

Comprehensive Senate Reform:

Why We Shouldn't Give Up

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From its outset, the Canadian Senate was meant to perform two critical functions. First, it was meant to be a legislative check on the House of Commons and particularly the Executive, in order to protect against the tyranny of the majority and facilitate cautious long-term planning in the policy-making process. Second, it was meant to enhance the intra-state nature of Canada's federalism by offering a regional perspective in federal government policy-making. It has generally performed admirably in the first role; but has sometimes over-stepped the bounds of democratic legitimacy or allowed partisanship to obscure its mandate, leading to a severe deficit in public support. It has utterly failed in its second role.

This paper takes account of the full context of the Senate's purposes and performance in examining popular proposals for abolition or reform. The paper argues that the two goals of Senate reform should be popular legitimacy of the second chamber and a step toward renewal of intrastate federalism in Canada, while retaining the Senate's strength as a house of sober second thought. Legitimacy is the most complex of the two goals; as such, much space is used assessing how reformation of the composition, selection and powers of the Senate could enhance its legitimacy. The ensuing analysis rejects abolition and simplistic proposals for reform, such as the so-called "Triple-E" Senate. It also rejects the defeatism widely expressed by academics in regard to constitutional reform of the Senate since the failure of the Charlottetown accord. It argues that not only is more complex constitutional reform of the Senate likely to produce the best outcome, but that it is possible. The paper concludes by reminding

the reader of the success of major constitutional amendment under Prime Minister Trudeau, and suggesting lessons that can be applied to enhance the prospects for constitutional amendment of the Senate.

Contextualizing Canada's Senate

A thorough analysis of proposals for Senate reform must be contextualized. Before one should consider reform, the following questions must be answered: What were the original purposes of the Senate? How was it meant to achieve those purposes? Where and how has it succeeded and/or failed? With the proper context, the informed reader can then move to consideration of the following: Were the original purposes appropriate and are there other purposes that the Senate should fulfill? Are there better ways of structuring the Senate to achieve its purposes? While scholars rarely neglect the necessary context, they often lament the lack of context provided in political manifestos aimed at Senate reform(CITE)—political manifestos that, of course, are more likely to capture media attention and inform the broader public discourse on reform. In order to properly contextualize the discussion, the following section examines the general role of second chambers in both federal and non-federal states as well as the specific history and unique purposes of the Canadian Senate. It provides answers to the first three questions before moving on to the final two.

Sober Second Thought

Very broadly, second chambers perform one core function in all bicameral states: they offer a second opinion. Whether elected or appointed, federal or unitary, invested with additional functions or not, the second chamber is meant to be a cautionary check in the legislative process to guard against bad—broadly interpreted—

decision-making.¹ In Canada's popular political parlance, the Senate provides "sober second thought." All discussion of composition, selection, powers and so on is therefore discussion of how best to assure a legitimately and rigorously developed second opinion and how much weight to give that second opinion in relation to the "house of confidence." Proposals for abolition of a second chamber are inherently an expression of confidence in the power of the House of Commons, non-governmental institutions and the electorate to adequately assess and pass judgment on the full ramifications of government policy, almost exclusively originating from the Executive and generally under relatively short timelines.

In Canada, the Senate was intended to provide sober second thought through composition by appointed "propertied interests."² The minimum age requirement of 30 and the minimum property value requirement of \$4,000 (in the context of the much lower average age of mortality and income equivalents of the time) were intended to ensure senators held "a more contemplative world view."³ While these two exact qualifications are effectively moot today, they remain a constitutional reminder of the contemplative purpose of the Senate, which, as will be discussed below, is very much alive in its culture of deliberation today.

Moreover, lifetime appointment (now mandatory retirement at 75) was meant to free senators from electoral and partisan pressures, allowing them to engage in longer investigatory and deliberative processes with a more long-term scope. This includes examination of important issues that for political reasons would go unexamined by the House of Commons.⁴ Lifetime appointment was also intended to reduce turnover vis-à-vis the House of Commons, creating a more experienced class of legislators.⁵

The Prime Minister is given free reign in the Constitution to nominate any individual believed to fit the Senate's mandate, allowing for the reparation of potential deficits of professional perspective in the policy-making process.⁶ For example, the Prime Minister could select experts in the field of business, arts and culture, or science.

