlane's assessment is that the Senate has navigated the changes successfully. It has not attempted to block legislation outright or engage the House of Commons in repeated "ping-pong" of bills. Although there has been a notable increase in the number of amendments proposed, the Senate has routinely bowed to the wishes of the House (and the government) in either accepting or rejecting amendments.

However, there are clear signs that a more independent Senate has made the legislative process more challenging and complex for the government. One of the most significant challenges the government has had in getting its legislative agenda through the second chamber has been organizational: with the majority of senators no longer in a party caucus, the benefits of getting large groups of senators "on the same page" have been lost. Government ministers quickly learned that they need to work harder on certain bills in order to ascertain and respond to senators' concerns, and gain their support. Public servants have also had to alter their work in some instances – for example, by providing a greater number of technical briefings to smaller groups of senators, a reflection of the range of opinions within the ISG. Finally, the Office of the Government Representative in the Senate (a new position, created in 2016) has played an important role in shepherding legislation through the second chamber, and negotiating timelines and votes.

Macfarlane concludes that some of the so-called difficulties may be a feature of the changes to the Senate, not a bug. A more independent Senate – one that is more responsive and active – will inevitably create more work for the government and add to the complexity of the legislative process. No longer negatively implicated as a patronage or even partisan institution, the Senate may witness a renewed legitimacy. It nonetheless remains in a period of transition, and future rule changes may be necessary to cement its evolution.

RÉSUMÉ

Le fonctionnement du Sénat et les relations du Sénat avec le gouvernement ont sensiblement évolué depuis que le gouvernement libéral a annoncé en 2015 l'instauration d'un nouveau processus de nomination « non partisan et fondé sur le mérite » à la Chambre haute. Avec la suppression du favoritisme politique – élément clé de l'ancien processus –, le Groupe des sénateurs indépendants (GSI) détient maintenant la majorité des sièges (58 sur 105 en mai 2019) d'un Sénat désormais plus indépendant.

Contrairement à certaines voix critiques qui s'inquiètent de cette transformation, Emmett Macfarlane juge favorablement les changements adoptés. Le Sénat n'a tenté de bloquer ouvertement aucune disposition législative, pas plus qu'il n'a entraîné la Chambre des communes dans un aller-retour incessant pendant l'étude des projets de loi. Et si le nombre des modifications qu'il a proposées a notablement augmenté, il s'est chaque fois plié à la volonté de la Chambre (et du gouvernement) de les accepter ou de les rejeter.

Mais pour le gouvernement, l'indépendance plus grande du Sénat a manifestement accru l'exigence et la complexité du processus législatif. Il s'est notamment heurté à un problème organisationnel pour faire adopter son programme législatif par le Sénat : la majorité des sénateurs n'appartenant plus à un caucus de parti, le gouvernement ne pouvait plus compter sur un bloc de sénateurs qui étaient « sur la même longueur d'ondes » que lui. Les ministres ont vite compris qu'ils devaient intensifier leurs efforts pour s'informer de l'avis des sénateurs sur certains projets de loi, répondre à leurs interrogations et obtenir leur appui.

Pour leur part, les fonctionnaires ont constaté qu'il leur fallait parfois adapter leurs méthodes, en multipliant par exemple les séances d'information technique pour des sénateurs réunis en petits groupes, qui représentaient l'éventail des points de vue au sein du GSI. Enfin, le nouveau Bureau du représentant du gouvernement au Sénat (créé en 2016) a joué un rôle important en assurant le suivi des projets de loi et en négociant les calendriers.

En somme, conclut Macfarlane, certains des prétendus problèmes soulevés par la transformation du Sénat pourraient constituer une fonctionnalité plutôt qu'une source d'ennui. À la fois plus dynamique et réceptif, un Sénat plus indépendant imposera inévitablement un surcroît de travail au gouvernement et ajoutera à la complexité du processus législatif. Mais délesté de son rôle négatif d'institution clientéliste ou simplement partisane, le Sénat pourrait fort bien retrouver une légitimité perdue. Il n'en reste pas moins en pleine transition, et d'autres changements à ses règles seront sans doute nécessaires pour consolider cette évolution.

INTRODUCTION

During the 2015 federal election campaign, the Liberal Party under Justin Trudeau promised a new “nonpartisan, merit-based” appointments process for the Senate of Canada. Once the Liberals formed government, an independent advisory committee was established to submit names to the Prime Minister for consideration. Modelled on existing judicial appointment advisory committees and the short-lived Advisory Committee on Vice-Regal Appointments, the Senate appointments body, the Independent Advisory Board for Senate Appointments, is composed of at least five members: three permanent federal members and two members from each province or territory where a vacancy is to be filled (Office of the Prime Minister of Canada 2016).¹ A key part of the reform was to eliminate patronage as a criterion for appointment, to reduce partisanship and to increase the independence of the Senate. Senators in the Independent Senators Group (ISG) now form a majority of the Senate’s membership (58 of 105 seats as of May 2019).

This study investigates how the Senate’s functioning has evolved since 2015, with specific attention to the relationship between the government and the second chamber. It finds that, contrary to the concerns expressed by some critics, the Senate has successfully navigated the changes to its composition. Although there are clear signs that a more independent Senate has made the legislative process more challenging and complex from the government’s perspective, it has not been unduly obstructionist. By obstructionist, I mean that the Senate has not attempted to block legislation outright or engage in repeated “ping-pong” of specific bills with the House of Commons. While there has been a notable increase in amendment activity, the Senate has routinely bowed to the wishes of the House in either accepting or rejecting amendments.

One of the most significant challenges relating to getting the government’s legislative agenda through the second chamber has been organizational: with the majority of senators no longer in a formal party caucus, the institutional benefits of getting large groups of senators “on the same page” have been lost. Government ministers quickly learned that they needed to work harder to ascertain, keep track of and gain senatorial support for certain bills. Public servants have also had to work harder in some instances, providing more technical briefings to smaller groups of senators, reflecting the disparate range of opinions and lack of the information flows that previously existed within parties. Finally, the role of the Office of the Government Representative in the Senate has been important for shepherding legislation through the Senate and efficiently negotiating timelines and votes.

The study begins with a brief examination of criticisms of the reform, and critics’ concerns about a renewed Senate’s potential for activism and dysfunction. It then assesses the Senate’s general performance in this vein by examining its record thus far. The progression of two controversial bills is then explored from the perspective of key

¹ I provided nonpartisan, unpaid advice to the government on the role, design and process of a new appointments process. This included the drafting of a proposal that became the basis for the reform.

players in order to provide a snapshot of some of the legislative challenges faced by the renewed second chamber. The bulk of the study then analyzes the evolution of the Senate's organization and the challenges it and the government have faced as the number of independent senators has grown. The study concludes with an assessment of existing challenges and the prospects for the role of a renewed Senate in the future.

