Sobering Up the Senate: Facilitating the Use of Sections 26-28 of the *1867 Act* to Enforce the Salisbury Convention

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I. INTRODUCTION

The Senate of Canada may indicate shortly whether it has any intention to provoke a constitutional crisis, one which would likely be the most severe in a century. Peter Harder, former Representative of the Government in the Senate, has proposed a motion that would express the sense that the upper chamber must reject any bill that contains a declaration that it will operate notwithstanding specified provisions of the *Canadian Charter of Rights and Freedoms*.[1]

Harder's notice of motion does not acknowledge the special status of government bills that featured in a speech from the throne, including bills that reflect a commitment made by a party in its election platform. If the Senate chooses to ignore the existence of a mandate from the people of Canada to enact federal legislation invoking the notwithstanding clause, a deadlock between the two Houses of Parliament would create unprecedented political turmoil.

What is worse: if the House of Commons does not act decisively to retain its primacy as the elected and politically responsible body in Parliament, the constitutional order guaranteed to Canada at Confederation will be replaced by an unprecedented form of managed democracy that cannot be reconciled with our constitutional design. This article will demonstrate that the guarantee of a constitution similar in principle to that of the United Kingdom included a Senate that was bound to obey the most important parliamentary convention at Westminster, and that measures were included to ensure it can be enforced.

The Salisbury Convention (known earlier as the mandate convention) is not merely a rule of political practice that has been accepted as binding in Canada. It was a necessary condition for the creation of a Westminster system of representative government in Canada. While John A. Macdonald and the delegates in London did not imagine there would be any need to enforce the primacy of the House of Commons, the British framers of the *British North America Act, 1867*[2] insisted that

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

[2] 30 & 31 Vict., c. 3 (U.K.) (now *Constitution Act, 1867*).

any body modelled on the House of Lords be subject to an override in the event of any crisis like the one that is now rapidly approaching.

The procedure to break the deadlock should the Senate breach the Salisbury Convention was not the product of the deliberations at Charlottetown or Quebec. It was presented to the Canadian delegates in London as an essential element of any bill for a legislative union to pass at Westminster by Lord Carnarvon, who as Secretary of State for the Colonies ultimately served as the sponsoring minister of the *British North America Act, 1867*. Carnarvon did his utmost to ensure that these provisions, which are now found at sections 26-28 of the *Constitution Act, 1867*, would be sufficient to prevent the Senate from obtaining the powers formerly possessed by the House of Lords.

The first section of this article will discuss the proposal currently before the Senate that it commit itself to blocking any legislation that invokes the notwithstanding clause, even if that legislation formed part of the election platform of a government that has the confidence of a majority in the House of Commons. It will demonstrate that this proposal is antithetical not only to the terms struck in 1982, but to the original bargain of 1867. It would further instantiate an Americanized constitutional order that is precisely the opposite of what Confederation was designed to achieve.

The second section will demonstrate that the Salisbury Convention has always been an essential part of Canada's constitutional order, and that the co-equal and countermajoritarian role envisioned for the Senate by Harder is precisely what the Convention prevents, by design. It will show how the framers of the *British North America Act, 1867* took great pains to make sure that senatorial overreaching could be prevented by implementing a robust deadlock-breaking procedure, which was designed to be supplemented if necessary.

The evidence that the framers wanted to include a means for controlling the Senate that would remain robust and adequate is detailed in the third section of the paper, which will present the legislative history of the revisions to the draft bill at Westminster; the bill went through five drafts. This section will show that while Lord Carnarvon was constrained by the requirement that any senators appointed to break a deadlock would not disturb the delicate regional balance, he did his utmost to make sure that sections 26-28 of the *British North America Act, 1867* would allow for an intervention powerful enough to break a deadlock. Furthermore, his revisions make it clear that he wanted to create a means of revising that procedure so that it would always be powerful enough to break a deadlock, even when — as now — a much larger group of senators would need to be appointed to impose the will of the House of Commons.

Finally, the fourth section of the article will apply the insights obtained from the 19th-century context of Confederation and the legislative history of the *British North America Act, 1867* to the problem at hand. It will demonstrate that even if a substantial majority in the Senate is in favour of breaching the Salisbury Convention, the deadlock-breaking provisions should be employed. If the Senate persists in

its obstinacy, the amendment contemplated and facilitated by Lord Carnarvon should be proposed. Ultimately, if the Senate resists the enforcement of the Salisbury Convention, after a thorough case is made for the propriety of the section 26 procedure and any amendments necessary to make it meaningful in the 21st century, the Senate would be running the risk of courting more powerful restrictions and alterations of its powers being imposed by means of the general amendment procedure.

II. THE DRIVE FOR A CO-EQUAL SENATE: WHO IS IN THE DRIVER'S SEAT?

As Howard Anglin and Ray Pennings have demonstrated, "If a majority of the Senate chose to block or severely delay a Conservative government's legislative agenda, it would plunge the country into a constitutional crisis the likes of which we have not seen in more than a century."[3] To understand the full significance and implications of the motion to oppose federal use of the notwithstanding clause, one should begin by considering who placed that motion upon the table. Peter Harder is not merely one senator among many. Shortly before his appointment to the Senate in 2016, Harder had served as a manager of Justin Trudeau's transition team, "overseeing the changing of the guard" following the previous year's election.[4] Upon accepting his senatorial appointment, Harder stepped down from his position as President of the Canada-China Business Council, an organization said to be "strewn with Liberal Party grandees", and which exercises such an outsized influence on foreign policy toward China that, in the words of Terry Glavin, "Beijing has come to see the Liberal Party of Canada as [its] political wing."[5]

Prior to heading up Justin Trudeau's transition team, Harder has also been employed at Denton's, a law firm that also played a significant role in the transition of government in 2015.[6] At Denton's, Harder was reunited with Jean Chrétien, who had earlier been one of his political mentors, having plucked him from the political

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[3] Howard Anglin & Ray Pennings, "Canada is Careening Towards a Constitutional Crisis in the Senate", *The Hub* (May 14, 2024), online: https://thehub.ca/2024/05/14/howard-anglin-and-ray-pennings-canada-is-careening-towards-a-constitutional-crisis/.

[4] Postmedia News, "Former Bureaucrats Praise Justin Trudeau's Decision to Appoint Peter Harder to His Transition Team", *National Post* (October 22, 2015), online: https://nationalpost.com/news/politics/former-bureaucrats-praise-justin-trudeaus-decision-to-appoint-peter-harder-to-his-transition-team. See also Julius Melnitzer, "Dentons Advisor Peter Harder Named to Senate and Other Legal Moves and Grooves for March 29", *Financial Post* (March 29, 2016), online: https://financialpost.com/legal-post/denton-advisor-peter-harder-named-to-senate-and-other-legal-moves-and-grooves-for-march-29.

[5] Terry Glavin, "What Jean Chrétien Has Done to Canada on the Meng Wanzhou Case", *Maclean's Magazine* (June 19, 2019), online: https://macleans.ca/politics/what-jean-chretien-has-done-to-canada-on-the-meng-wanzhou-case/.