Lastly, the very nature of a second body, with a different mandate and a different method of composition, brings a different perspective to the policy-making process that may add value.⁷ Conversely, by emphasizing sober second thought, the Senate would allow the House of Commons to do what it does best: address pressing matters in a timely and efficient manner and sustain the government.⁸ As Smith notes, the Senate must be viewed as part of the overall system of governance designed by the Founders.⁹

Intrastate Federalism Through Regional Representation

While not always explicitly referenced, a primary role of Canada's Senate was to serve as a vehicle for intra-state federalism in order to represent regions and "propertied interests" within the federal government's legislative process. In particular, the Senate helped satisfy Québec's anxieties regarding the protection of francophone culture by ensuring it would have equal representation to Ontario, while the House of Commons would be structured according to representation by population.¹⁰

Intra-state federalism was an important principle to John A. MacDonald, who sought to structure a highly centralized federation. As he wrote to the lieutenant-governor of Nova Scotia:

The representatives of Nova Scotia as to all questions respecting the relations between the Dominion and Province sit in the Dominion Parliament, and are the constitutional exponents of the wishes of the people with regard to such relations. The Provincial members have their powers restricted to the subjects mentioned in the *BNA Act* and can go no further.¹¹

In this view, the Senate would be a federal body that could legitimately represent regional interests and perspectives, and would be the only body that could do this in balance with the good of the whole country.¹² Regionalism alone, the only mandate that could be expressed by individual provinces, would inevitably lead to the loss of the benefits of confederation.

Other Senate Functions

The Senate as originally structured has also led to other ideas about its function. Related to the objective of sober second thought, the Founders envisaged the Senate as being the “representative” body of Canada.¹³ That is, while the House of Commons would directly represent the electorate, the Senate, through appointment, would be more broadly representative of the make-up of Canada.

Of course, notions of who merited representation were a lot more constricted at the time of Confederation. The idea of the Senate as the representative body is now generally interpreted as meaning the Senate ought to reflect the diversity of Canada in a way that is difficult to be achieved through the majority-reflective directly elected House of Commons. Because there are minimal restrictions on the Prime Minister’s prerogative to appoint Senators, gender, ethno-cultural background and so on can factor

into the appointment process. Indeed, since women have been allowed to serve in the Senate, they have consistently had greater representation within it than within the House of Commons.¹⁴ A more representative Senate, in addition to ensuring underrepresented perspectives are brought to bear on policy-making, could be a legitimizing force for the unelected chamber if Canadians see themselves reflected in its makeup.

The Senate's Performance

Sober Second Thought

On balance, the Senate has lived up to its mandate in providing effective and sober second thought. Even in the rare times when it has been perceived to have over-stepped the bounds of democratic legitimacy it has usually had reasonable arguments for doing so.¹⁵ Unfortunately, an unelected body imposing its will on the elected House of Commons is untenable in the eyes of the majority of Canadians and the Senate has not helped its case by subordinating *sober* to *partisan* in some high-profile cases. Consequently, the lifetime appointment process has failed to completely achieve many of the aims it was expressly designed to achieve while suffering from an accumulated deficit of public legitimacy.

On the positive side of the equation, the Senate is well known for its many excellent policy studies among those who follow policy development closely. Because of low turnover and more freedom from partisan pressure and electoral duties, its policy studies are broader, longer, more technical and on the whole better than those of the House of Commons.¹⁶

The Senate does also reflect the diversity and expert representation needed for good policy development better than the House of Commons.¹⁷ It has also shown itself to be independent, both exercising a check on the lower chamber under double and single majority eras.¹⁸ Unfortunately, there are numerous, and sometimes extreme, deviations from the above, owing to systemic factors in the selection of Senators.

