Feature

The Applicability of the Salisbury Doctrine to Canada's Bi-Cameral Parliament

The presence of a large number of non-partisan Senators, the work of the Special Senate Committee on Senate Modernization, and the growth of a more activist Senate has focused much attention on the Salisbury Doctrine. This convention of the United Kingdom's Parliament holds that the appointed House of Lords should not reject a government bill passed by the elected House of Commons if the content of the bill was part of the government's electoral campaign platform. In this article, the author outlines the Salisbury Doctrine, examines political consideration which may have influenced its development and use, and reviews whether it may be applicable in Canada's bi-cameral Parliament. He contends Canada's Senate should not be beholden to the Salisbury Doctrine. The author concludes that while the Senate should show deference to the elected Commons when necessary, it should not accept any agreement, legal or political, that hampers its ability to outright reject any bill it deems outside the apparent and discernable popular will. However, he suggests the Senate should exercise this power with restraint.

Christopher Reed

The recently more activist Senate has given rise to the consideration of the applicability of the Salisbury Doctrine, a convention of the United Kingdom's Parliament, to Canada's bi-cameral Parliament. At its core, the modern interpretation of the Salisbury Doctrine is that the appointed House of Lords should not reject a government bill passed by the elected House of Commons if the content of the bill was part of the government's electoral campaign platform.[1]

The Salisbury Doctrine is relatively new, dating back to 1945 when the Labour Party won a strong majority in the House of Commons. The new Labour Government faced a large Conservative Party majority in the Lords. The then Viscount Cranborne (later the Fifth Marquess of Salisbury), the Conservative Leader of the Opposition in the Lords along with his counterpart the Viscount Addison, the Labour Leader of the Government in the Lords, developed what became known as the Salisbury Doctrine, so as to not paralyze the legislative agenda of the government by having government bills unduly blocked in the Lords.[2]

However, the Doctrine has its roots much further back than 1945 and in fact speaks to a larger subject – the relationship between the House of Commons and the House of Lords.

As early as 1832 during the debate of the Reform Bill, which would expand the electorate in Britain and signal the beginning of the shift of political power from the Lords to the Commons, it was stated by the Duke of Wellington that no matter how bad a bill is that comes from the Commons, if it was a government bill that was endorsed by the elected house, the Lords had a duty to pass it. However, the

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Third Marquess of Salisbury proposed that the House of Lords had a 'referendal function'; which meant that if the Government of the day was using the Commons merely as its tool to pass a bill for which there was no expressed mandate of support from the people then the Lords had a duty to defeat the Bill. This theory put the Lords in the position of guardians of the people despite their non-elected nature.[3]

Political considerations

The 1945 agreement which gave rise to the Doctrine has been interpreted as a face-saving measure by the Conservative Lords. The appointed nature of the Lords, at that time still largely a hereditary body, often generated low popular opinion of the Lords. The Labour Party, portraying itself as the party of the people and the workers, could have easily whipped up popular opinion against the Lords and by extension the Conservative Party who held the majority there. That may have been the reason why Viscount Cranborne proposed the Salisbury Doctrine in the first place, so as to not injure the popular opinion of his party.[4]

The politics of popular opinion aside, there was another fear amongst the Lords – that of being swamped.

In 1909, the Liberal Government passed a budget in the House of Commons and sent it to the House of Lords for their approval. The Lords refused to give the bill second reading. Eventually the government sought dissolution and went to the people – winning a renewed (but smaller) majority in 1910. Determined to not repeat the troubles of 1909, the Government introduced the *Parliament Act* which set out a suspensive veto power for the Lords as opposed to an absolute veto. After much debate and back and forth on amendments between the two chambers, the bill was passed by the Lords, but only after it was revealed that the government had sought, and achieved, the agreement of the King to create enough new Liberal Peers to assure a Liberal majority in the House of Lords and thereby passage of the bill. Essentially the government was willing to use its executive power of appointment to swamp the Lords into submission.[5]

So, in 1945, between the low popular opinion of the Lords, the potential political machinations of the Labour Party, and the possibility of being swamped by Labour Peers, there were justifiable fears that may have led Viscount Cranborne to propose the Salisbury Doctrine.