[6] Kathryn May, "Peter Harder's Job on Trudeau Transition Team Lauded by Former Bureaucrats" *Ottawa Citizen*. (October 21, 2015).

realm in 1991 to serve as Deputy Minister of Citizenship and Innovation.[7] At some point in his government service, Harder was initiated into the dark arts of bureaucratic impediments to political direction: an article written at the time of his appointment to Trudeau's transition team noted he retired after the first year of the Harper Government as Deputy Minister of "Foreign Affairs, where public servants and diplomats resisted the Conservatives' shift in foreign policy".[8]

From his first day in the red chamber, Peter Harder was a senator unlike any other, because it was on that date that he assumed his office as the Representative of the Government in the Senate, a position that until the previous year had been known as the Leader of the Government in the Senate,[9] who had also enjoyed the status of a cabinet minister. Accordingly, for the next three-and-a-half years of service in that role, Harder was "tasked with shepherding legislation"; he "presided over major reforms as the prime minister pushed for a less partisan, more independent Senate" and "championed Trudeau's push to reconstitute the chamber along non-partisan lines".[10] After Marc Gold took over the position of government representative,[11] Harder continued his efforts to transform the Senate into what appears to be a less partisan institution, by joining and revitalizing the Progressive Senate Group, which obtained official status in May of 2020 after Harder and two other senators joined it,[12] resulting in two caucuses in the upper chamber composed of former members of the erstwhile liberal Senate caucus.[13] Harder explained this move to reporters as

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[7] Postmedia News, "Former Bureaucrats Praise Justin Trudeau's Decision to Appoint Peter Harder to His Transition Team", *National Post* (October 22, 2015), online: https://nationalpost.com/news/politics/former-bureaucrats-praise-justin-trudeaus-decision-to-appoint-peter-harder-to-his-transition-team.

[8] Postmedia News, "Former Bureaucrats Praise Justin Trudeau's Decision to Appoint Peter Harder to His Transition Team", *National Post* (October 22, 2015), online: https://nationalpost.com/news/politics/former-bureaucrats-praise-justin-trudeaus-decision-to-appoint-peter-harder-to-his-transition-team.

[9] Julius Melnitzer, "Dentons Advisor Peter Harder Named to Senate and Other Legal Moves and Grooves for March 29", *Financial Post* (March 29, 2016), online: https://financialpost.com/legal-post/denton-advisor-peter-harder-named-to-senate-and-other-legal-moves-and-grooves-for-march-29.

[10] John Paul Tasker, "Former Government Point Man Peter Harder Joins the Progressive Senate Group", *CBC News* (May 14, 2020), online: https://www.cbc.ca/news/politics/peter-harder-progressives-1.5569325.

[11] Joan Bryden, "Trudeau Names Quebec Sen. Marc Gold as New Government Representative in Red Chamber", *Global News* (January 24, 2020), online: https://globalnews.ca/news/6456850/marc-gold-senate-government-representative/.

[12] John Paul Tasker, "Progressive Senate Group Back from the Dead as Another Independent Defects", *CBC News* (May 21, 2020), online: https://www.cbc.ca/news/politics/progressive-senate-group-pierre-dalphond-1.5578447.

[13] John Paul Tasker, "Former Government Point Man Peter Harder Joins the Progressive

intended to create a "bulwark" against majoritarian dominance in the Senate of the Independent Senate Group.[14]

Despite changes to the caucus structure that appeared to portend a significant reduction in his influence in the Senate, the facilitator of the Independent Senate Group (Yuan Pao Woo) appeared to endorse this initiative. Commenting on Harder's efforts, Woo echoed that "ISG senators are committed to a more independent, less partisan upper house . . . Sen. Harder has been a strong advocate for a more independent, less partisan Senate, and we look forward to his continued advocacy of Senate modernization."[15] While it may seem strange that members of these two supposedly distinct and independent caucuses sing each other's praises (and apparently from the same choir book), this becomes easier to understand when one bears in mind that most of both groups' members were appointed by Justin Trudeau. After all, it is a time-worn maxim of politics that "whose bread I eat, his song I sing".[16]

Having been invited to the benches of the red chamber, well-appointed by the Liberals, it is perhaps unsurprising that not one of the 80 senators appointed during the Trudeau government has chosen to sit with the Conservative caucus. The number of senators in that group has been diminished to the point that by October 2025, the caucus will be only one seat away from losing its official party status in the Senate. Additionally, Senator Woo had attempted to strip the designation of "opposition" and "official opposition" from the Conservative caucus and its leader,[17] a move that suggests that the creation of a non-partisan Senate may nonetheless have a partisan purpose.

As Anglin and Pennings have noted, this also carries with it a serious risk of political and constitutional instability:

> The new "independent" model has removed the indirect accountability that might discourage such an abuse of the Senate's power. Because some of the new "independent" senators may believe that they were appointed on the basis of their individual merits, they may be emboldened — or even expected — to exercise their

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Senate Group", *CBC News* (May 14, 2020), online: https://www.cbc.ca/news/politics/peter-harder-progressives-1.5569325.

[14] John Paul Tasker, "Former Government Point Man Peter Harder Joins the Progressive Senate Group", *CBC News* (May 14, 2020), online: https://www.cbc.ca/news/politics/peter-harder-progressives-1.5569325.

[15] John Paul Tasker, "Former Government Point Man Peter Harder Joins the Progressive Senate Group", *CBC News* (May 14, 2020), online: https://www.cbc.ca/news/politics/peter-harder-progressives-1.5569325.

[16] Martin H. Manser, *The Facts on File Dictionary of Proverbs*, 2d ed. (New York: Facts on File, 2002) at 302.

[17] *Senate Debates*, 44-1, No. 165 (April 30, 2024) at 2340 (Hon. Yuen Pau Woo), online: *Senator Yuen Pau Woo* https://senatoryuenpauwoo.ca/en/parliamentary-activities/speeches/motion-165-motion-to-amend-the-rules-of-the-senate/.

> newfound political power to thwart the democratically elected House of Commons in a way that partisan appointees did not.[18]

This description is entirely correct. However, as the first clear indication that we are hurtling toward this confrontation comes from a notice of motion filed by the former Representative of the Government in the Senate, a more cynical explanation may be necessary.

While the Trudeau government's campaign to transform the Senate into an ostensibly less partisan institution would initially appear to run counter to its desire to implement a legislative agenda (including an agenda to transform the Senate), this apparent contradiction dissolves once one observes that Trudeau has maintained a high degree of control over the appointments. While the Independent Advisory Board for Senate Appointments provides some appearance of neutrality, it should be noted that its recommendations are non-binding, and it is composed of members appointed by the Minister of Intergovernmental Affairs.[19] These members serve three-year terms that are renewable at that Minister's discretion — hardly a hallmark of a truly independent committee.[20]

While the purportedly non-partisan caucuses might convince some observers that the Senate has changed, those with a better sense of history may still agree with the statements of Robert Alexander MacKay made almost a century ago:

> [T]he Senate rests upon nothing but itself and the Prime Minister or party leader who has appointed its members. Therefore, when it opposes the House of Commons its action seems capricious and arbitrary. To the public such action is the antithesis of representative government, and the voice of the Senate is but the voice of the Minister who has appointed its members, "ventriloquising through his nominees". This is the chief explanation of its weakness and of its unpopularity.[21]

This is a clear threat to representative government as we know it, however it is disguised.

Given the unpopularity of the Senate, it is understandable why a government

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[18] Howard Anglin & Ray Pennings, "Canada is Careening Towards a Constitutional Crisis in the Senate", *The Hub* (May 14, 2024), online: https://thehub.ca/2024/05/14/howard-anglin-and-ray-pennings-canada-is-careening-towards-a-constitutional-crisis/.