The analysis that follows draws on 10 interviews conducted from August 2018 to March 2019 with the following: Senator Peter Harder, Government Representative in the Senate; Senator Yuen Pau Woo, Facilitator of the Independent Senators Group; Senator Joseph A. Day, Senate Liberal Leader; Senator Yonah Martin, Deputy Leader of the Opposition in the Senate; a senior staff member in the Office of the Leader of the Opposition in the Senate; and five not-for-attribution interviews with senior public servants in federal government departments and central agencies. The analysis incorporates their views on the Senate's functioning and the evolution of its relationship with the government.

A NEW APPOINTMENTS PROCESS, A NEW SENATE ACTIVISM?

Critics of the Liberal government's reforms to the Senate appointments process have argued that eliminating partisanship as a key criterion for selection would render the second chamber even more undemocratic, more activist or simply unworkable (Canadian Press 2015; Coyne 2016; Dodek 2015). Legal scholar Adam Dodek warned that a lack of partisanship may make organization of the Senate difficult:

Politics is a team sport. There are only so many mavericks who have the personality to be lone wolves. Most of us want and like to be part of a group – especially those who are attracted to public service.

Eradicating partisanship may also be undesirable. What the Trudeau government will have to come to grips with is that the Senate is not an expert panel of independent, diverse voices – although it may serve this function at times, and serve it well. The Senate is a critical and constitutional part of the day-to-day process of legislating in Canada. It is needed to pass the government's legislation. (Dodek 2015)

Not long after the first round of appointments under the new system, columnist Andrew Coyne complained that the Senate's willingness to propose amendments to a number of bills constituted an "anti-democratic outrage" (Coyne 2016). Writer Gordon Gibson warned that the situation was a "constitutional crisis waiting to happen" (O'Neil 2017). The concern was that, if the independence of the Senate was emphasized, senators would be emboldened by a newfound perceived legitimacy that would encourage activism.

In terms of its overall behaviour in the current Parliament, one early study suggests the Senate's amendment "activism" is not significantly greater than in other modern

parliaments (Macfarlane 2019). There are different ways to analyze amendment activity, including as a percentage of bills introduced or as a percentage of bills that receive royal assent. It is therefore difficult to make meaningful comparisons across parliaments until the current one is dissolved. As Paul Thomas notes, statistics need to be interpreted cautiously, and numbers alone do not indicate whether proposed amendments are substantive or technical, nor do they provide “the wider political context in which the Senate was attempting to modify a given bill – for example, whether the same party controlled both houses” (Thomas 2019, 24). Nonetheless, by the end of June 2018, the Senate had amended 14 bills, all but one of which were government bills. Thus, government bills amended represented 14.2 percent of total government bills introduced. This is a greater amendment rate than in other recent parliaments, whether under the majority Liberals in the 37th Parliament (2001-04), at 10.7 percent, or under the minority Conservatives in the 39th Parliament (2006-08), at 10.2 percent (Heard 2014, 146). By contrast, in comparison to the first 41 years of the Senate’s existence, when it amended 21.5 percent of bills and rejected another 2 percent, the current amendment activity seems light (Ross 1914, 76). The absolute numbers demonstrate that the overall amendment activity is far from astronomical: 14 amended bills is in line with any number of recent parliaments, including the 33rd (18), 35th (14), 36th (10), 37th (14) and 39th (9).

More significantly, the Senate has not acted obstructively by outright rejecting legislation (something that has occurred only five times since 1988), imposing severe delays on the passage of bills or playing multiple rounds of “ping-pong” by repeatedly returning bills to the House with amendments. In fact, for every bill the Senate passed with amendments under the current Parliament except one (a transportation bill²), either the Senate’s amendments were accepted by the House or, if its amendments were rejected, the Senate dutifully passed the legislation as originally passed by the House.

If it is clear that the new Senate has not been particularly obstructionist, it is less clear whether its increasing independence has made the legislative process more difficult.³ In the following sections, I explore the extent to which the executive – ministers and public servants – have had to adjust to the new realities of a larger, more diverse group of nonpartisan senators, and how the senators themselves have adjusted to their newfound independence.

TWO SNAPSHOTS OF LEGISLATIVE WRANGLING: BILLS C-45 AND S-3

As the number of independent senators increased over time, the executive and, in particular, public servants tasked with helping usher legislation through the second

² The Senate returned Bill C-49 to the House with 18 amendments. The House accepted two amendments, modified three others and rejected the rest. The Senate Conservatives and a handful of independent senators insisted on sending the bill to the House a second time with two further amendments, something the second chamber had not done since 2006. The House rejected the amendments and the Senate then passed the bill (Canadian Press 2018).

³ For context, see a recent report by the Institute for Research on Public Policy (2019).

chamber have faced a host of challenges. With most senators no longer part of partisan caucuses, the highly individualized environment of the new Senate means technical briefings by public servants on complex or highly salient bills are often given to small groups or even one senator at a time. Tracking support on contentious legislation is increasingly difficult. And procedural surprises, whether the result of the disparate views of individual senators, the relatively high number of inexperienced senators (partly due to the high number of vacancies in the Senate at the time the Liberal government came to power) or an emboldened Conservative opposition have, in the view of some observers, caused additional complexity and delays.

These difficulties presented themselves during the course of the current Parliament in relation to a number of bills, two of which I explore here. In interviews with relevant players, the processes affecting these particular bills were identified as generally representative of the challenges faced by the renewed Senate; they also faced a relatively high level of media scrutiny.

Bill C-45

Bill C-45 legislated the legalization and regulation of marijuana sales. It was introduced in April 2017 and did not receive royal assent until June 2018. From the perspective of some interviewees who were closely following the marijuana file, the process in the House of Commons was carefully choreographed. The Standing Committee on Health met for intense marathon sessions that began before the House returned from summer break, ultimately proposing amendments supported by the government and the NDP. The Senate process stood in stark contrast; the bill was eventually referred to five different committees for in-depth study, a move one public servant described as “kind of unprecedented.” The mandates of the various committees cut across “umpteen” ministers’ portfolios, with several ministers appearing more than once before committees (public servant interview). There was also a constant threat that the Senate would reconvene the Committee of the Whole, where the entire Senate membership sits as a committee, to invite additional ministers.

Bill C-45 was viewed by some observers as a test case at a time when the Senate was trying to figure out its future. Some interviewees, though not all, described the C-45 process in the Senate as “not pleasant” and “harrowing.” Public servants, who had to provide all materials to support the Senate’s review of the bill and support their minister, were involved in unusually intensive outreach to senators. The highly individualized nature of dealings with the ISG members in particular appears to have generated a sense among those involved that this was a marked departure from what was usually necessary under the old partisan Senate. According to one public servant, the new process “frankly felt almost American” (interview).