More Modern Circumstances

In 1999, as a result of the Wakeham Commission on Reform, all but 92 of the Hereditary Peers were expelled from the House of Lords and an independent Appointments Commission was established to seek greater input for nominees to the peerage. Prior to this reform, the House of Lords was largely dominated by members of the hereditary aristocracy, many of whom were Conservative supporters. In addition, the majority of Life Peers created before the Wakeham reforms were political appointees who were affiliated with the government party of the day, which recommended their appointment. The relatively new Appointments Commission, along with the reduction of hereditary peers, has led to a House of Lords that is no longer dominated by one party but rather one where independent peers, the Cross Benchers, hold the balance of power. [6]

This has led to growth in popular support for the Lords in recent years. Nominees for peerages now come from all parties represented in the House of Commons as well as from retired professional public servants granting a degree of accountability and responsibility to the newly created members of the House of Lords. This is something the Lords did not enjoy when the membership was largely seen as a political reward or inherited by virtue of birth. [7]

Circumstances have not only changed in the House of Lords but also in the House of Commons. The Salisbury Doctrine relies on the bill in question not only to be a government bill but also to be a bill that enacts a part of the government's platform from the previous election. Modern politics has led to political platforms that are greater in size but not necessarily in substance. The growth of centrist, big tent parties has meant that political parties as organizations want to appeal to the largest segment of the population as they can in an effort to win a majority of seats in the House of Commons. That begs the question: can a bill truly encapsulate a particular electoral promise? Parties invariably need to leave wiggle room in their promises to broaden interpretation and appeal, and governments invariably need latitude in drafting legislation to allow for unforeseen or future circumstances. This means that it may be difficult to find direct links between campaign promises and draft legislation.[8]

The above has led to calls in Britain for the Doctrine to be restricted in its use if not abolished all together.[9]

Applicability in Canada

Given the new dynamics of the current Senate, the applicability of the Salisbury Doctrine to Canada's bi-cameral Parliament has been of interest to some Senators and to the Special Senate Committee on Senate Modernization as part of its ongoing study. But, in many ways, if not in name, the Salisbury Doctrine has always been in place in Canada vis-à-vis the relationship between the Senate and the House of Commons.

The Senate, while not hereditary, is not unlike the House of Lords – an appointed elite. One only need look at the original financial and property qualifications required to become a Senator to determine the desire to have what amounted to a landed gentry in Parliament. For that reason, and its corresponding low support in popular opinion brought about by its lack of an electoral mandate, has meant that the Senate itself has restrained its use of a veto over government bills. Two examples in recent history are excellent case studies of the views of both Marquesses of Salisbury – the Third and the Fifth.

The Senate's refusal to adopt legislation enabling the free trade agreement (FTA) with the United States in the late 1980s led directly to the calling of the 1988 election. Some Senators at that time argued that the FTA was not part of the government's election platform and, if inspired unknowingly by the Third Marquess, they wanted to refer the legislation back to the people. Likewise, the Senate's insistence to amend the bill regarding the cancellation of the Pearson Airport contracts in the early 1990s proceeded not unlike the Doctrine enunciated by the Fifth Marquess. The bill, which was a major campaign plank for the government, received second reading and was sent to committee where amendments were made regarding the protection of the right to seek remedy in the court for the cancelled contracts; the amended bill did eventually pass. So, if the Senate practiced restraint in the past, why has it become part of the discussion now to apply the Salisbury Doctrine?