[19] See, *e.g.*, Government of Canada, News Release, "Government of Canada Announces Appointments to the Independent Advisory Board for Senate Appointments" (February 14, 2024), online: https://www.canada.ca/en/democratic-institutions/news/2024/02/government-of-canada-announces-appointments-to-the-independent-advisory-board-for-senate-appointments.html.

[20] Government of Canada "Independent Advisory Board for Senate Appointments: Mandate and Members" (last modified November 27, 2024), online: https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/members.html.

[21] Robert A. MacKay, *The Unreformed Senate of Canada* (Oxford: Oxford University Press, 1926) at 192 [footnotes omitted].

intent on empowering it considerably would seek to improve its image. Further insight into why this is necessary can be gained from a discussion paper published by Peter Harder on April 12, 2018, while he was still in post as the Government Representative in the Senate.[22] In it, Harder outlines his vision for the "new model"[23] of the upper chamber, which addresses as its central question, "how far should the Senate go — as an appointed body — in challenging legislation that has been approved by Canadians' elected representatives?"[24]

Harder's answer, despite being voiced in soothing tones, is quite jarring: the Senate can go as far as he believes it must, including blocking legislation that has the clear and unequivocal support of the populace, expressed in a general election. The justification for this unprecedented obstructionism can be found in Harder's conception of the Senate's purpose, which includes its role as the guardian of "a safety valve to protect Canadians against the tyranny of the majority", which would "defer to legitimate and reasonable government policy choices accepted by the House of Commons *that aren't inherently bad or fundamentally ill-considered*".[25]

In short, Harder re-characterizes the Senate as an inherently countermajoritarian institution. His discussion paper connects the Trudeau government's efforts to reform the upper chamber to obtaining sufficient legitimacy to block what it considers detrimental to minorities (or that which it deems inherently bad): "The current Government's approach to the Senate seeks, through the removal of a party-affiliated government caucus . . . to . . . demonstrate to Canadians its value as a *complementary* body".[26] The Senate is, in Harder's telling, effectively co-equal to the elected House of Commons, as it has the power to "thwart the will of the house", in a set of "rare and exceptional circumstances",[27] which Harder would only elaborate several years later.

Harder's vision of a more muscular Senate ignores the basic realities of an appointed chamber. In the words of MacKay: while "[t]o all appearances, it may be quite as powerful as a lower house, and legally have the right of an absolute veto on legislation passed by the lower chamber and the right of obstructing completely the Executive, . . . the moment it lays claim to such powers its existence is

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[22] V. Peter Harder, "Complementarity: The Constitutional Role of the Senate of Canada", *Senate GRO* (April 12, 2018), online: https://senate-gro.ca/wp-content/uploads/2018/04/Complementarity-The-Senates-Constitutional-Role-2018-04-12-Final_E.pdf [hereinafter "Harder, Complementarity"].

[23] Harder, "Complementarity" at 3.

[24] Harder, "Complementarity" at 2.

[25] Harder, "Complementarity" at 4-5 [emphasis added].

[26] Harder, "Complementarity" at 8 [emphasis added].

[27] Harder, "Complementarity" at 11.

imperilled".[28] In Canada, thwarting the House of Commons in the manner proposed will only serve to reactivate the means by which the Senate was at Confederation prevented from assuming the role of a countermajoritarian force.

Notably, the failure to acknowledge the *de facto* entrenchment of the Salisbury Convention and the methods for enforcing it might be a fatal mistake. These provisions, now found at sections 26-28 of the *Constitution Act, 1867*, were included in the final draft of the *British North America Act, 1867* by its sponsoring minister to prevent precisely what Harder proposes. It is for this reason that his plans to create a co-equal and countermajoritarian Senate are doomed to failure, should the Government and the House of Commons rise to this challenge.

III. THE SALISBURY CONVENTION: SHIELDING THE SENATE'S THIRD RAIL

The Salisbury Convention is, in essence, the rule that forbids the upper chamber from rejecting a bill that was passed by the House of Commons, if that bill fulfils a promise that was part of the government's platform during an electoral campaign.[29] Labelling it a convention or a doctrine is something of a misnomer, as it is not merely a rule or a political practice that the Senate chose to impose upon itself. Rather, it is the price that the appointed legislative bodies of Westminster system democracies must pay to remain in existence — and in the case of the Canadian Senate, in order to come into existence.

1. Control Over the House of Lords Before 1867: The Mandate Convention

While some historically deficient commentators date the formal recognition of this convention in the United Kingdom to 1945, those who are better informed note the recognition of this rule in the late 19th century, under a different name.[30] While it may not have been known by the name "Salisbury" until the time of either the fifth or the third Marquess of Salisbury in the House of Lords, it was in operation much earlier, when it was called the mandate convention. It was catalyzed by a confrontation between the two chambers of the Westminster Parliament. This occurred over three decades before Confederation, and the House of Commons secured a decisive victory for representative government.

Prior to the passage of the reform acts, only approximately one-tenth of English adult males were eligible to vote in parliamentary elections. After decades of popular agitation, Prime Minister Charles Grey brought a bill in 1831 that would

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[28] Robert A. MacKay, *The Unreformed Senate of Canada* (Oxford: Oxford University Press, 1926) at 62.

[29] Christopher Reed, "The Applicability of the Salisbury Doctrine to Canada's Bi-Cameral Parliament" (2017) 40:4 Can. Parl. Rev. 10 at 10.

[30] See generally Glenn Dymond & Hugo Deadman, House of Lords Library Note, "The Salisbury Doctrine", *UK Parliament* (June 30, 2006), online: https://www.parliament.uk/globalassets/documents/lords-library/hllsalisburydoctrine.pdf.

double the number of those enfranchised.[31] After it was defeated in the House of Commons, his party obtained a dissolution and then won an overwhelming majority in the ensuing election. (Charles Grey, being the second Earl Grey, had inherited peerage and consequently served as prime minister from the House of Lords rather than the House of Commons.) The bill was then blocked in the House of Lords, principally by the Lords Spiritual (that is, the Bishops of the Church of England who were then seated in the upper chamber).[32]

After a brief prorogation of Parliament, King William IV expressed his consent in principle to Lord Grey's proposal to appoint enough new peers to the House of Lords to secure electoral reform. In the end, packing the upper chamber proved unnecessary, as the Duke of Wellington warned his Tory peers of Lord Grey's plan. The Duke of Wellington's appeal to the House of Lords was not predicated on threats alone, but appealed to principle. Regarding the bill, he noted: "You can't have a worse opinion of it than I have, but it was recommended from the throne; it was passed by the Commons by a large majority, and we all must vote for it. The Queen's Government must be supported."[33]

The House of Lords ultimately supported the *Representation of the People Act, 1832*,[34] and over the course of the next three decades, this deference solidified into a convention with a clear scope and a well-accepted justification.[35] Walter Bagehot's *The English Constitution*, which was first published in serial form between May of 1865 and 1867 (and quickly moved from the status of instant classic to something like a book of authority on the functions of Parliament), gives us a clear sense of how the mandate convention had been observed shortly before Confederation:

> Since the Reform Act the House of Lords has become a revising and suspending House. . . . The House [of Lords] has ceased to be one of latent directors, and has become one of temporary rejectors and palpable alterers.[36]

Simply put, the mandate convention reflected the conventional view that since the House of Commons had democratic legitimacy and the House of Lords did not, and since a government that had the confidence of the House of Commons could rely on the Queen to appoint enough new peers to overcome persistent opposition, the dominance of the House of Commons was now a *fait accompli*. Accordingly, "both

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[31] Eric J. Evans, *The Great Reform Act of 1832* (London: Routledge, 1988) at 26.

