

DRAFTING FOR DIVERSITY THROUGH PRIVATE MEMBERS' BILLS: A SENATE PERSPECTIVE

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Outline

- Introduction: *The Law is Not Engraved on Stone Tablets*
- Government Bills
- Private Members' Bills
- Private Members' Public Bills
- Private Members' Private Bills
- Conclusion

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Introduction: The Law is Not Engraved on Stone Tablets



- Permanent and immutable vs. dynamic and alive
- Parliamentary vs. judicial solutions
- Pointing out problems vs. proffering solutions

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Drafting for Diversity Through Private Members' Bills

"Diversity" – The diverse legislative objectives that private members bring to the table, unfettered by the political agenda of the Government and the policy objectives of the federal bureaucracy.

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Setting the Stage

As the first speaker, I must set the stage for the panel:

- Review the types of legislation
- Place private members' bills in context

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Types of Legislation

A basic division between types of bills:
public vs. private

Sir Fortunatus Dwarrris: "A general or public act, then, regards the whole community; special or private acts relate only to particular persons, or to private concerns."

A General Treatise on Statutes (1831; 1873 ed.)

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Types of Legislation, cont'd.

Maxwell: "Modern statutes are either public or private, a public Act (which may be either general, or local or personal, according to the extent of its application) being one which relates to some matter of public policy, while a private Act relates to the affairs of some individual or body in a matter which is not of public concern."

Maxwell on the Interpretation of Statutes
(1875; 12th ed. 1969)

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Types of Legislation, cont'd.

Driedger: "Bills are either public, private, or local, although the distinction is not always clear. Loosely defined, a public bill is one that relates to matters of general application; a private bill is intended to confer special powers or privileges on a particular person or group of persons; a local bill relates to a particular area rather than the whole community. Local bills are usually private bills and the two are grouped together as 'local and private bills'."

"The Preparation of Legislation" (1953) 31
Canadian Bar Review

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Modern Categorization of Bills from a Parliamentary Perspective

Based on procedural considerations:

- **Public Bills** (sponsored by Government or private members):
 - Government Bills
 - Private Members' Public Bills ("Private Members' Bills")
- **Private Bills** (only sponsored by private members):
 - Private Members' Private Bills ("Private Bills")

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Modern Categorization, cont'd.

"There are two kinds of public bills. Those introduced by the Government are called 'government bills' and those introduced by private members are called 'private members' bills'. It is the government bills that take up the greatest amount of parliamentary time. Time limitation and complicated procedures are two reasons why few private members' public bills, in proportion to the number introduced, are ever enacted into law."

Raymond L. du Plessis, "Parliament in Action: The Law Making Process", Office of the Law Clerk and Parliamentary Counsel, Senate of Canada, May 1978
(revised October 1991)

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Categorization of Bills Cont'd...

- Senate bills ("S-bills") vs. House of Commons bills ("C-bills")
- Nomenclature:
 - S 2 to S 20 for Government bills
 - S 21 to S 100 for private members' bills
 - S 101 and on for private bills(The same applies in the House of Commons)

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Government Bills

Volume:

- generally make up about 90% of the legislation that is presented for royal assent

Origin:

- same client: the Government of the day
- different drafter from Private Members' Bills: Government bills were drafted in Parliament in the 19th century, but are drafted in the Executive Government today

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Government Bills, cont'd.

Procedure:

- treated separately from other public bills, once introduced
- given procedural priority by the *Rules of the Senate* and the *Standing Orders of the House of Commons*

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Government Bills cont'd...

- Constraints on introducing Government bills in the Senate
 - Constitutional (“money bills”)
 - Political (Ministers sit in the House of Commons)
- Why introduce a Government bill in the Senate?
 - Timing
 - Workload

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Private Members' Bills

Recall: Private Members' *Public* Bills
vs. Private Members' *Private* Bills

Distinction important to both parliamentary procedure (during the enactment process) and to judicial interpretation (following enactment)

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Private Members' Bills cont'd...

- Function: the whistle on a kettle
- Origin: usually drafted in Parliament
- Variable intended results: negotiation; debate; enactment

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Other Characteristics of Private Member's Bills

Public or private, all Senate private members' bills must:

- be within the legislative authority of Parliament;
- comply with the *Canadian Bill of Rights*;
- comply with the *Canadian Charter of Rights and Freedoms*
- not be a money bill;
- observe federal legislative drafting conventions; and
- comply with parliamentary practice

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Considerations Often Discussed Between Parliamentary Counsel and the Sponsor

1. Would public support be useful, and how can it be created and demonstrated?
2. Who will be the witnesses on the bill? Are witnesses available to defend the basic policy considerations of the bill? Are the witnesses in full support of the draft bill without reservations? Have the witnesses committed in writing?

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Considerations, cont'd.