Arguably, the Salisbury Doctrine was an attempt by the Conservative majority in the House of Lords to save face for their party and not offer a plank of attack for the governing Labour Party. Likewise, if a majority of senators are from a party different than the government, they often show some restraint so as to not enable the government to score political points on the back of the majority party in the Senate. However the growth of an independent Senate and of individually independent senators does not offer such a political motivation for restraint; hence the search for ways to govern the relationship between the Senate and the House of Commons. But is the Salisbury Doctrine applicable to Canada? If it is, is it even needed?

The factors that have led to calls for reform or abolishment of the Doctrine in Britain are very much the same in Canada. Like Britain, Canada now has an independent Appointments Committee that advises the Prime Minister regarding potential nominees to the Senate. Also, partisan senators do not hold the balance of power in the Senate, it is the cross bench group – the Independent Senators Group (ISG) that does. In fact, the only partisan political caucus left in the Senate is the Conservative Party Caucus because the Senate Liberals are not affiliated in any formal way with the Liberal Party of Canada. In addition, Canadian political party platforms – like in Britain – are often vague and left open to interpretation. Likewise, any ensuring legislation is broad in scope; it can be difficult to create a 100 per cent direct link between a campaign promise and a bill before Parliament.

None of these factors take into account the multi-party and first-past-the-post systems where often the party that forms government, even a majority, does so only with a plurality of votes.[10] Who then speaks for the other voters when a majority government can run roughshod over the House of Commons? The Senate exists as a safety valve to what the Fathers' of Confederation considered the possible partisan excesses of the House of Commons.[11]

Finally, two factors in Britain that led in part to the contemporary relationship between the House of Commons and the House of Lords are not present in Canada; first, the threat of swamping and second, the acknowledgement of the primacy of the House of Commons. The Canadian Senate is a body of fixed size. While there is the extraordinary power of the Queen to appoint an additional eight senators, it has only been used once. Therefore there is no fear on the part of Canadian Senators of being suddenly swamped by new colleagues on the premise that a certain piece of legislation needs to be passed.

The threat of swamping in Britain led to the passage of the 1911 *Parliament Act* that recognized in law the supremacy of the House of Commons. Further, on April 25, 2006, in creating a joint committee of the Houses of Parliament to study the relationship

between the two chambers – the Lords expressly stated: "That [they are] accepting the primacy of the House of Commons."[12]

Canada's Senate, by contrast, with the exception of certain matters such as the power to introduce money bills or collect revenue, has never formally acknowledged the supremacy of the Commons.

For the reasons set out, namely: the already existing prudent nature of the Senate's legislative powers, the increasing vagueness of party platforms, the broadening scope of enabling legislation, governments exercising a majority of their powers without a majority of popular support and, lastly, the co-equal nature of the Senate to the House of Commons, Canada's Senate should not be beholden to the Salisbury Doctrine. The Senate should show deference to the elected Commons when necessary but should not accept any agreement, legal or political, that hampers its ability to outright reject any bill it deems outside the apparent and discernable popular will. However, the Senate should exercise this power with restraint.

Notes

1 Glenn Dymond and Hugo Deadman. *The Salisbury Doctrine.* London: House of Lords Library, 2006, p. 1.

2 *Ibid.*, pp. 5-6.

3 Richard Kelly. *House of Lords: Conventions.* London: House of Commons Library, 2007, p. 2.

4 *Ibid.*,pp. 5-6.

5 Dymond and Deadman, p. 19.

6 Lizzie Wills. "The Conservatives and the Lords – the slow death of the Salisbury Doctrine." *WA Comms*, August 6, 2015. URL: https://wacomms.co.uk/the-conservatives-and-the-lords-the-slow-death-of-the-salisbury-doctrine/.

7 David Browne. "Snooping and Salisbury: A Second Chance for the Red Benches" *The Forum* TT15 Journal, June 2015, pp. 10-11.

8 *Ibid.*, p. 10.

9 Wills.

10 *Ibid.*

11 *Reference re Senate Reform SCC 32* (Supreme Court of Canada 2014), p. 737.

12 Kelly, p. 4.