[32] William Blackstone, *Commentaries on the Laws of England*, vol. 1 (London: John Murray, 1857) at 141.

[33] G. H. L. Le May, *The Victorian Constitution: Usages and Contingencies* (New York: St. Martin's Press, 1979) at 129-130.

[34] 2 & 3 Will. 4, c. 45 (U.K.).

[35] Eric J. Evans, *The Great Reform Act of 1832* (London: Routledge, 1988) at 53-67.

[36] Walter Bagehot, *The English Constitution* (London: Chapman & Hall, 1867) at 130.

Wellington and Bagehot assumed that the House of Lords must take its direction from the House of Commons".[37]

Given the fact that the proposals for an appointed upper house of what became the Dominion Parliament were framed during this period, it is unsurprising that many historians and political scientists have noted that "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".[38] This was not mere happenstance. Both the text and the legislative history of the *British North America Act, 1867* (renamed at patriation the "*Constitution Act, 1867*") demonstrate the intentions of its framers to make sure it was scrupulously observed, and they illustrate the attempt to create a mechanism to ensure compliance that was as close as possible to what had been contemplated — or indeed, threatened — by Lord Grey in 1832.

2. Lord Carnarvon's Insistence on the Senate's Democratic Accountability

Peter Harder is only the latest advocate of a countermajoritarian or co-equal Senate to ignore the specific textual provisions of the *British North America Act, 1867* in favour cherry-picking from the vague and often contradictory musings of the Fathers of Confederation about the Senate between 1864 and 1866.[39] This is unfortunate, since the specific means of resolving a confrontation between the House of Commons and the Senate received detailed attention during the drafting of the *British North America Act, 1867*. These provisions were at odds with earlier models for an upper house, and John A. Macdonald remained steadfast in his opposition to them until they were forced upon him. It was not until the end of January 1867 that the vague ideas about the upper house from 72 resolutions of the Quebec Conference of 1864 took on a much more specific form. What is most pertinent to note here is that this had been motivated by the need to ensure the supremacy of the House of Commons in any future showdown with the Senate.

After the London Conference of 1866, the Derby-Disraeli government accepted the Canadian delegates' proposal to draft legislation for the legislative union that would become the Dominion of Canada.[40] After a first draft of a proposal formulated at the Conference was tendered to the imperial authorities (a draft which had principally been the work of John A. Macdonald, George-Étienne Cartier, and Alexander Tilloch Galt), the task of supervising the legislative drafting fell to Henry

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[37] Corrine Comstock Weston, "Salisbury and the Lords, 1868-1895" in Clyve Jones & David Lewis Jones, eds., *Peers, Politics and Power: The House of Lords 1603-1911* (London: Hambledon Press, 1986) at 463-464.

[38] Christopher Reed, "The Applicability of the Salisbury Doctrine to Canada's Bi-Cameral Parliament" (2017) 40:4 Can. Parl. Rev. 10 at 12.

[39] Jennifer Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate* (Ann Arbor: University of Michigan Press, 2009) at 29-30.

[40] Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863-1867* (Toronto: Macmillan, 1976) at 391-424.

Herbert, who had inherited the office of Lord Carnarvon. During this drafting process, Lord Carnarvon served as Secretary of State for the Colonies and would be assisted by Lord Monck and the professional legal expert and draftsman F.S. Reilly.[41]

While considerable scholarly attention has been devoted to the transformation of the methods of nomination and representation from the plan drawn at Quebec into what was enacted at Westminster, considerably less attention has been devoted to the development of the specific sections of the *British North America Act, 1867* that addressed Lord Carnarvon's concerns about the implications of an irresponsible appointed upper chamber. Carnarvon, upon presenting the second draft of the *British North America Act, 1867*, had attempted to convince Macdonald to adopt a legislative structure that more closely resembled that of the United States, with limited terms for senators. In Donald Creighton's words, "Colonial Office officials strongly objected to a Senate with fixed numbers, appointed for life, on the ground of a possible deadlock with the House of Commons."[42]

The legislative history that follows demonstrates why it is a serious mistake to attempt to draw conclusions about the provisions of the *British North America Act, 1867* from the statements of Macdonald and others made prior to February 1867: "It was obvious, with the weight of British disapproval . . . that the Quebec plan for the Senate would have to be changed; and the only remaining questions were how far the change would go."[43] On the account of the Speaker of the Senate Robert Duncan Wilmot (who had been a delegate from New Brunswick present in London at that time), the Canadians initially refused to bend to Carnarvon, who had insisted "that some provision should be made to meet a deadlock between the two branches of the Legislature, should such a collision ever occur".[44] In response to the delegates' unwillingness to reconsider, Carnarvon "expressed his regret *and said he did not think the Act would be passed in that shape*. After several meetings and long discussions, we finally agreed upon the Constitution of the Senate as it now stands in the Act, and to adopt the *26th Section as a safety valve in the event of a deadlock*."[45]

There is ample evidence that section 26 of the *British North America Act, 1867*

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[41] Peter Gordon, ed., *The Political Diaries of the Fourth Earl of Carnarvon*, vol. 35 (Cambridge: Cambridge University Press, 2009) at 144.

[42] Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863-1867* (Toronto: Macmillan, 1976) at 419.

[43] Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863-1867* (Toronto: Macmillan, 1976) at 420.

[44] George Ross, *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered* (Toronto: Copp, Clark Company, 1914), quoting Senate Debates of 1877 at 71.

[45] George Ross, *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered* (Toronto: Copp, Clark Company, 1914), quoting Senate Debates of 1877 at 71 [emphasis added]

was a condition for the existence not only of the Senate, but the Dominion of Canada. Additionally, it was a condition imposed by Lord Carnarvon, who "did not believe that the democratic character of the Senate was sufficient security against collision, and in this belief he was, no doubt, influenced by his experience in the House of Lords".[46] In short, Carnarvon was determined to make sure that there was an enforcement mechanism that came as close as possible to what had been developed to enforce the mandate convention after the initial rejection of the Great Reform Act.

After the delegates gave in to Carnarvon's ultimatum on February 2, 1867, it was he who supervised the subsequent drafting, and he who ultimately served as the sponsoring minister of the Bill. Accordingly, to understand how his intentions (as the delegates had grudgingly accepted them) were embodied in the *British North America Act, 1867*, we should pay detailed attention to the drafts that were produced after that time, which shed considerable light on how section 26 and section 27 were designed to be employed in the event of a confrontation between the Senate and the House of Commons.

IV. THE DRAFTING AND MEANING OF SECTIONS 26-28 OF THE *BRITISH NORTH AMERICA ACT, 1867*

After the delegates accepted that the Imperial Parliament would never enact a legislative union without a provision for the override of senatorial obstruction, they produced a draft on February 2, 1867, that contained the following provisions at sections 16-17:

> 16. If any Money Bill passed by the House of Commons is rejected by the Senate for any one Session, or if any other Bill passed by the House of Commons is rejected by the Senate on three consecutive occasions . . . it shall be lawful for Her Majesty to create additional Members of the Senate, preserving the rule of equality between the three Divisions . . .
>
> 17. In case of any such increase on such vote beyond the normal number of seventy-two Members of the Senate, no additions shall thereafter be made until each section shall be represented by twenty-four Members and no more.[47]

Crucially, in an accompanying note dated February 1, 1867, the delegates indicated that the maximum number of senators pursuant to this procedure would be fixed at 78.[48] Accordingly, under Carnarvon's direction, they would need to square

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[46] George Ross, *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered* (Toronto: Copp, Clark Company, 1914), quoting Senate Debates of 1877 at 70.