3. Who might oppose the bill and how can they be neutralized? (non-partisan)
4. What position will the Government take, and how can it be persuaded to support the bill?

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Considerations, cont'd.

5. What parliamentary allies are needed? What parliamentary allies are available? Should support for the bill be multi-partisan? Are there specialty caucuses with a particular interest?
6. Is a communications plan needed? What is the timing and what are its elements? Who will manage the media? Are both official language communities being served?

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Considerations, cont'd.

7. Are resources needed to promote the bill and are the resources available?
8. Who in Parliament needs to be notified and when?

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Considerations, cont'd.

9. To which committee should the bill be referred?
10. Who will sponsor and manage the bill in the other House?

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Recent Senate Successes

- Recent times have seen a growth in both the number and complexity of private members' bills, and Senators have had significant success with them (see tables at end of paper)
- Success is not only measured by enactment; it may take the form of significant non-legislative changes in Government policy

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e.g. Youth and Tobacco

- **Bill S-13** (36th, 1st), the *Tobacco Industry Responsibility Act* – Senator Kenny
 - introduced February 1998 for establishment of \$120M per year Canadian Anti-Smoking Youth Foundation funded by a 50¢ levy per carton
 - passed by Senate; died in House of Commons after being ruled procedurally out of order
- **Bill S-20** (36th, 2nd), *Tobacco Youth Protection Act*
 - new and improved version of Bill S-13
 - passed by Senate on October 5, 2000; Parliament was dissolved 18 days later

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Youth and Tobacco, cont'd.

- **Bill S-15** (37th, 1st), *Tobacco Youth Protection Act* – Senator Kenny
 - introduced February 2001
 - passed by Senate on May 15, 2001; adverse Speaker's ruling in House of Commons on June 12, 2001 and withdrawn
- Initiative reputed to have created enormous divisions within national Government caucus
- Bill credited with having forced the Government to introduce its own anti- youth smoking initiative

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e.g. Whistleblowing

Bill S-6 (37th, 1st), *Public Service Whistle-blowing Act* – Senator Kinsella

- introduced on January 31, 2001; never enacted but credited with influencing Government policy
- in June 2001, the Government announced the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*
 - policy allowed public servants to bring forward information concerning wrongdoing (e.g. misuse of public funds, a breach of the *Values and Ethics Code for the Public Service*) internally within their department
 - policy also created Public Service Integrity Officer to act as external neutral third-party to review and investigate disclosures from employees who believe that their issues cannot be disclosed within own department, or raised their disclosure issues in good faith through the departmental mechanisms but believe that disclosure was not appropriately addressed

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e.g. Census Statistics

An Act to amend the Statistics Act and the National Archives of Canada Act (census records) – Senator Milne

- **Bill S-15** (36th, 2nd): designed to remove a legal ambiguity that would to open up access to census records while protecting privacy rights; died after first reading
- **Bill S-12** (37th, 1st): introduced February 7, 2001; died again on order paper before third reading

An Act to amend the Statistics Act – Government Bill

- **Bill S-13** (37th, 2nd): introduced February 5, 2003; died on order paper
- **Bill S-18** (38th, 1st): introduced November 2, 2004; passed by Senate on April 20, 2005 and enacted on June 29, 2005

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e.g. Citizenship

■ **Bill S-2** (38th, 1st), *An Act to amend the Citizenship Act* – Senator Kinsella

- enables persons who lost their citizenship as children as a result of their parents' actions to re-acquire Canadian citizenship by not requiring such persons to reside in Canada for a year as permanent residents before applying for citizenship
- royal assent May 5, 2005

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e.g. Official Languages

■ **Bill S-3** (38th, 1st), *An Act to amend the Official Languages Act (promotion of English and French)* – Senator Gauthier

- enhances the enforceability of the Government of Canada's obligation under Part VII of the Act
- royal assent on November 25, 2005

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Private Members' Private Bills

- Approximately 3% of bills considered by the Senate are private bills.
- By parliamentary practice, the Senate has a special role to play in their preparation and enactment.
- While private bills are traditionally distinguished from public bills by referring to their content, the need to distinguish them rarely gives rise to difficulties.

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Private Bills, cont'd.

- All Government bills are considered to be public bills regardless of content; they are public bills by virtue of the very fact that the Government sponsors them.
 - e.g. *An Act to incorporate the Jules and Paul-Emile Leger Foundation* (S.C. 1980-81-82-83, c. 85), introduced by the Government.
 - e.g. the amendment to the *Judges Act*, specifically designed to accommodate the career of Madam Justice Louise Arbour on the international stage.

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Private Bills, cont'd.

1. Origins of a Private Bill: a private member's private bill is the initiative of a private person, while a private member's public bill is the initiative of a parliamentarian
2. Role of the Sponsoring Senator: facilitator and gatekeeper (private members' private bills) vs. promoter (private members' public bills)

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Private Bills, cont'd.