The source of many of the problems is the partisan nature of selection. Nearly all Senate appointments are based on the political party of the Prime Minister. This supports the notion that the number one reason appointments are made is patronage, not reflection of sober second thought, independence, diversity and regional representation.¹⁹

The most recent use of the Senate's legislative veto provides a glaring example of how partisanship still pervades Senate deliberations. After being passed by a coalition of the second and third parties in the House of Commons under a minority government, a bill regarding climate change was killed without debate by the Conservative government majority in the Senate, at the behest of the Prime Minister.²⁰ Certainly no independent check on the Executive was exhibited, nor sober second thought, as the bill was never even debated in the Senate.

Regional Representation and Intrastate Federalism

The particularities of Canadian federalism have thoroughly undermined achievement of intra-state federalism through regional representation in the Senate, despite the Founders' intentions. In fact, numerous scholars note that the Senate's performance as a representational force for the regions of Canada is its greatest failing.²¹

Soon after Confederation, the Judicial Committee of the Privy Council significantly devolved power to the provincial governments, negating most of the federal government's power to impose its will on the provinces. Arrangements under Executive Federalism and the increase in Western population and economic strength without a commensurate increase in Senate representation exacerbated the trend of provincial governments exercising the legitimate voice of provinces and regions within Canada.²² Canada is now recognized as the most decentralized federation in existence and the Senate has become essentially irrelevant as a body of regional representation.²³ Watts even goes as far as to assert that Canada's Senate members have the least credibility as spokespeople for regions of all bicameral states.²⁴

Broader Legitimacy Problems

Often related to its problems of adequately providing a vehicle for regional representation and sober second thought, the Senate has suffered from numerous legitimacy issues over the years, leading to a general loss of confidence among Canadians. For example, the Senate's conflict of interest rules are less strict than the House of Commons', allowing Senators to sit on corporate boards while serving in the Senate. The rules even allow Senators to sit on committees that deal directly with industries within which they are corporate directors.²⁵ Seemingly, such rules would be easy to amend without the need for deeper reform, but the fact that they have not, speaks to a larger perception held by a substantial minority of the population of the Senate as an often borderline corrupt and entirely unaccountable institution. Those that hold such a perception are able to furnish far more evidence than just the conflict of interest rules. Infrequent attendance by certain Senators in the past, criminal charges brought against members, including in cases of election fraud, and extensive partisan

electioneering on the taxpayer's dime are just a few of the more recent and high-profile instances that can be pointed to.²⁶

The result of the Senate's failures is a dismal credibility rating with the public. Polling firm Angus Reid has tracked Canadians' views on Senate reform for years. The most recent polling shows that just 5% of Canadians polled support an unreformed Senate, while over a third support abolition.²⁷ While defenders of the Senate point out that the media fixates on scandal and rarely reports on the extensive good work that the Senate engages in,²⁸ this is a red herring. The media does the same thing with the House of Commons. While it may result in low approval ratings of politicians in general, it has not resulted in any calls for significant reform to the powers of the House of Commons or any support for its abolition, only some support for a proportional representation voting system. The House of Commons has a fundamental democratic legitimacy that the Senate lacks.

Abolition is not the Answer

The lack of legitimacy of the Senate and frustration with the lack of reform has led to a fairly strong abolition movement. The modern movement for abolition of the Senate has primarily been given voice through the New Democratic Party of Canada. Now the Official Opposition, its most recent election platform proposed a nationwide referendum on abolition of the Senate and the implementation of proportional representation in the House of Commons. The NDP points to the fact that the provinces long ago abolished their second chambers without negative consequences as evidence that Canada can as well.²⁹ It is important to note that the NDP's support for abolition is inextricably linked with its support for electoral reform in the House of Commons, thus allowing for a representative House of Commons to make up for the lack of a

more representative Senate. Nevertheless, Watts warns that the abolition movement is borne of frustration with the lack of reform not academic rigor and its success would do more harm to Canada than good.³⁰

First, in terms of the NDP proposal, whatever the merits of proportional representation, it does not facilitate regional representation.³¹ As previously discussed, the goal of reform to Canada's federal government institutions should be to enhance intra-state federalism through robust regional representation. Abolition would provide an even greater foundation for decentralized federalism dominated by provincial executives.