[47] Joseph Pope, ed., *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Law Publishers, 1895) at 162. See also G.P. Browne, *Documents on the Confederation of British North America* (Montreal: McGill Queen's University Press, 2009) at 268.

[48] Resolution of the North American Delegates with regard to the Elasticity of the Senate, reprinted in G.P. Browne, *Documents on the Confederation of British North America*

a procedure designed to enforce the mandate convention with this limitation.

In the next draft of the Bill, the single section addressing addition of supplemental senators read as follows:

> 20. On the application of the Government of Canada, Her Majesty in Council may from time to time sanction an appointment of additional Senators, so as that the whole number shall in no case exceed seventy-eight, the proportion allotted to each of the three divisions being preserved. In case of vacancies after any such increase above seventy-two; no appointment shall be made without the sanction of the British Government till the whole number is reduced below seventy-two.[49]

However, between this confidential draft and the enactment of the bill, considerable modifications were made to this provision — all of which were presumably made at Carnarvon's direction. The final draft (the essential features of which were ultimately enacted) included the following three sections devoted to the deadlock resolving mechanism:

> 26. If at any Time on the Recommendation of the Governor-General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor-General may summon to the Senate such Three or Six Persons (as the Case may be) representing equally the Three Divisions of Canada.
>
> 27. *In case of the Appointment at any Time of such additional Three or Six Senators* the Government General *shall not Summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation*, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.
>
> 28. The Number of Senators shall not at any Time, notwithstanding anything in this Act, exceed Seventy-eight.[50]

Unlike all the earlier drafts, these provisions, as memorialized in section 27, contemplate repeated uses of the section 26 deadlock-breaking appointments procedure. However, insofar as this would seemingly contradict the terms of the limitation of section 28, even the most well-informed commentators have concluded that while "Section 27 envisages the possible re-use of section 26 provided the number of Senators does not exceed" the number fixed by section 28, "[t]he circumstances under which this could take place are . . . obscure".[51]

(Montreal: McGill Queen's University Press, 2009) at 263.

[49] Joseph Pope, ed., *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Law Publishers, 1895), at 184; G.P. Browne, *Documents on the Confederation of British North America* (Montreal: McGill Queen's University Press, 2009) at 184.

[50] Joseph Pope, ed., *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Law Publishers, 1895), at 217-218 [emphasis added]; G.P. Browne, *Documents on the Confederation of British North America* (Montreal: McGill Queen's University Press, 2009) at 217-218.

[51] Mollie Dunsmuir, "The Senate: Appointments Under Section 26 of the Constitution Act, 1867" (August 1990), *Government of Canada,* see online: <https://publications.gc.ca/

Considerable light can be thrown on these circumstances by examining the evidence that Carnarvon had indeed envisioned a more vigorous use of the deadlock-breaking procedure than the unamended *British North America Act, 1867* would allow. It is worth noting that when Carnarvon introduced it in the House of Lords, he addressed the section 26 procedure and what he viewed as its defects quite explicitly:

> [A]s . . . a difference of opinion between the two Houses . . . might bring about what is popularly known as a legislative dead-lock, a power is conferred upon the Crown — a power, I need not say, that would only be exercised under exceptional and very grave circumstances — to add six members to the Senate . . . It may, perhaps, be said that the addition of six members will be insufficient to obviate the legislative discord against which we desire to provide. I am free to confess that I could have wished that the margin had been broader.[52]

Why, if Carnarvon had reservations about the limits of the deadlock procedure created by the temporary maximum number of senators, did he not press for further changes? The answer is that he had already created a means for addressing the limitations of section 28 in his final modifications to the Bill that became the *British North America Act, 1867*. The earlier drafts had not contained any reference, however obscure, to repeated use of the special appointment procedure. Additionally, by including the temporary maximum number of senators after the use of this procedure within the same section, they had created a self-contained mechanism. Conversely, the *British North America Act, 1867* as it was enacted after Carnarvon's final revisions contained three free-standing provisions: one that allowed for special appointments (section 26); another that limited appointments in the ordinary course until the numbers fell to the normal number, as it was before the first or subsequent use(s) of the special appointments procedure (section 27); and a final one that set the maximum number of senators in the event that this special procedure were to be employed (section 28).

In essence, as Carnarvon had wished for a higher margin, he had broken out the provision that set the outer bound of that margin into a discrete provision — one that could be later amended without affecting the other provisions. While in the 21st century we are bound by the constitutionally entrenched amendment procedures found in Part V of the *Constitution Act, 1982*,[53] this was certainly not the case in 1867, and this sheds considerable light on how the framers of the *British North America Act, 1867* thought the mechanism for breaking a deadlock between the Senate and the House of Commons could quickly be made functional, should that prove necessary.

Collection-R/LoPBdP/BP/bp244-e.htm> at n. 17. Dunsmuir's reference to 112 senators corresponds to the maximum number fixed by the *Constitution Act (No 2), 1975*, 23-24 Eliz. II, c. 53, s. 1(b).

[52] *Senate Debates*, 3-4 (March 19, 1877) at 215-216 (as quoted by Senator MacPherson).

[53] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

As Mollie Dunsmuir noted: "As Canada grew, the carefully crafted compromise on the deadlock provision required amendment to allow for the addition of new provinces."[54] When Manitoba was admitted as a province into Confederation in 1870, it was allotted two seats in the Senate; three more seats were created when British Columbia was admitted. This was accomplished by means of federal legislation, as an implicit amendment of the provisions of the *British North America Act, 1867* that had set out the number of seats in the Senate. Indeed, although the *Manitoba Act, 1870* had made an implicit amendment of Imperial legislation, this passed without comment at Westminster until the enactment of the *British North America Act 1886*, which retroactively validated the addition of these seats in the Senate and further stated the following:

> [A]ny Act passed by the Parliament of Canada . . . has effect, notwithstanding anything in the British North America Act, 1867 and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act . . .[55]

In 1905, eight more Senate seats were created when Alberta and Saskatchewan joined Confederation. When legislation enacted at Westminster allotted the two new provinces these seats, amending the terms of section 22 of the *British North America Act, 1867*, it also, by implication, amended the maximum number of senators found in the deadlock-breaking provisions: the actual number of seats in the Senate would have been seven seats greater than the temporary maximum number applicable in the event of an appointment under section 26, had section 28 not been considered impliedly amended by the cumulative effect of domestic and imperial legislation. An explicit textual amendment to section 28 would follow in 1915, when the *British North America Act, 1867* recognized that the number of seats in the Senate was now 96 and established that the maximum number of senators after the use of the section 26 procedure would be 104.[56]

In the early years of the Dominion, the argument that Parliament could not explicitly amend the number of senate seats specified by the *British North America Act, 1867*, as it had done implicitly in 1870 and 1871, had not yet been made. Later, the Dominion Parliament would accept that amendments of this nature were *ultra vires* the Dominion Parliament and reserved to Westminster. This led to the enactment of the *British North America Act, 1871* (which extended imperial sanction to the *Manitoba Act, 1870*, but only to settle doubts about its validity, rather than endorsing those misgivings).

