Insight, Lessons & Unintended Consequences: Inside Bill C-14

(Gregory Matte - 21 June 2016)

For those who've been following the federal government's efforts to pass Bill C-14 into law by the Supreme Court's June 6 deadline, it has provided tremendous insight into a complex, ethical issue. More importantly, it has also provided some interesting foresight on the consequences of recent events affecting the Senate, and how the interplay between the House of Commons and the Upper House may be on a path towards a very different relationship.

The Senate has taken a bruising over the past many months due to the manner in which certain Senators were disciplined, culminating with the Mike Duffy trial. The highly questionable basis upon which certain Senators (Duffy, Wallin, Brasseau and Harb) were singled out and severely disciplined for their expense claim practices revealed the dark side of the Government's efforts to maintain control over the Upper House through the Prime Minister's Office (PMO). Although the defense demonstrated that it was unjustifiable to single out Duffy's expenses given that such practices were not uncommon (Duffy was acquitted of all 31 charges,), the trial portrayed the Senate in the worst possible light to the Canadian public; dysfunctional, an embarrassing waste of tax payer money, and of no added value to the federal legislative process. Naturally, these events and insights only strengthened the arguments for those calling for the complete abolition of the Senate.

The other catalyst for change was Justin Trudeau's pre-election decision to excommunicate the former Liberal Senators from the Liberal Party of Canada, including the Liberal caucus and other Liberal activities. Of note, these same Liberal appointed Senators were not invited to the recent Liberal Biennial Convention in Winnipeg (although at least one did attend anyways). While the true motives and calculations behind this unprecedented decision may never fully be known, it is clear that the affected Senators were not consulted in advance and that the expressed reason for the move was to provide a clear contrast between the Liberals and the Conservatives in advance of the fall 2015 election. Although it would be difficult to pinpoint a causal relationship between this decision and the outcome of the election, it is reasonable to conclude that many voting Canadians saw this move in a positive light.

But what are the consequences of these events on the Senate going forward? It's probably safe to assume that the abolition of the Senate in the next few years is highly unlikely due to the significant risks of attempting to modify Canada's Constitution, which would be part of such a process. Furthermore, while the NDP had this as a plank in their 2015 election platform, their chances of forming the next government may further diminish until they find a new leader and come to terms with the significant economic implications of the highly idealistic *Leap Manifesto*. So assuming that the Senate remains intact, have these events been a catalyst for internal reform, and if so, what are the consequences on the extant bicameral legislative relationship it has with the House of Commons and on the process of law making for Canada?

This is why the recent circumstances surrounding Bill C-14 have been so insightful into foreshadowing such consequences. Given that this Bill was both an election promise and an opportunity for the new Liberal government to demonstrate its legislative abilities, there was (and still is) a lot at stake politically. The stakes were further raised by the deadline

imposed by the Supreme Court of Canada. The failure of the government to introduce such a law by the deadline had created a temporary and unfortunate legal environment of uncertainty for medical practitioners and patients alike. Furthermore, it could have lead to a patchwork of interpretations across provincial/ territorial jurisdictions, religious faiths and individual ethical principles. Instead, the passing of Bill C-14 into law has now created a homogeneous legal environment with clearer guidelines, thereby rendering implementation of doctor assisted death less problematic.

But why did the Bill fail to meet the 6 June deadline? Certainly the government was well aware of the deadline and should have not only assigned the proper priority to its passing, but also mapped out a reasonable timetable that would accommodate the inevitable need for debate and amendments that would be associated with such a complex, emotionally-charged and significant law. Having won a majority government certainly provided the comfort of knowing that the Bill could be successfully whipped through the House of Commons. But what about the Senate? Having created a newly evolving environment of political independence, at least amongst the ex-communicated Liberal Senators, perhaps the Government under-estimated the consequences of an Upper House that refused to rubber stamp a Bill. Furthermore, the Senate actually had a respectable body of knowledge on the subject of assisted death through years of studies and committee work in this and similar areas of interest. Bill C-14 provided the Senate with a significant opportunity to demonstrate the value of the "sober second thought" that the Upper Chamber of the Westminster model of Parliament was supposed to provide.