Scholars are fond of pointing out that only two large modern federations—Nigeria and Pakistan—have adopted unicameral legislative bodies and both abandoned them in favour of bicameralism after disastrous results.³² In the case of Pakistan, for example, its split in 1971 was linked to unicameralism's inability to adequately represent its regionally concentrated diversity.³³ Moreover, unicameral countries tend to be unitary and territorially small, with relatively small and homogenous populations.³⁴ Such comparative analysis is instructive for Canada's purposes. Canada is both territorially massive and ethno-culturally diverse. As an example of the consequence of abolition for Canadian federalism, the resultant concentration of power in the House of Commons would mean Ontario would dominate the legislative process and Atlantic Canada would be effectively excluded from it.³⁵ Abolition would also concentrate power further in the Cabinet and Prime Minister's Office.³⁶

Finally, abolition would require the unanimous approval of the provinces³⁷, which make the prospect of its realization effectively nil. With the option of Senate reform, public support for

abolition is not even close to a majority across Canada, meaning it would surely fail if it ever came to a referendum.³⁸ Thoroughly unfeasible and damaging to Canadian federalism, abolition of the Senate is not worth pursuing.

The Triple-E Senate

Clearly, the way forward is through reform, but of what sort? The most popular proposal for reform, originating from the West, is the Triple-E Senate, standing for elected, effective and equal. The Triple-E Senate was popularized by the Reform Party movement that eventually swept Stephen Harper's new Conservative Party to power. It is associated with equal seat distribution for all provinces, term limits and a directly elected membership. It would essentially mirror the American form of bicameralism within a parliamentary context.³⁹

Shying away from constitutional amendment, the Conservative government under Prime Minister Harper has adopted a moderated proposal that does not address seat distribution. His government has introduced a bill to limit Senators' terms to eight years and a separate bill to authorize Prime Ministerial Senate appointments following a direct election process at the provincial level.⁴⁰

Problems with a Directly Elected Senate

As Stilborn and others argue, while election would certainly confer popular legitimacy on the Senate, it would also change the Senate to a chamber that "duplicate[s], rather than complement[s], the representation of the House of Commons."⁴¹ With equal claim to democratic legitimacy for each chamber, Canada's legislative process would become more characterized by deadlock between

the chambers. Partisanship and full engagement in the electoral process would also characterize the new Senate, undermining its role as an independent and contemplative body.⁴² One need only look to the hyper-partisan legislative gridlock of the United States to see clearly how sober second thought would suffer under a directly elected Senate.

So What, Then?

Keeping in mind the twin goals of greater popular legitimacy and intra-state federalism, while maintaining effective sober second thought, this paper proposes more robust change to the Senate than is currently proposed. Though it proposes much more extensive reform than Smith, it is also guided by his thoughtful principles of Senate reform that proposals should: 1) demonstrably improve governance as a whole; 2) ensure balanced power within the political system; 3) ensure the Senate's strength is enhanced as a complementary body to the House of Commons; 4) respect the "fundamental features and essential characteristics of the Senate" as set out by the Founders (these being independence, continuity, long-term perspective, professional and life experience and policy investigation); 5) provide the Senate with sufficient powers; 6) ensure the capability of members of the Senate; and 7) improve public confidence.⁴³ Broadly, it suggests a more representative and advisory body, with appointments devolved to non-partisan appointment commissions in each province. Below is a sketch of some of the significant proposals for reform.

Suspensive Veto

The fact is legislative power on its own creates a compelling philosophical argument for direct democratic representation. If the legislative powers of the Senate can be curtailed in such a way that

the Senate is still able to provide effective sober second thought, the Senate can attain popular legitimacy within Canada's democratic framework without the problems that direct election would bring. In fact, such a proposal is not out of line with the natural evolution of the Senate's use of its powers.⁴⁴