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[54] Mollie Dunsmuir, "The Senate: Appointments Under Section 26 of the Constitution Act, 1867", *Government of Canada* (August 1990), online: https://publications.gc.ca/Collection-R/LoPBdP/BP/bp244-e.htm at n. 17.

[55] *British North America Act, 1886*, 49 & 50 Vict., c. 35, s. 2 (U.K.).

[56] *An Act to amend the British North America Act, 1867*, 5 & 6 Geo. V, c. 45 (U.K.) (also known as the *Constitution Act, 1915*).

As the *British North America Act, 1871* demonstrated, the Colonial Office was entirely willing to recommend legislation at Westminster that would adjust the provisions of the *British North America Act, 1867* that governed the number of seats in the Senate. Indeed, it was the position of the Colonial Office before that time that such amendments could be introduced by the government of the Dominion without the consent of its Parliament: the draft bill that became the *British North America Act, 1871* had been created by the Executive and would have been forwarded to Westminster without any formal action by Parliament, were it not for the motion made in the (Dominion) House of Commons by Luther Holton that such requests should be made by an Address or Petition to Her Majesty from both Houses of Parliament, which was unanimously assented to, and which established a constitutional convention.[57]

It is this history that best illustrates the hidden meaning of the structure of the deadlock-breaking provisions of the *British North America Act, 1867*. Section 26 authorized the cabinet to make the request for the appointment of supplementary senators by providing advice to the Governor General, who would then make that recommendation to the Queen. Section 27 impliedly authorizes further appointments by means of a "further like direction", which could exceed the number found in section 28, unless legislation at Westminster were introduced to amend that maximum number of senators, as was done impliedly in 1905 and explicitly in 1915. In the first years of the Dominion, a request for an amendment of section 28 could have been made by the Executive alone, and indeed this would invariably have been the case, insofar as a Senate obstructing a bill passed by the House of Commons in contravention of the mandate convention — the very scenario that motivated the creation of the deadlock-breaking provisions — could hardly be expected to consent to an Address or Petition that asked Her Majesty to pack the Senate.[58]

This course of action may have been precisely what Carnarvon intended when he amended the *British North America Act, 1867* to specifically mention the possibility of a repeated invocation of the special appointment procedure and which placed the provision establishing the maximum number of senators after that procedure in its own section. It is also worth considering that, in his third term as Secretary of State for the Colonies, Carnarvon would have been the point of contact for a Dominion government seeking either — or both — an appointment under section 26 or

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[57] George Ross, *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered* (Toronto: Copp, Clark Company, 1914), quoting Senate Debates of 1877 at 117.

[58] See, *e.g.*, C.W. de Kiewiet & F.H. Underhill, eds., *Dufferin-Carnarvon Correspondence, 1874-1878* (Toronto: Champlain Society, 1955) at 354, n. 1: "When Mackenzie took office in 1873, with a strong majority in the Senate against him, he asked permission to increase the membership of the Senate, under Section 26 of the B.N.A. Act. This request . . . was refused by Lord Kimberley, the colonial secretary. The matter did not become public till 1877, when the Conservative Senate passed an address approving of Lord Kimberley's action."

legislation amending section 28 of the *British North America Act, 1867*. As he was insistent on a deadlock-breaking procedure that would be sufficient to overcome any attempt to violate the mandate convention, it is likely that he would have supported both requests. The reason that there was no need to make them is likely because senators understood the price that would be paid if they rejected legislation that had been part of a government's election platform. This, along with respect for the conventions of the upper chamber, explains why no one has seriously contemplated doing so until very recently. Accordingly, we should return to the question of this new threat to responsible government, and how the House of Commons should respond.

V. ENFORCING THE CONVENTION IN THE 21ST CENTURY

When Peter Harder articulated his vision of the complementary role of the Senate in 2018, he expressed tentative support for the Salisbury Convention (as the mandate convention is now known). However, this was couched within an assessment that it was not really a rule, but more of a guideline derived from underlying principles, which were observed out of prudence, rather than by necessity. He also made the claim, contrary to the views of generations of constitutional scholars, that it was not self-evident that the Salisbury Convention was now in force: "Whether the Salisbury Convention is binding upon the Senate as a fully crystallized convention is a complex question — requiring deeper analysis".[59]

Only after setting aside this essential issue does Harder make his case for breaching that convention. In doing so, he relies on misconceptions of the role of the Senate and the nature of the notwithstanding clause. These arguments, if put into practice in the manner he contemplates (and indeed now advocates), would require the use of the deadlock-breaking procedure in the manner its framers intended, and possibly constitutional amendment.

1. Harder's Americanized Vision of the Senate and Constitution of Canada

In his discussion paper, Harder muddies the waters to make them appear deep. He labels the Salisbury Convention a "Westminster convention"[60] even though it has been scrupulously observed in Ottawa since Confederation. Crucially, he also pushes forward the date of its emergence until after Confederation, arguing that it possesses "roots in the *late* 19th Century"[61] — ignoring the scholarly consensus of its emergence in 1832 and the significance of this being firmly established before Confederation.

Furthermore, Harder ignores the evidence from over 150 years of post-Confederation practice in the Parliament of Canada that the Convention was accepted as binding, the hallmark for the recognition of a convention. It is a simple

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[59] Harder, "Complementarity" at 43.

[60] Harder, "Complementarity" at 41.

[61] Harder, "Complementarity" at 41 [emphasis added].

matter to find many statements to this effect, such as Senator Frances Lankin's comment in 2016:

> [T]he Senate would neither defeat nor insist on its amendment to a bill that implements a policy or program that's clearly articulated in the government's mandate, that is, if they ran on it and it was part of the election campaign commitment . . . *By parliamentary convention*, that's not something the Senate would reach into and attempt to overturn or block.[62]

Harder recasts this perspective into the view that "election promises should — in principle — be passed by the appointed Senate", and he suggests that "certain rare cases should not be sheltered by such a convention given key features of the Senate's core mission as a safety valve against potential excesses of majority rule".[63] He then presents a hypothetical measure modelled on Japanese-Canadian internment during the Second World War, arguing the Senate would have a "constitutional duty to block such a bill, notwithstanding the Salisbury Convention".[64]

History demonstrates that it was precisely the creation of the purported duty of the House of Lords to block unconstitutional legislation that led to the emergence of the Convention; the opposition in the upper house to the Great Reform Act was predicated on the view that the expansion of the franchise was contrary to the constitutional order of the United Kingdom. Wellington and William IV simply imposed on the upper chamber the reality that their view of unconstitutionality could not prevail within a Westminster system of democracy, as the upper house cannot be held accountable for its views even when they are manifestly wrong, and even when they are invoked to block a measure with resounding popular support. That remains as true in 2025 as it was in 1832.

Since 2018, Harder appears to have broadened his category of the "rare cases" that would purportedly warrant ignoring the Salisbury Convention (if indeed he grants that it has crystallized as a convention in Canada over almost two centuries of observance). He now urges the Senate to reject any legislation that invokes the notwithstanding clause, on the grounds that this would constitute "an admission of infringement of [*Charter*] rights", and, "as a protector of minority voices, the Senate is best-equipped, and indeed obligated, to push back in overt circumstances of tyranny of the majority, of which this is, I believe, a prime example".[65]

What is the potential use of the notwithstanding clause at issue that Harder believes provides the prime example of a case that justifies breaching the Salisbury

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[62] Harder, "Complementarity" at 43 [emphasis added].

[63] Harder, "Complementarity" at 44.