Officials at Health Canada worked closely with Department of Justice counterparts to help steer the bill through the second chamber, and one public servant noted that “I think they [Justice] had enough experience to forewarn us that the Senate was an independent beast.”

The government delayed its initial timelines for cannabis legalization as a result of the extensive Senate scrutiny. (The original target date was July 1, 2018, which was pushed back to October 17, 2018.) The Senate ultimately proposed 46 amendments to Bill C-45, many of which the government accepted. Thirteen of the Senate's substantive amendments were rejected, including a proposal to affirm the right of provincial governments to ban home cultivation, a provision to create a public registry of investors in cannabis companies and a ban on the distribution of logo-branded pot merchandise. Notably, a late motion in the Senate to return the amendment on banning home cultivation to the bill a second time was defeated 45 to 35. That same day, the Senate voted to pass the bill in a 52-29 vote.

Some of the senators apparently required an explanation of why "reasons" were not attached by the House of Commons when amendments were rejected (public servant interviews). Certain senators also seemed to behave as if ministers of the Crown were "somehow accountable to them, instead of to Canadians" (interview). There is a widespread view among different actors familiar with the process that Senator Harder, Government Representative in the Senate, worked to educate senators that their role is to scrutinize but not to hold ministers to account (i.e., the difference between proposing amendments and demanding that ministers or the House provide "reasons").

It is unclear just how concerned the government was during the C-45 process about the prospects for obstructionism or the threat of a "ping-pong" match with multiple rounds of amendments. Some interviewees noted that a long back-and-forth process was unlikely, while others were concerned about mischief and aggressive tactics by the Conservative opposition. The Conservative senators operated as a block and engaged in activities such as bringing props to committee or less than respectful questioning. Three Conservative senators even travelled to Washington to speak with United States Attorney General Jeff Sessions about Canada's pot legalization (Blais-Morin and Zimonjic 2018).

Bill C-45's sponsor in the Senate was Tony Dean, who publicly noted that he thought the Senate functioned well throughout the process (Zimonjic 2018). Dean is credited by observers with taking a read of the situation and doing what was required to navigate the new political reality in the second chamber, ensuring that people were briefed and attempting to have a constructive, nonpartisan discussion.

Yet it is Senator Harder who is cited as instrumental in getting agreement on a timeline and holding the final vote (public servant interviews). This is something even the opposition Conservatives acknowledge. A senior staffer in the Office of the Leader of the Opposition in the Senate, who cited Bill C-45 as an example of negotiation showing how the Senate has generally been functioning well, points out that "until [Harder] stepped up for proper negotiation, the bill wasn't going anywhere....There were some trust issues" (interview). While public servants and members on different sides of the issue generally thought the C-45 process proved effective, not everyone was satisfied. Independent Senator André Pratte was angry the bill passed without the more sub-

stantive amendments posed by the Senate and questioned whether the government took “amendments into consideration seriously” (Zimonjic 2018).⁴

Bill S-3

Bill S-3 dealt with registration of Indian status under the *Indian Act*. It was introduced in the Senate because of a backlog in the House, so it should have received the same treatment accorded to any government bill introduced in the House. The legislation was in response to a Quebec Superior Court decision that existing registration rules violated section 15, the equality rights provision of the Canadian Charter of Rights and Freedoms. The old rules meant Indigenous women who married non-Indigenous men lost their status, while Indigenous men who married non-Indigenous women did not. Bill S-3 was intended to resolve the issue of treating the female line the same as the male line.

The technical complexity of the legislation presented many of the same challenges for the government and public servants as Bill C-45. It was difficult to explain to senators and other stakeholders why the rules were drafted the way they were. There were many more technical briefings than usual, with more independent senators, who had more fractured views (public servant interview). The office of the Minister of Health was also more involved than it normally would be. The government adopted a two-stage approach to the broader inequities in the *Indian Act* registration process. The immediate issue was to be addressed under Bill S-3, with consultation on broader issues to continue (this is ongoing).

The government also needed the legislation to move quickly because the court initially gave it only 18 months to resolve the constitutional issue. However, as a result of Senate opposition to the bill, the government was forced to request an extension on two separate occasions. Witnesses appearing before the Standing Senate Committee on Aboriginal Peoples were generally very critical of the legislation, wanting more inclusive language that went beyond the court’s requirements, something many senators picked up on. The bill initially sought to reverse discrimination for individuals who lost their status since 1951. An intensive period of negotiation followed, and the government agreed to some amendments, while rejecting others, in order to get the bill passed.

Among the Senate’s amendments to the bill was a provision implementing the new rules in all cases dating back to 1869. The government agreed to implement the change, though only after a consultation period which remains ongoing (Indigenous and Northern Affairs Canada 2019). According to estimates by the Parliamentary Budget Officer, up to 35,000 Canadians were immediately eligible to register as status Indians at a cost of roughly \$55 million in annual benefits. Once the new rules permit

⁴ The comments from Senator Pratte are interesting because they came after a speech he made during debates on the second version of the bill in which he spoke in opposition to another vote against the bill (see Thomas 2019, 26-7). In other words, although Pratte was unhappy with the government’s substantive decision to refuse certain amendments, he did not believe the Senate’s role was to obstruct the will of the House.

registration for family lines going back to 1869, as many as 670,000 individuals will be eligible (Forrest 2017).

Like Bill C-45, the process under Bill S-3 left those involved with the clear impression that the new Senate presented distinct challenges. One public servant interviewed had never been involved in a bill with so many amendments put forward by the second chamber. Some within government interpreted this as showing that the current Senate may be less deferential toward the views of government or the House; senators seem more willing to play an active role and attempt to represent voices that have not always been heard.

Interviewees noted that the Bill S-3 process highlighted a spike in lobbyist activity and the apparent openness of some senators to lobbyists and stakeholders. There is a clear perception among public servants that the impact in this area is different or more significant than in the past (interviews). This perception is borne out by data beyond the Bill S-3 process: records from the Office of the Commissioner of Lobbying show that lobbyists made contact with senators twice as often in 2017 as in 2016, and six times as often as in 2015 (Smith 2018). Most of these contacts involved independent senators. At a 2018 Institute for Research on Public Policy (IRPP) round table on the Senate, Elizabeth Roscoe noted that lobbying communications with senators numbered roughly 450 a year from 2011 to 2014; that number rose to 700 in 2016 and 1,450 in 2017. At the same round table, Yaroslav Baran noted that, where lobbyists previously focused their activity on ministers and opposition leaders, independent senators have become more of a focal point because they “are more concerned with substance and can respond to stakeholders’ views by amending legislation or influencing other politicians” (Institute for Research on Public Policy 2019, 11).