There are those that worry that removing the veto power of the Senate for exceptional circumstances would significantly undermine its effectiveness as a check on the Executive.⁴⁵ However, Thomas notes three conventions for use of the Senate's veto: 1) very controversial bills without an electoral mandate; 2) bills that likely violate the Constitution or the Charter; and 3) bills that violate fundamental rights of minorities.⁴⁶ The last convention seems to be the same as the second, as any violation of a fundamental right would violate the Charter. Ultimately, there is clear and effective recourse through the courts to nullify any such bill. While a court challenge would be costly, its necessity would likely also be rare if the Senate exercised its suspensive veto, clearly communicated the reasons a bill might violate the Constitution and suggested amendments if applicable. In terms of the first Senate convention, one must return to the principle of the house of confidence and confidence in the electorate. It is rare that a non-constitutional matter can have a very long term effect on the country and not be undoable after a subsequent election. The Senate should certainly exercise its suspensive veto in such cases; but in order to retain its legitimacy should not have power to overrule the house of confidence.

Provincial Appointment Commission

Devolution of appointments to provincial commissions could serve to reinvigorate intrastate federalism, while maintaining other

fundamental characteristics of the Senate, such as independence, capability, professional and life experience and so on.

Evidence from the German model suggests that bringing direct provincial representatives together in a federal body with a mandate to work in the interest of the whole country serves to co-opt these representatives while maintaining their public legitimacy as sub-national spokespeople. In fact, some provincial leaders have rejected this model of Senate selection in the past precisely because they viewed it as a threat to their power within the federation.⁴⁷

Watts, too, is hesitant to recommend the German model, as it was designed to facilitate the significant devolution of administrative powers to the sub-national units that is a hallmark of German federalism.⁴⁸ However, with the administration of criminal justice and the welfare state devolved to Canada's provinces, as well as significant areas of shared jurisdiction, a similar model would not at all be out of place in Canada.

Seat Distribution

Given the scope of this paper, it does not endorse or suggest a specific proposal for seat distribution, but rather summarizes the challenges. The Constitution breaks Canada up into five regions: Ontario, Québec, Western Canada, the Maritimes (now including Newfoundland and Labrador and more appropriately titled Atlantic Canada) and the territories. Each region has twenty-four Senate seats, except for the territories, which have one seat each. The redistribution of Senate seats is a very difficult proposition because numerous interests must be balanced. The small Atlantic Canada provinces desire a strong voice, the growing Western provinces desire fairer distribution of seats and demographically declining

Québec requires protection of Québécois nationhood through a powerful voice. It should also be acknowledged that the massive regional distribution no longer reflects the distinct differences between each province in those regions, particularly in the case of the West. Many of the seat distribution suggestions originate from one of these interests. All provinces must come together to find a suitable resolution.

Non-Partisanship

Without expounding upon the statement, Watts argues that proposals to make the Senate non-partisan “neglect the fundamental importance of parties in policy formation within parliamentary systems...”⁴⁹ The reality is parliamentary systems are part of an overall governance system that includes partisan elected officials and numerous non-partisan institutions, such as the judiciary and civil service. A key argument in favour of bicameralism is the ability to have an *independent* second chamber in the legislative process that is composed in a separate fashion and therefore complements the work of the House of Commons. Replicating partisan attachments in the second chamber, as demonstrated in an earlier section of this paper, serves more to undermine those essential goals. Furthermore, the Senate as it exists is a bastardization of party representation. For example, the New Democratic Party has formed government in numerous provinces and for lengthy periods of time, is currently the Official Opposition and has had a substantial share of the popular vote in federal elections for decades; yet not one Senator represents the NDP.

By ending partisan appointment in the Senate, political parties would remain of fundamental importance to Canada’s parliamentary system, just not of overwhelming importance. As an

example, Franks notes that policy investigations originating in the Senate tend to have more credibility not only because of their exhaustiveness but because they are less influenced by partisanship than House of Commons investigations are.⁵⁰ This of course would be strengthened if partisanship were formally removed from the Senate.