3. There are legal differences in the application and interpretation of private Acts.

9. No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

Interpretation Act, R.S., c. I-23, s. 9.

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Private Bills, cont'd.

- Common Law: Private Acts must be specially pleaded, and this remains the rule unless the Act itself or another Act provides otherwise.

- However, the *Canada Evidence Act* provides:

18. Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.
R.S., c. E 10, s. 18.

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Private Bills, cont'd.

- Interpretation: Rule of strict construction (the *contra preferentem* rule)

"So far as persons not concerned in the Act are concerned, the Act is read strictly against the promoters; so far as the promoters themselves are concerned it is read as a contract between them and is to be construed accordingly."

Harper v. Hedges (1924), 93 L.J.K.B. 116 at 117 per Scrutton J.

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Historical Trend

- The decline in the volume of private legislation since Confederation due to the enactment of statutes of general application obviated to a large extent the need for private bills.
 - e.g. The *Canada Corporations Act* and the *Canada Business Corporations Act* obviate to a large extent the need for new incorporations by private Act.
 - e.g. The *Divorce Act* obviates the need for individual divorces by private Act.

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Historical Trend, cont'd.

- The decrease in the importance of private legislation, coupled with an increase in the time allocated by the House of Commons to Government business, has had the effect of transferring the primary responsibility for dealing with private bills from the House of Commons to the Senate.

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Historical Trend, cont'd.

- Moreover, the fee for a private bill was raised to \$500 in the House of Commons in 1932, but remained at \$200 in the Senate.
- However, as late as 1968, E. Russell Hopkins, the Law Clerk of the Senate, was able to comment:

"Occasionally, a private bill is still introduced in the Commons where political opposition is expected: this enables the sponsors to take advantage of the extra hours allotted for the consideration of private members' business in the Commons in the early part of each session."

Confederation at the Crossroads: The Canadian Constitution (Toronto: McClelland, 1968)

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Private Bills Today

- The unwavering parliamentary practice is for private bills to originate in the Senate, and officials of the House of Commons now refer potential petitioners to the Office of the Senate Law Clerk and Parliamentary Counsel.
- The petitioner must select a sponsoring Senator, and eventually a sponsor in the House of Commons.
- It is usual to select sponsors from different parties in order to point to the non-partisan nature of the bill.

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Private Bills Today, cont'd.

- It is the practice to discourage all petitions for private bills that are not necessary.
- Potential scope of private Acts include banks, boards of trade, bridges, harbours, insurance, patents, pipelines, railway bridges and tunnels, railways, religious and charitable organizations, and trust and loan companies.
- Companies with private Acts will often prefer to maintain that status and resort to private legislation to amend their Acts of incorporation. (See Table 4 for a list of private Acts enacted by Parliament since 1980)

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Drafting a Private Bill: Role of Counsel

The Role of Parliamentary Counsel:

- draft most private bills introduced in the Senate
- review all bills
- assist the petitioner and sponsoring Senator not only with drafting the bill but also with navigating the parliamentary process

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Drafting a Private Bill: Preambles

- A private bill must contain a preamble that documents the key representations made to Parliament in the petition for the bill.
- The preamble identifies the petitioner and recites the need for the bill, the prayer for its enactment and the expediency of granting the prayer.
- A preamble should be limited to a recital of facts without political posturing, conclusions of law or expressions of opinion.

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Procedural Aspects of Private Bills

Notice
Affidavit of Publication
Petition
Fees
Parliamentary Agent
Sponsors

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Procedural Aspects, cont'd.

Advertisement:

The proposed bill must be brought to the attention of persons or a group of persons who may have an interest.

A notice must be published in the *Canada Gazette*.

The notice must:

- clearly state the nature and objects of the proposed bill; and
- be signed by either the applicant or the lawyer acting on behalf of the applicant.

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Procedural Aspects, cont'd.

A similar notice must also be published in:

- the official gazette of the relevant province; and
- a leading local newspaper, with substantial circulation in the area concerned, at least once a week for a period of four weeks and must be in both official languages where reasonably required.

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The Litmus Test for the Speedy Passage of Private Bills

- The decision to pass a private bill is a political one that is not subject to natural justice.
- The Senate will usually show exceptional reluctance to pass a controversial bill.

e.g. Opus Dei (died on order paper)

e.g. Detroit Windsor Tunnel (enacted)

e.g. Dai At Mitaq (died on order paper)

e.g. Boy Scouts (currently in the Senate)

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Conclusions

- The law is not set in stone; it is dynamic and alive.
- Private members' bills are one means of writing or re-writing the law.
- Through private members' bills, private members bring to the table diverse, and sometimes unpopular and controversial, legislative objectives, unfettered by the political agenda of the Government of the day and the policy objectives of the federal bureaucracy.
- The Senate's experience with private members' bills has been a successful one.

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Thank You

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