As is apparent from this brief account of two high-profile bills’ progressions through the second chamber, the increasing complexity of the new Senate environment has presented challenges for the executive. However, it is important not to overstate the dynamics at play. The majority of government bills presented to the Senate have progressed with little of the drama associated with the prominent pieces of legislation just reviewed. Nonetheless, the Senate’s record so far and the relevant actors’ views on how the less partisan, more independent culture is working raise a number of questions: How is the Senate organizing itself to adjust to its new composition? How is the government – from ministers to public servants – reacting and cultivating the new relationship? And finally, what do the current challenges mean for the future of the Senate and its relationship with the government?

ORGANIZATIONAL CHALLENGES: THE SENATE IN TRANSITION

One of the most direct consequences of the reform to the Senate appointments process is that a majority of senators no longer have a partisan affiliation. The ISG is now the largest group of senators, with a majority of total seats. The purpose of the ISG is not to act as a caucus or even as an ideologically coherent faction; instead, it exists to

protect the independence of senators and to provide a structure for the representation of nonpartisan members in the broader coordination of the second chamber's work, including the composition of committees. The ISG has a facilitator (loosely analogous to the leader of old government or opposition caucuses) whose role is to represent and help coordinate the group's interests.

This organizational mandate means that the ISG should not be regarded as a traditional caucus. There are no whipped votes. In fact, the independence of individual ISG members is prized. One result is that, in the initial year or two following the reforms, information flows and organization in the context of the legislative process were challenging. Under the traditional partisan Senate, senators generally sat as members of the governing or opposition caucus, where they received political briefings on various pieces of legislation and coordinated partisan messaging surrounding the government's legislative agenda. Senators appointed under the new system do not coordinate their actions on the substance of individual bills in this manner. This reality accounts for many of the organizational difficulties that presented themselves in relation to Bills C-45 and S-3.

The ISG has taken steps to address some of the organizational and information-sharing difficulties. It is developing practices to coordinate the sharing of knowledge and expertise in scrutinizing bills through the use of secretariat resources and voluntary measures. Information and outreach data are compiled on shared drives for ISG members to access. Senators with special interests in particular files will take the lead (sometimes as the sponsor of a bill) to help keep colleagues up to date. These innovations stem from the recognition that individual senators do not have the time or resources to comprehensively scrutinize every piece of legislation. They are thus beginning to learn to rely on colleagues to share the burden and prevent duplication of efforts.

According to Senator Woo, the facilitator of the ISG, there is an expectation that, over time, as these forms of coordination are implemented, the problems faced by public servants will become less acute and will require less hands-on management and fewer technical briefings to small groups or individual senators (interview).

These coordination efforts are procedural. None of the organizational endeavours imply that ISG members will adopt similar substantive views on pieces of legislation or that the coordination affects how they will ultimately vote. Yet it is significant that the ISG recently adopted the *Charter of the Independent Senators Group* as a way of formalizing its organization, its role and the responsibilities of the facilitator and deputy. The Charter explicitly limits the ISG membership to nonpartisans, which precludes anyone who is a member of a recognized party, parliamentary group or caucus of the House of Commons, or who has direct involvement in the activities of a recognized political party registered under the *Canada Elections Act*, including public endorsements or fundraising for political parties or one of their candidates (Independent Senators Group 2018). The Charter outlines the purpose of the ISG as follows:

Members of the ISG have joined together for the purpose of affirming and protecting each Senator's freedom to vote as he or she sees fit in respect of

their parliamentary duties, and to enhance the ability of individual Senators to conduct their functions as parliamentarians. By sharing expertise, pooling resources and providing mutual support, ISG Senators:

- a) contribute to the planning and coordination of Chamber business and committee work;*
- b) share information and assist ISG Senators with their administrative needs;*
- c) coordinate collective action on issues related to Senate administrative processes and practices that the ISG has designated or may designate, as the case may be, as priorities or matters of common importance to all members of the ISG;*
- d) respect that each Senator can only fulfill the role of Senator if she or he maintains their right to express views that are aligned with the Senator's own judgment;*
- e) build on ongoing efforts to modernize the Senate in terms of its culture, rules and practices, in order to strengthen the work of the Senate as an effective, respected, and non-partisan Chamber of sober second thought that is complementary to the House of Commons. (Independent Senators Group 2018)*

In view of these efforts, Senator Woo suggests that some of the problems faced by senators and public servants during the C-45 or S-3 processes might be transitory.

From the perspective of Senate Liberal Leader Joseph Day, a lot of the adjustment stems from both the rapidity of the reform and the lack of a clear idea of what the Senate should look like after the changes to the appointments process. Day notes that "part of reacting to Mr. Trudeau's decisions was a lack of guidance on where we should go...we're struggling with procedure often when it would be better to get into the substance of how things should be changed." The considerable number of new appointees has also made it difficult for the ISG to adjust, according to Day: "the learning of the role of senator and being given the opportunity and time to develop an appreciation of how the individual can participate and contribute is not as smooth a transition as it could be or should be....In Mr. Harper's time, when he appointed a larger number at one time, filling a big number of vacancies, they came into the Senate and we noticed the same thing. The ability of these individuals to be nurtured along, to learn the process and to appreciate the unwritten but important aspects of the Senate were lost" as a result of the sheer number of new senators (interview).

Procedural adjustments are not the only factors influencing the evolution of the renewed Senate. Two other variables are significant: the composition of the Senate – the size of the ISG, especially relative to the size of the opposition Conservative caucus – and the relative inexperience of the recently appointed senators. Each of these factors has influenced the posture different senators have adopted in relation to bills. Further, they are factors that the government and particularly the Government Representative in the Senate have had to account for when steering legislation through the second chamber.

When Senator Harder was appointed as one of the first seven independent senators, the Conservatives enjoyed a majority in the Senate and on every committee (as well as chairing most of them). As the government representative, Harder was tasked with getting the various Senate leaders to agree on managing major bills, particularly by having conversations with then leader of the Opposition, Claude Carignan, in order to allow votes to take place and to prioritize certain bills. A prominent example of this early legislation was Bill C-14, which legislated eligibility requirements and laid out certain regulations for medical aid in dying. Harder notes that “we were able to get an agreement amongst the leaders on how we would manage the bill – I do think it worked quite well” (interview).