Representativeness

As Rémillard notes in his review of the Senate's purposes, the Senate was not meant to "'represent' the people" but to be "'representative' of the people".⁵¹ There is no question that it accomplishes this better than the House of Commons, but it is still far from reflective of Canada's diversity. Watts argues that "genuine representativeness" is key to legitimacy and it is also endorsed in the Wakeham Report on House of Lords reform in the UK.⁵² Because territorial representation does not represent disbursed groups, such as women, Aboriginal peoples and so on, reserved seats through the appointment commissions could be implemented to make the Senate more representative.⁵³

Term Limits

Term limits have been widely endorsed as an important means of enhancing Senate accountability and therefore legitimacy.⁵⁴ This, of course, must be balanced with the long-term scope of the Senate. The Harper government has proposed eight-year term limits, which should be a minimum level.

There are undoubtedly ideas not contemplated here, particularly in terms of the minutia of Senate functioning and relation with the House of Commons. However, the preceding

articulates a selection of major reform proposals that in concert with one another address the goals identified.

The Challenge of Major Constitutional Amendment

Suggestions for fundamental Senate reform have largely fallen out of favour with scholars because of the perceived difficulty of constitutional amendment.⁵⁵ The Supreme Court has established that changes to the “essential characteristics” or “fundamental features” of the Senate cannot be completed by Parliament alone.⁵⁶ This has the potential to be interpreted fairly broadly. Even the Harper government’s proposed legislation to significantly reduce Senators’ terms of office may be open to challenge for a perceived impingement on the fundamental feature of sober second thought. Certainly any change in the selection process or composition would require invoking the amending formula of passage in the Senate and House of Commons and by at least two-thirds of the provincial legislatures representing 50% of Canada’s total population.⁵⁷

The disastrous results of the Meech Lake and Charlottetown conferences on constitutional reform seem to have put a chill on any major effort at constitutional amendment; yet the pessimists forget about the very successful, if arduous and sometimes painful, process undertaken just ten years before Charlottetown that repatriated Canada’s constitution and gave it an amending formula and the Charter of Rights and Freedoms. Meanwhile, the Senate faces a crisis of popular legitimacy that affects Canada’s democratic system as a whole and that, as demonstrated above, requires more thorough reform than can be achieved through non-constitutional means. Instead of throwing up their hands, Canada’s political leadership must learn from the contrasts between the Trudeau and Mulroney eras of constitutional negotiation.

As Jeffrey shows, the Trudeau-era amendment process, while containing errors, was marked by openness, transparency, flexibility, length and deliberation and most importantly, a focus on limited content. Trudeau communicated openly and clearly with the Canadian people and they were kept engaged throughout the process, ensuring provincial participation even when negotiations were limited to areas the provinces did not necessarily have an interest in discussing. The process was also evidently solicitous of and responsive to expert opinion. In sum, the process was a “force for political integration.”⁵⁸ In contrast, the Mulroney-era of constitutional talks was characterized by its closed and inflexible nature, its lack of focus and lengthy deliberation and the fear-mongering and bully tactics of the Prime Minister.⁵⁹

The lesson is particularly apt for Senate reform, as there is a distinct lack of public awareness and appreciation of the good work that the Senate does do. By focusing public attention on just Senate reform in a deliberative and non-demonizing process, open constitutional negotiation could serve to inform the public about the myriad benefits of the second chamber and provide a foundation of confidence that the Senate will perform its important roles even better in the future.

This paper has demonstrated that the Senate suffers from a clear crisis of democratic legitimacy and structures that have inhibited its achievement of the purposes for which they were fashioned. In particular, the Senate has utterly failed to provide geographic representation, facilitating the extreme decentralization of Canadian federalism, despite its constitutional foundations. The appointment process of the Senate could also do much more to engender a contemplative and representative legislative body that is complementary to the House of Commons. It has also demonstrated that simplistic proposal for abolition and reform

would severely undermine important fundamental roles of the Senate within Canada's whole system of governance.

Yet, scholarly and popular pessimism toward deeper reform is pervasive, and the federal government is now pursuing much smaller non-constitutional means of reform. It has been twenty years since the last major round of constitutional negotiations and an entirely new generation of political leaders are now elected federally and provincially. It is time to remember the lessons of past successes in constitutional reform, as well as failures, and come together to forge a better future for Canada's democracy.

Notes

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- 57 Ibid.
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- 59 Jeffrey, Brooke, Lecture, March 1 2012.