[64] Harder, "Complementarity" at 44.

[65] Paul Wells, "Should the Senate Block the Notwithstanding Clause? Senator Harder has Thoughts" (July 3, 2024), Substack, online: https://paulwells.substack.com/p/should-the-senate-block-the-notwithstanding [internal quotation marks omitted].

Convention? As was reported of the Leader of the Official Opposition of late, it is the use of the Constitution's derogation procedure to re-insert statutory minimum sentences back into the *Criminal Code*,[66] which is hardly akin to Japanese-Canadian internment. Furthermore, as Mark Harding has noted, Harder's belief that the use of section 33's notwithstanding clause is an admission of infringement demonstrates a "troubling understanding of the Constitution",[67] which is, unfortunately, one misunderstanding among many.

As demonstrated above, in addition to concluding that the application of a constitutional provision — the inclusion of which was the essential precondition for the Charter — is evidence of unconstitutionality, he fails to note that the convention he would be breaching was itself the essential precondition of the *British North America Act, 1867*, and thus of Canada itself. Furthermore, Harder's attempt to reinforce his argument about the necessity of the Senate's intervention by characterizing the invocation of section 33 to re-insert mandatory minimums as "a preemptive use" of the notwithstanding clause is nonsensical.

Reinstating mandatory minimums, such as the one-year minimum for sexual abuse of a minor under 16 (which was struck down in 2024)[68] would be anything but pre-emptive. Since the Supreme Court of Canada resuscitated the doctrine of the reasonable hypothetical in 2015, many other minimum sentences have been eliminated. Most recently, in August 2024, the one-year minimum for the importation of child pornography was held to be cruel and unusual punishment by the Court of Appeal for Ontario.[69]

From 2006 to 2015, Parliament had added new mandatory minimum sentences into the *Criminal Code* to ensure that the punishments for firearms and drug trafficking offences would pursue the goals of deterrence, denunciation and incapacitation more adequately. The judiciary (and especially the Supreme Court) has made it clear that they disagree with the public policy of balancing the goal of rehabilitation against these objectives in that manner.[70] To make sure that their view would prevail, the Court pronounced that the application of a sentence with a minimum range established by an Act of Parliament could be struck down as cruel

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[66] Stuart Thomson, "Pierre Poilievre Prepares to Embrace the Notwithstanding Clause — and All Its Controversy" *National Post* (May 1, 2024), online: https://nationalpost.com/news/canada/pierre-poilievre-embraces-notwithstanding-clause.

[67] Mark Harding, "A Future Poilievre Government Is Headed Straight for a Senate Showdown", *The Hub* (July 15, 2024), online: https://thehub.ca/2024/07/15/mark-harding-a-future-poilievre-government-is-running-headlong-into-a-senate-problem/.

[68] *R. v. Basso*, [2024] O.J. No. 951, 2024 ONCA 168 at para. 61 (Ont. C.A.).

[69] *R. v. Pike*, [2024] O.J. No. 3530, 2024 ONCA 608 at para. 183 (Ont. C.A.).

[70] See Dale Smith, "Rolling Back Harper-era Sentencing Laws", *National* (April 4, 2022), online: https://nationalmagazine.ca/en-ca/articles/law/in-depth/2022/rolling-back-harper-era-sentencing-laws.

and unusual punishment contrary to section 12 of the Charter even if the within-range sentence imposed on that offender was fit and proportionate to the actual offence.[71]

Characterizing the reinstatement of mandatory minimum sentences as pre-emptive requires ignoring a decade of relentless judicial activism. The use of section 12 to strike down these provisions has obtained such momentum that legal academics now advocate for the elimination of the 25-year minimum sentence for premeditated murder. Despite the fact this has been in the *Criminal Code* since its enactment in the 19th century, the goal of convincing the Supreme Court to strike it down as unconstitutionally cruel and unusual punishment is now considered by these advocates to be both laudable and attainable.[72]

Harder's mischaracterization of the use of the notwithstanding clause to respond to this invidious judicial activism as "pre-emptive" serves to legitimize the breaching of the Salisbury Convention. While he argues that "preemptive use of the notwithstanding clause takes the judicial branch out of the equation, leaving the protection of rights to the Senate",[73] this is evidently not the case here. This ignores the fact that the judiciary chose to insert itself into the equation, such that it might grant convicted criminals a new Charter right not to be subjected to a mandatory minimum sentence.

Finally, it should be noted that Harder has followed the lead of the Supreme Court of Canada by conceiving of those convicted of crimes — notably, including those convicted of sexual assault on a minor under 16 — as "minorities" who should not be subjected to the tyranny of the law-abiding majority. In the event that the first federal use of the notwithstanding clause is to re-insert a one-year minimum sentence for sexual abuse of a minor under 16 years old[74] (and possibly the same minimum for the importation of child pornography,[75] or the six-month minimum sentence for the possession of child pornography,[76] which was struck down in 2018[77]), the Senate would not be in a good position to self-aggrandize itself into a body that is complementary and co-equal to the House of Commons by opposing it on these grounds and in such an unprecedented manner.

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[71] *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 at paras. 47-49 (S.C.C.).

[72] Stacey M. Purser, "Reconsidering *Luxton* in the Post-*Nur* Revolution: A Brief Qualitative and Quantitative Analysis of Recent Challenges to Mandatory Minimums and Other Sentencing Provisions" (2021) 44:5 Man. L.J. 124 at 147.

[73] Paul Wells, "Should the Senate Block the Notwithstanding Clause? Senator Harder has Thoughts" (July 3, 2024), Substack, online: https://paulwells.substack.com/p/should-the-senate-block-the-notwithstanding.

[74] *Criminal Code*, R.S.C. 1985, c. C-46, s. 151.

[75] *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1(3).

[76] *Criminal Code*, R.S.C. 1985, c. C-46, s. 163.1(4).

[77] *R. v. John*, 142 O.R. (3d) 670, 2018 ONCA 702 at paras. 38-40 (Ont. C.A.).

That said, Harder has expressed a firm intention to prevail upon his fellow senators (most of whom are Liberals *de facto*, if not *de jure*, and who sat in the red chamber while he was the Representative (formerly the Leader) of the Government in the Senate), having presented his notice of motion to that end on May 23, 2024. That motion would state: "That the Senate express the view that it should not adopt *any bill* that contains *a declaration pursuant to section 33 of the Canadian Charter of Rights and Freedoms*, commonly known as the 'notwithstanding clause.'"[78]

It is notable that this motion recognizes, at least informally, that the notwithstanding clause is part of the Charter. What is less edifying is that it contains no requirement that a bill invoking the notwithstanding clause be pre-emptive in nature to trigger this requirement to reject it. However, for practical purposes, what is most notable about Harder's motion is that it would commit the Senate to breaching the Salisbury Convention.