Over time, as the independents grew and eventually outnumbered the Conservatives, adjustments were necessary. Senator Harder and the ISG reached interim agreements with the Conservatives about the composition of committees, in order to achieve greater proportionality of representation. There is a clear sense from Harder that while in some ways the increasing number of independents made the job easier, it also freed the Conservatives to oppose legislation more stridently. As he explains, the Conservatives could “exercise their opposition stance without fear of defeating legislation because of numerical superiority” (interview). Harder cites Bill C-45 as an example of this: the opposition members voted against the bill at both second and third readings, which was fairly unusual (interview). “In an odd way,” Harder states, “both procedurally and substantively, the Conservatives [have flexed their] muscles more” as their numbers have fallen (interview). Despite this, negotiations between the various caucus and group leaders on C-45 ensured the Bill’s relatively timely passage. This reflects a broader context of consultation among the Senate’s leadership. Senator Day notes, for example, that the various leaders meet every Tuesday morning (during sitting weeks) to discuss priorities and challenges; he argues that this spirit of cooperation among the four leaders (Harder, Day, Smith and Woo) has been very helpful (interview).

The Conservatives have a different perspective. In the view of Senator Martin, it is ISG members whose behaviour has changed as their numbers have grown, in part due to an expectation that simple majority rule would make it easier to get what they want done at the committee level and on the Senate floor. Some of the rules that give minority parties power, especially power to complicate procedural matters, have, in Martin’s view, proven frustrating for the ISG. Examples of such rules include the facts that the time allocation rule can be applied to only one stage of debate on an item if there is no agreement between parties and that every senator can introduce a variety of motions during debate. (Martin notes that these rules also frustrated the Conservatives when they held the majority.) According to Martin, the result is that trust has eroded on committees as ISG members have sought to change rules, and this erosion of trust has affected day-to-day sittings (interview).

Senator Woo notes that the opposition has generally wanted to show that they are being a good opposition while also not wanting to create a dysfunctional Senate (interview). However, in some ways the increasing membership of the ISG makes Senator Harder’s job more difficult. Where Harder could reach an agreement with Conservative opposition leaders (previously Senator Carignan, now Senator Larry Smith), the

government representative and the facilitator of the ISG “can’t have the same conversation as he has with the opposition leader,” Woo points out, “because I don’t whip my members” (interview). Negotiations on timelines and prioritizing certain bills will undoubtedly become more complicated in a context where the “leader” cannot reliably speak for the group, or even necessarily predict the behaviour of its members.

Senator Day largely concurs, but notes that a lack of support from the government has made Senator Harder’s job more difficult than need be. “He’s performing something we’ve never had before. That would be a difficult job for anyone to do. He had no experience in the Senate...He’s not, in my view, given the support of government for him to carry out the role it would appear he’s expected to perform. So he’s sitting there learning his job every day, and he’s a capable person and is adjusting nicely, but it has not been an easy road for him.” Day argues that Harder could do the job a lot better if he were a member of cabinet and had clearer, more direct organizational support from the government (interview). Senator Martin also emphasizes this point, noting that “Harder is Government Leader, but not [really],” because he is not at the cabinet table, and this has made his task more difficult (interview).

Senator Woo notes that, because the numbers have changed so much in the Senate over the course of just a couple of years, there is a different dynamic in the second chamber. “The traditional duopoly of decision-making and direction between government and opposition has been disrupted,” Woo states (interview). Meanwhile, the formal rules of the Senate have not changed to incorporate nongovernment, non-opposition input into various decisions concerning bills, time allocation or committee selection. In practice, some of these processes have been adjusted on an ad hoc basis, and matters will not proceed or further changes be made without ISG buy-in.⁵

Like Senator Harder, Senator Woo also sees the opposition Conservatives becoming more strident in their approach over time as the change in numbers has also “created a dynamic whereby the opposition has gone from playing the role as the responsible loyal opposition that is trying to make the Senate work to one now that is basically... exercising its prerogative as the opposition and not much more” (interview). When they were a larger group, there was a sense that the Conservatives were more willing to avoid being disruptive. Now that they are a more distinct minority, “they’ve left all the responsibility of ensuring the Senate is working to the government and to the ISG. They’re doing that for a strategic reason: if the ISG functions to make things work smoothly, allow bills through, the Conservatives will accuse them of being Liberals. If the ISG is more disruptive, the Conservatives will still criticize” (interview).

One public servant suggests there is evidence that this dynamic encouraged the independents to become more organized: “At a certain point, it became clear the [opposition was] highly organized and tactically had all the advantage. And at a certain point, you saw the independents start to behave more as a group, with a common interest. They entered into this process kind of altruistic, acting in good faith, and that

⁵ For more details on proposed future changes, see Thomas (2019).

optimism was extinguished by some of the partisan attacks...and then the independents start to organize a bit more" (interview).

The overall dynamic came to a head in April 2019, when Senator Harder proposed a "programming motion" to impose strict deadlines on 11 bills at various stages of the Senate's legislative agenda. The proposal was withdrawn after negotiations between the various Senate leaders apparently broke the impasse, leading to an agreement to expedite much of the legislation but to drop deadlines on three controversial bills (Snyder 2019).

From the perspective of the Conservative opposition, their task is not to stop the government's agenda – particularly on matters that were in its election platform – but to use the Senate as a voice for raising legitimate concerns.⁶ According the senior staffer, "we can't fight on what's being done but on how it's being done." Therefore, on key pieces of legislation, the opposition has negotiated with Senator Harder to get what they view as sufficient time to scrutinize bills and enough witnesses at committee to "create a legislative track record we can use when things go bad."

Nonetheless, the Conservatives are ambivalent as to whether it is the government's responsibility to ensure that the Senate functions smoothly. So while the process that led to the passing of Bill C-45 demonstrates, from the opposition's perspective, that the Senate is working, the government "left a lot on the table" before the summer break in 2018. Bills on environmental assessment, workplace harassment and other issues "all got stranded because [Harder] said 'you have to sit,' to which the answer is 'Who's responsible for quorum in the Senate? Not us. The government is.' So the Prime Minister chose to go the independent route and can't guarantee quorum."

The Senate's current composition reminds us that the renewed second chamber is still in transition. With a sizable partisan opposition still in place, it is not yet a fully nonpartisan, independent body. That shifting dynamic makes it difficult to predict how much things will continue to change, although one factor may help stabilize things over the medium to long term: the independent senators' increasing experience.

It is apparent that some of the tensions over whether the Senate would act in an obstructionist manner during the Bill C-45 process emanated from the relative inexperience of certain independent senators. If the perception of some individuals involved with the C-45 process is accurate, certain senators had the view that ministers "answer to" the Senate, as if the second chamber were a confidence chamber.⁷ Similarly, simple procedural misunderstandings – for example, whether messages from the Commons rejecting amendments should spell out reasons in a manner similar to the written reasons of appellate courts – suggest that increased experience might alleviate

⁶ The interviews in this paragraph and the paragraph below are from the same senior staffer in the office of the Conservative Party Leader.

⁷ In fact the House of Commons is the confidence chamber, because it is there the government can be defeated in a vote on a confidence matter.

the temptation some senators feel to assert the Senate's authority to interfere more directly with the government's agenda.