Clearly the government began to feel the pressure of the looming deadline, witnessed by the rather draconian measures taken by the House Leader to expedite passage of the Bill through the House and culminating with the unfortunate "elbow gate" incident with the Prime Minister. Wisely, these measures and the incident were quickly followed by apologies and reversion to more customary practices. However, the Senate was a different matter. Despite the public pleas by the government to expedite passage, the Senate chose to take the high road of prober deliberation and constructive amendments. Not surprisingly, the Bill failed to meet the June 6 deadline.

But what does this foreshadow for the legislative process going forward? Despite having missed the deadline, the sky didn't fall and a subsequent compromise was reached on amendments that led to Senate approval and Royal Assent on June 17. Clearly it would be wise for the Government to adopt a more conciliatory and inclusive approach in considering amendments to new legislation. Reason needs to triumph over partisanship, as this will ultimately be of greater benefit to more Canadians in the longer term. Such an approach would demonstrate that the Liberal's promised era of civility and professionalism has finally been introduced into the House. Furthermore, being less than a year into their mandate, the majority of Canadians will likely forgive and forget the antics as being part of the learning process of a new Government.

The Senate is a different matter. As previously mentioned, Bill C-14 provided a highly visible opportunity for the Senate to demonstrate a determination to turn the corner of past practices of rubber stamping, thereby finally providing the utility that it was designed to contribute to the legislative process. Of particular note, the elephant in the room will be the scope of eligibility for doctor-assisted death with some legal experts and Senators having raised concerns that such a narrow applicability may be unconstitutional. There is a sense of inevitability that this new law will eventually be tested by the courts, which would, if it

ever comes to pass, vindicate the reinvigorated Senate and validate the potential for a truly non-partisan chamber of "sober second thought." Furthermore, if additional measures are taken to change Senate guidelines for the declaration of primary residences, expense claims and acceptable ancillary roles (such as concurrent participation in Board of Directors, party fund raising, etc.), there is an opportunity to slowly gain public confidence if they individually and collectively turn the corner towards a more professional style.

I have long been of the view that, as with appointments to the Supreme Court or other similar Government-in-Council appointments, a well-reasoned nomination process should be applied rather than simply rewarding political cronies. The Liberals have recently introduced a revised selection process that is long overdue and constructively progressive if done well. An effective nomination process would not only include pre-requisites to "qualify" for consideration, but should also include a thoughtful apportionment of new appointees to ensure balanced representation from important quarters of our society: legal; arts; medical care; journalism; education; business; law enforcement; as well as defence and security. While the "qualifications" could be tailored to academic, professional and/or community accomplishments, thereby introducing a degree of rigor and merit to the process, the result would undoubtedly provide a cadre of experienced and accomplished Canadians that would provide important perspectives from the across the spectrum of our national values and interests.

Naturally, it will take time for such an evolution to occur as new appointees slowly replace the "old guard" of political appointees. However, juxtaposed with this rather utopian view is the darker side of a very different, potential development wherein the independence of Senators makes them prey to special interest groups, or worse, corporate interests. If the Senate begins to achieve a position of independent influence on the outcome of legislation, they will be increasingly subjected to lobbying. Being unelected without concern for re-election and now independent of partisan influences, it's not inconceivable that some Senators could be tempted by opportunities of personal gain. One need only reflect on the Airbus scandal to realize that such things can and do happen in Canada; ignoring this potential outcome would be irresponsible and reckless.

In summary, the confluences of the Mike Duffy trial and the excommunication of former Liberal Senators from the Liberal Party of Canada may be the catalysts for positive change to the role of the Senate and a long overdue enrichment of the legislative process. However, care must be taken to foresee and effectively curtail the potential negative unintended consequences that may manifest themselves as the actual and perceived independence of Senators increases over time. Further improvements to the selection criteria of Senators as well as irreproachable guidelines for their roles, responsibilities and limitations would be important steps towards positive and constructive reform of the Senate. Given that significant new legislation such as electoral reform awaits the sitting of Parliament this fall, it would be wise to address such Senate reform with priority.

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