2. How Can the House of Commons Enforce the Salisbury Convention?

If the House of Commons does not respond adequately to a breach or even a credible threat to the Salisbury Convention in the manner Harder's motion contemplates, a range of evils would ensue. First, the Senate will have effectively rewritten the Constitution of Canada, by eliminating as it concerns the federal level the clause of the Charter that was the necessary condition of its existence. Second, the Senate, an appointed body that continues to reflect a partisan, winner-take-all nature, will have elevated itself into a body as powerful as the one composed of those whom Canadians elect. Finally, elections themselves may ultimately become meaningless, insofar as they will be incapable of leading to changes of policy wherever the Supreme Court has constitutionalized what is properly considered political, a dynamic that continues to accelerate at breakneck speed.[79]

The first step to defend the primacy of the elected chamber of Parliament falls to the government, as the deadlock-breaking procedure established at Confederation specifies. Before acting, the government should make the case to the Canadian public that the Salisbury Convention was never breached in the history of Canada because it is essential to our constitutional design. A response of this nature requires a well-articulated justification. Assuming that every vacancy in the Senate is filled, the next step would be to follow the example of the Mulroney government by invoking the procedure specified in section 26 of the *Constitution Act, 1867* by advising the Governor General to appoint eight additional Senators.[80] This is a

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[78] *Senate Debates*, 44-1, No. 203 (May 23, 2024) at 1420 (Hon. Peter Harder, Notice of Motion Concerning Bills With A "Notwithstanding Clause"), *Senate of Canada*, online: https://sencanada.ca/Content/SEN/Chamber/441/debates/pdf/203db_2024-05-23-e.pdf#page=8 [emphasis added].

[79] See generally Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Annual Rev. of Political Science 93.

[80] CBC News Archives, "When Brian Mulroney Upsized the Senate to Pass the GST",

plenary power, without conditions on its use, and in the one instance when it was invoked (in 1990, to ensure passage of the Goods and Services Tax, among other legislation) it was upheld by the courts in no uncertain terms.[81]

At that time, the government should note that section 27 of the *Constitution Act, 1867* contemplates repeated invocations of the section 26 procedure, should it be necessary to break a deadlock between the parliamentary chambers. It is at this point that the government should obtain clear consent, via Resolution of the House of Commons, that the elected chamber will do its utmost to protect the constitutional order. To that end, the resolution should contemplate amending the maximum number of senators found in section 28, as was envisioned by Lord Carnarvon; in the 21st century, this requires using the unilateral amendment procedure outlined in section 44 of the *Constitution Act, 1982*.

The unilateral amendment procedure was used to amend the maximum number of senators set in section 28 when enacting the *Constitution Act, 1999 (Nunavut)*.[82] There is no controversy about whether this procedure can be used to raise the maximum number of seats in the Senate after making use of the deadlock-breaking provisions, nor should there be any argument about whether it would be appropriate to raise this figure substantially, should a majority of senators support a breach of the Salisbury Convention. While the appointment of a significant number of supplementary senators would enlarge the Senate considerably, if those appointments were made from people close to the mandatory retirement age, the upper chamber would revert back to a body with the customary number of positions not long after this crisis resolves.

It is also worth noting that the provisions of the constitutional amending formula found in section 47(1) of the *Constitution Act, 1982* themselves embody the Salisbury Convention: the Senate is prevented from blocking a range of constitutional amendments, as that section limits it to a six-month suspensive veto. However, this provision does not apply to an amendment targeting the Senate itself, if it is brought pursuant to the unilateral amendment procedure found in section 44. At patriation, the terms of Part V embedded the Salisbury Convention within section 47(1), but not for procedure that most resembles ordinary legislation in which it had always been observed.[83] This seems to indicate that the framers of the *Constitution*

CBC News (September 27, 2018), online: https://www.cbc.ca/archives/when-brian-mulroney-upsized-the-senate-to-pass-the-gst-1.4839649.

[81] *Reference re Constitutional Question Act (British Columbia)*, [1991] B.C.J. No. 244, 78 D.L.R. (4th) 245 (B.C.C.A.).

[82] *An Act to amend the Nunavut Act and the Constitution Act, 1867*, S.C. 1998, c. 15, s. 43.

[83] Section 47(1) states: "an amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 *may be made without a resolution of the Senate* authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not

Act, 1982, much like their forebears in 1867, could scarcely imagine a Senate so drunk on its self-righteousness that it would argue that it was right and proper to assume in perpetuity a status equal to that of the elected and democratically accountable chamber of Parliament.

Unfortunately, unless Harder and his allies can be motivated by either shame or fear to change course, it may be necessary to contemplate an amendment to which the provisions of section 47(1) apply to bypass an unconstitutionally obstinate Senate. An amendment to the powers of the Senate brought pursuant to sections 42(1)(b) and 38(1) of the *Constitution Act, 1982* would require the support of the House of Commons and resolutions of the legislative assemblies of at least two-thirds of the provinces that together have at least 50 per cent of the population of all the provinces. If the House of Commons is forced to obtain the support of seven provinces to ensure its paramountcy over the Senate, it is likely that a price would need to be paid. In exchange for paying that price, it is also likely that the House of Commons would want to obtain good value for that bargain.

Should the House of Commons be forced to rely on the provinces for a constitutional amendment, it might seek to trim the aspirations of the upper chamber in a decisive and enduring manner. If that body remains appointed, perhaps its ability to block any legislation whatsoever could be curtailed, by means of a provision like that found in section 47(1). Limiting the Senate to a six-month suspensive veto over all the bills approved by the House of Commons might be the least radical solution to the problem that Peter Harder's motion symbolizes.

VI. CONCLUSION

Any proposal for the Senate to breach the Salisbury Convention is, in effect, a plan to transform the Canadian constitutional order into a chimera with the worst features of the United States and the United Kingdom. An appointed body that blocks the will of the populace as it is expressed in a federal general election will never obtain legitimacy, although it could cause unprecedented disruption and political instability. For all its faults, Harder's proposal should be credited for its explicitness: his vision of a "complementary" upper house that has a countermajoritarian role. This can be the subject of a direct comparison to the design of the framers of the *British North America Act*, *1867*.

When compared against the intentions of the framers of our constitutional order — both in 1982 and in 1867 — it quickly becomes apparent that a co-equal Senate is precisely the development that the framers of the *British North America Act, 1867* had sought to prevent. A thorough examination of their efforts demonstrates they also gave serious thought to how this could be prevented. Lord Carnarvon made significant efforts to convince the Canadian delegation at Westminster that the possibility of a deadlock between the Senate and the House of Commons needed to

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adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution." [emphasis added].

be taken seriously. Additionally, during the drafting of the bill that became what we now know as the *Constitution Act, 1867*, he made it simple and straightforward to amend these provisions so that they would remain effective.

While commentators have been puzzled by section 27's provision for repeated use of the section 26 special appointment procedure, this makes perfect sense when we remember that Carnarvon had placed the clause containing the maximum number of Senators into a self-standing provision. It is likely that he envisioned the need for a discrete amendment to section 28, as that might have proved necessary to allow for sufficient supplementary appointments to resolve a deadlock between the two legislative chambers.

Accordingly, if the Senate refuses to pass a bill containing the notwithstanding clause that embodies a promise made to Canadians from the campaign trail, the section 26 procedure should be used to appoint eight supplementary senators. The House of Commons should then consider a bill to amend section 28 to increase the temporary maximum number of senators to an amount that would overturn the Liberal majority in the Senate who are committed to a transformation of our constitutional order contrary to its framers' intentions.

Should the Senate seek to block the use of the unilateral amendment procedure to amend section 28, the House of Commons should remind the Senate that structural amendments to the upper chamber's powers can be made by means of the general amendment procedure, and there would be ample support for doing so, including from the provincial legislatures, should that unelected body attempt to seize control of legislative power in a manner not seen in any Westminster democracy after 1832. It is up to the senators whether they will accept a return to the role mandated by our constitutional instruments as they currently stand, or whether radical reforms will be necessary to prevent any further attempts to subvert the democratic nature of Canada's representative government.