How some of the new senators conceive of their independence may also need adjustment over time. For example, some ISG members apparently have the view that it would be inappropriate of them to meet informally with, or be lobbied by, cabinet ministers in relation to specific pieces of legislation. Senator Woo acknowledges this view, noting that independent senators are working through some "doctrinal issues" and one is the relative distance they should keep from the "political class" (interview). Over time, he expects that their views will become more nuanced and less dogmatic. "It's not difficult to understand that one can obviously talk to a minister and still be independent, so I don't think that will be a big problem in the years ahead," Woo notes. The struggle for some senators has thus far been a desire to demonstrate that they are independent in name but also in practice, so they take pains to avoid even the appearance of conflicted behaviour or external influence. "Many will want to err on the side of caution, but [there is] no contradiction in speaking to a minister and still holding an independent view" (interview).

It is important not to overstate this particular issue. One senior public servant notes that Senate question period with ministers has been helpful and a means for ministers to build relationships within the second chamber (interview). Senator Harder also states that some ministers' relationships with senators have been helpful in marshalling support for certain pieces of legislation (interview).

Thus far, this analysis has examined the different facets of the renewed Senate's evolution as challenges or problems. Yet to the extent that increased complexity, greater diversity of viewpoints, and forthright efforts to scrutinize legislation in line with a "sober second thought" role create challenges, they are perhaps properly characterized as a feature, rather than a bug, of the government's reform of the appointments process.

This sentiment is echoed by various players involved with the current Senate. As one public servant notes, "the extent of the reform is completely underappreciated outside Ottawa. I don't think Canadians understand how significant a reform it has been, and how detrimental it has been to the government's interests – and the government doesn't get credit for it" (interview). Senator Woo concurs, stating that "it is precisely in the nature of a more independent Senate that you'll have more independent views! The views will be disparate and will require greater management on the part of public servants to address questions" (interview). Woo adds that this is precisely why the ISG created its Charter.

THE RENEWED SENATE: ITS PERFORMANCE AND ITS FUTURE

Critics of the new Senate appointments process asserted that eliminating partisanship would either encourage senators to become obstructionist or effectively render the second chamber unworkable or dysfunctional. The preceding analysis suggests that

the general picture is of a robust and active chamber fulfilling its role while adjusting to its new composition. Although there is evidence of a strong willingness to propose amendments, that is distinct from obstructionism, for which there is little evidence. More significant for the present analysis is that, despite delays with certain pieces of legislation, there is little evidence of dysfunction.

From Senator Harder's perspective, the Senate has come through the most difficult part of its transition:

I do think we are no longer in what I call the experimental stage, that the notion of a less partisan, more independent Senate that is complementary to the House of Commons is taking root...I don't think it would be easy to turn the clock back to the status quo ante. I think that's significant. The conduct of the Senate has been such that the early concerns among some people that we would either be a rubber stamp or a committee that would oppose anything hasn't happened. [There is] a good deal of confidence that you can have a less partisan and more independent Senate that doesn't impede government. (interview)

It is significant, Harder points out, that he has never used time allocation so far, noting that it was used some 25 times in the previous (2011-15) Parliament. Recent events, particularly the aforementioned programming motion to expedite the legislative progress on a number of bills and Harder's threat to employ an aggressive timetable, put this boast in context. It should also be noted that Harder can only propose time allocation, as under the Senate Rules it must be approved by a vote in the chamber.⁸ Further, the Senate has generally accepted messages from the House about its amendments. "I'm reasonably serene that the Senate exercises the independence that the Prime Minister says he wanted," Harder states (interview).

Senator Woo generally concurs with this view, although he notes that the transition period is not quite over. "The Senate is partially independent [but] has a partisan caucus that can significantly hold back the full flowering of an independent second chamber that is unelected and complementary to the House," he states. In his view, the new appointments process is working and is producing appointments "on par with the best we've seen under the [old] partisan process. That is not a statement of 'we're better than they are,' but the new batch do come to Senate without political connections and involvement of previous connections, and I think Canadians like to see that" (interview).

A senior staffer with the Conservative opposition thinks the informal adjustments made to the legislative process and committee system have been fruitful. "I see no signs that it's not working" (interview).

Senator Day takes a historical view, noting that things have not changed so dramatically from the recent past:

⁸ My thanks to one of the anonymous peer reviewers for pointing this out.

An outsider might not appreciate some of the things in the Senate ever since I arrived. Even in Harper's time we proposed amendments. I can remember [the Conservative government's] first piece of legislation, Bill C-2, and that went back and forth several times. There were over 80 amendments to that bill... ping-pong is unusual, but does happen and is there as a tool for Parliament to use and for the Senate to use. And it usually happens when the House of Commons starts taking for granted the role of the Senate. And they're not doing that now – maybe there's more effort on behalf of the executive to inform senators about objectives and goals of the legislation. (interview)

Day does not make any predictions about how the Senate's legislative process and relationship with the government will proceed, but his comments suggest he is sanguine about its current attitude toward the legislative process.

Senator Martin notes that increased amendment activity does not necessarily reflect a more robust sober second thought role in the newly reformed Senate but instead is, at least in part, a result of the lack of explicit government and opposition caucuses (interview). "The ISG is sort of acting like the government caucus, but they're not. When you have a group that isn't congruent with how they're behaving – that incongruity, that misalignment...makes everything more challenging for everyone." ISG senators do not sit in the governing caucus and so they cannot weigh in on legislative proposals, "so no wonder there are more amendments."⁹ Further, many of the amendments are narrowly technical rather than substantive changes to bills. Martin adds that the inter-party/group discussions (at the leader, deputy and caucus/group levels) are starting to look more the way they did before the reform; nevertheless, the incongruencies in the ISG's role create gaps and challenges.

A senior public servant notes that, while the overall legislative program in the Senate is different, it has not slowed things down. "One thing people assume is that things are taking longer" the public servant notes, "we would say there's not a lot of evidence for that yet" (interview).¹⁰ When particular bills are slowed by amendments, delays have not usually been particularly long. In this regard, the lengthy Bill S-3 process is regarded as the exception rather than the rule. Moreover, because amendments may effectively bring the bill back to the cabinet table for consideration, part of the delay is not publicly visible and not the result of an inefficient Senate process. This public servant states that the second chamber is still dealing with the changes and how to apply them. "The overall dynamic is very much in flux," which is particularly challenging for new ministers and people new to Parliament. People who have been around a while, like Ralph Goodale, are generally more strategic and adept at navigating the legislative process. More broadly, the government (ministers and the bureaucracy) now recognizes that "we can no longer take the Senate for granted."

⁹ A similar point was made by Senator Leo Housakos on the March 18, 2019, episode of TVO's *The Agenda*.

¹⁰ Events since this interview was conducted might call this point into question.

That the Senate has thus far functioned well in a complex new context is no guarantee that it will continue doing so. A number of questions and issues remain unresolved, particularly as the number of independent senators continues to increase. What will be the impact on the legislative process in the Senate once there is no longer an established, recognized and partisan opposition caucus? Thus far, the Senate has organized the transition via informal agreements between the various groups. Eventually, changes to its formal rules may be necessary to recognize the new reality and satisfy independents that resources, committee spots and procedures are allocated or organized fairly. What form should these changes take?

One of these issues was partially taken up by the Special Senate Committee on Senate Modernization, which issued its first report in October 2016. That report included a number of recommendations: update committee membership rules to ensure that senators who do not belong to a political party can participate more fully; introduce televised debates in the Senate; and establish rules to divide certain omnibus bills so that their substance can be properly reviewed by committees (Senate 2016).¹¹

One of the most important recommendations was allowing for the recognition of non-partisan caucuses in the *Rules of the Senate*. A proposal to organize the Senate around regional caucuses was advanced in a 2016 report by former senators Michael Kirby and Hugh Segal (Kirby and Segal 2016b). In their view, “over the years, an excessively partisan Senate became less fair-minded as it mirrored the House and the Prime Minister’s Office. Rules advantaged partisanship while sober second thought became an infrequent experience” (Kirby and Segal 2016a). Without regional representation as a central organizing principle for the Senate, Confederation would not have occurred, the authors argue. Senate caucuses organized by region would not mean “like-minded senators can’t gather around voluntary groupings: a military affairs group; a minority languages group; a free enterprise group; an anti-poverty group; or even a politically like-minded group. But partisan affiliation should no longer provide the sole basis for authority or a route for any government to subvert independence” (Kirby and Segal 2016a).

The formal rules of the Senate need to be adjusted precisely because they currently serve to entrench partisanship. As Kirby and Segal (2016b) note, “Independent Senators must secure proportional rights vis-à-vis partisan Senators in order to play a meaningful role in the management of the Senate agenda, rules on committee membership, the way the Senate budget is spent, and so on. As things stand now, the Independent Senators have no access to funding for research, which is granted to ‘parties’ only.”

As noted, some of these issues have thus far been dealt with informally. Formal changes to the rules, particularly as the ISG has become the majority, may soon be necessary, but Kirby and Segal’s solution – structuring the Senate around regional caucuses – has not met with broad acceptance. Independent Senator André Pratte, for example,

¹¹ The committee’s second major interim report was released in April 2018. That report, drawing on expert witness testimony, broadly examined what principles were required in a Westminster system (Senate 2018).

objected to the proposal because of the “risk that senators will come to see all the issues coming before the Senate only from the perspective of their region. Since the region will be the chamber’s organizing principle, it will become senators’ dominating preoccupation... Canada does not need yet another institution fostering regional tensions” (Pratte 2016).

In the short to medium term, there are also signs it may be difficult to change the Senate’s formal rules. A senior staffer in the Office of the Leader of the Opposition notes that the government’s entire legislative agenda would be at risk if there appeared to be a government-led effort to initiate changes. (I interpret these comments to include anything pushed by Senator Harder’s office.) In this Conservative staffer’s view, the consensus model the Senate has been operating on should continue to work.

For his part, Senator Harder is clear that the formal organization and question of caucuses “is for the Senate to decide, not for me” (interview). His own hope for the final year of the current Parliament was that the Senate would devote its time to the legislative agenda. “A lot of energy and time would be taken up with internal organizational issues, which could distract from our legislative role. I would be on the side of [continued] organic evolution.” Senior public servants note that, while there was initially plenty of public debate about the Senate’s formal organization, particularly the regional caucus proposal, they have not heard much discussion behind the scenes in the last year or two (interviews).

Another problem arises given that certain changes to the *Parliament of Canada Act*, such as giving groups or senators not affiliated with a party the resources and money to spend on research, need to be initiated by the House of Commons. Senator Woo recently called on the Prime Minister to initiate formal changes in law and fulfill his promise to finalize the Senate’s transition to full independence. Senator Woo was quoted in the media, saying “I have been in the Senate now for two years and what I’ve learned is that the road map depends on him (Trudeau) to finish the job” (Press 2018).

It is an open question whether the Senate needs a designated opposition caucus. As independents come to dominate the second chamber, it is more likely we will see an increasingly dynamic process instead: shifting opposition, varying in membership and size, on an issue-by-issue or bill-by-bill basis. Independence by definition means that senators will not vote in lockstep on a wide range of issues. This is not to say that senators will not coalesce over broad areas of policy, be it fiscal conservatives, environmental activists or members with particular views on criminal justice policy. There is no reason to think the Senate needs a dedicated group of senators as “the opposition”; it is not the confidence chamber, and it does not exist to oppose the government’s overall legislative agenda. The fact that it has traditionally had a formal opposition caucus is fundamentally the product of its historic partisanship. As the partisan era comes to an end, there is no obvious reason why its organizational vestiges should be maintained.

Moreover, it is not clear that the Senate needs to be organized in formal caucuses either. Despite the concerns of critics that a Senate composed of untethered in-

dependents is unworkable, the record so far suggests the opposite. Like-minded senators will still cooperate on shared interests in particular issues or policy areas, and can do so in parliamentary groups rather than formal caucuses. The Senate may be able to function without formal organization on substantive issues or characteristics such as ideology or regional representation. Rather, the core organizational requirements may be largely procedural, ensuring equitable staffing of committees and a relatively efficient process for getting bills scrutinized and voted on. The type of information sharing and procedural innovations advanced within the ISG may constitute the minimal requirements needed to ensure the Senate functions smoothly in a postpartisan era. Perhaps the only substantive changes needed are those relating to equitable distribution of resources (Press 2018).

Independence is also a feature of the institution itself, and the Senate will organize itself as it sees fit. Yet the fact that it has functioned with an increasingly large group of independent senators along precisely the parameters I have described for the majority of a Parliament session is highly suggestive.

Nonetheless, this is not a prediction about how the Senate will ultimately organize itself. One of the outstanding questions about the second chamber's future behaviour is whether independents will continue to operate with a reasonably deferential stance to the government's legislative agenda. When speaking of Senator Harder's role in getting the government's legislative agenda through the Senate, Senator Woo notes that an increasing number of independents might make his job easier, but there are no guarantees. One public servant said that formal changes may be necessary or legislating will "quickly become very uncertain" as senators assert themselves and the pace will slow (interview). By contrast, another public servant believes the government has adjusted and become more strategic in its dealings with the Senate. This individual feels the Senate will, in the final year of the current Parliament, appear even more productive and efficient overall than it has over the past three years (interview). As of April 2019, the evidence on these predictions is mixed at best.

There are reasons to be uncertain about how things will progress in the Senate. Senators appointed precisely on the basis of their independence, and in a process that came to involve an application process, might reasonably not expect to come to Ottawa to rubber-stamp government legislation. Critics of the reforms to the appointment process expressed concern on these grounds. Moreover, key aspects of Prime Minister Trudeau's approach to appointments seem to encourage a representative aspect to the role of senator. For example, he has made a concerted effort to increase the number of Indigenous members of the second chamber, appointing nine Indigenous senators in under three years (as of May 2019, there were 12 Indigenous senators). The renewed Senate may become an important site for the protection of Indigenous interests (Macfarlane 2018).

Another, more cynical, element is the supposition by some critics, as noted above, that because the current ISG members frequently support government legislation, they

are somehow “Liberals” in all but name. One analysis of recorded votes in the Senate from the beginning of the current Parliament to July 2018 reveals that ISG members appointed by Trudeau voted with the government 84.2 percent of the time, compared to ISG members appointed by previous prime ministers (77.2 percent), Senate Liberals (76.8 percent), and Conservative senators (20.1 percent) (Evelyn and Allen 2018; see also Godbout 2018). The implication of this assertion is that, if a new government takes power in 2019, the renewed Senate may become an antagonistic, obstructionist institution (particularly if that new government is Conservative).

It is certainly true that the real test for the nonpartisan behaviour of the Trudeau-appointed independents is a long-term one. It is not clear whether this voting behaviour reflects ideological support of the current government or a nonpartisan approach that generally respects the government’s capacity to pass its legislative agenda. Senators appointed under the new process are expected to have a clear understanding of the role of the Senate as a chamber of sober second thought. In other words, there is a presumption that independent senators in particular will have a normative conception of their role, and that of the institution, that guides their behaviour. In political science, the study of role norms finds that they can be influential in shaping and constraining the behaviour of various actors, including independent and unelected ones such as justices of the Supreme Court of Canada (Macfarlane 2010, 2013). Further, such actors are sensitive to the expectations and opinions that other actors and the general public hold about them (Baum 2006). Independent senators should care about the Senate’s reputation and legitimacy; if they do, they will not risk it by inappropriately exceeding the limits of the Senate’s proper function.

Whatever attitudinal trajectory senators adopt in the future, the record thus far suggests the Senate has adjusted, albeit with challenges, to its burgeoning independent status. Regardless of the outcome of the 2019 federal election and the future status of the appointments process – Conservative Leader Andrew Scheer has promised to return to the old patronage method of appointments (Bryden 2018) – a sizable contingent of nonpartisan senators will occupy the second chamber for years to come. Thus far, they are operating largely within the parameters that a merit-based, nonpartisan appointments process would ideally produce.

CONCLUSION

The Senate has been subject to debate since Confederation. In the modern era, efforts to reform the second chamber via formal constitutional changes were ultimately fruitless (Russell 2004; Smith 2003). The recent change to the appointments process, made informally and at the discretion of the Prime Minister, arguably constitutes the most significant alteration to the Senate in its history. Although it is not clear if future prime ministers will retain the independent, nonpartisan advisory process, the reform might also end up being one of the most important legacies of the Trudeau government. Depending on the results of the 2019 election, the longer the new process remains in place, the harder it will be for future prime ministers to revert to the old system of patronage.

A major reason for this is that, as the preceding analysis has shown, the renewed Senate is working. Despite inevitable challenges and adjustments, the second chamber is fulfilling its advisory role as a chamber of sober second thought. It has not engaged in undue obstructionism. Nor has it created serious disruptions for the government's legislative agenda (although organizational issues did lead to delays toward the end of the current parliament). The difficulties the renewed Senate has faced derive largely from the added complexity and constraints on organization that have resulted from senatorial independence and the partial (thus far) elimination of partisan caucuses. An increasing number of divergent views among independents has made the work of ministers and public servants – tasked with getting legislation through the second chamber – considerably more demanding in certain ways.

As explored above, tracking support for bills in the Senate, distributing information and even giving technical briefings to small groups or individual senators have created more work and generated more uncertainty for the government. This may be a feature, not a bug, of the changes to the Senate. A more independent Senate – a Senate that is more responsive and active – will inevitably create more work for the government and add to the complexity of the legislative process. As the preceding analysis suggests, ministers and public servants are learning to become more proactive in this regard. Moreover, given that the manner in which some senators have conceived of their independence has contributed to the uncertainty – whether because of increased willingness to propose amendments or unwillingness to meet informally with cabinet ministers for fear of impinging on independence – it is likely that as they become acculturated to the Senate's norms this too will evolve.

A number of developments may help to reduce or eliminate some of the problems analyzed here. The ISG's charter and its other organizational efforts to improve information sharing and address procedural matters should reduce some of the burden currently facing public servants shepherding bills through Parliament. Similarly, as independent senators gain more experience, they may become more comfortable and understand how independence operates in practice. As senators become used to their role, they may realize, for example, that it does not impair their independence to communicate with cabinet ministers or even be lobbied by them for their support.

Nonetheless, there are also reasons to be cautious about drawing firm conclusions about the success of the renewed Senate. There is clear evidence that the Senate remains in a period of transition. As noted in the preceding section, it has not yet adopted formal changes to its rules to accommodate nonpartisan groups or establish an adequate and equitable distribution of resources for them. Thus far, the government has maintained that this is for the Senate to decide for itself, but it may need to initiate action if a bill to amend the *Parliament of Canada Act* includes spending provisions.

Moreover, it is not clear what further adjustments might be prompted as independents continue to be appointed. What will a Senate virtually full of independents look like? How will it organize itself? Will it need to create a new set of caucuses, whether on regional grounds or some other basis? Or will it simply adapt procedures to accom-

moderate the new fluidity and dynamism that come with nonpartisan, independent senators? And, if it does adjust procedurally to this new reality, will independent senators become emboldened to act in an increasingly activist, or even obstructionist, manner, as critics of the reforms have argued? It is, perhaps, too soon to tell.

Thus far, the evidence suggests the renewed Senate has the potential to become a significant success story. No longer negatively implicated as a patronage institution, let alone a partisan one, a recently disgraced institution may achieve an unprecedented level of legitimacy. If it manages to conduct itself as the complementary, rather than competitive, body the Supreme Court describes in its 2014 *Reference re Senate Reform* opinion, it may serve the ideals envisioned by its defenders. This includes the useful function of providing legislative and policy advice and acting as a constitutional safeguard for Parliament's legislative agenda. It might also continue much of the valuable work the historic Senate always did: long-term study and commissions on policy issues of concern to Canadians that members of Parliament rarely have the time to engage in. Time will tell.

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