

SENATE REFORM IN CANADA: THE CASE FOR AN ELECTED SENATE

PRABHJOT NAGRA

Senate reform is an issue that has been a topic of discussion and debate in Canada's political sphere for almost as long as Canada has existed as a country. The Canadian Senate is an institution formed at the time of Confederation, and its structure, role and, composition embody the spirit of compromise that laid the foundation for Canada to come into existence. Unfortunately, the Senate that was established a century and half ago is now an institution that has failed to evolve in order to adequately serve the needs of Canada and its modern day political reality. This research paper will explore the role of the Senate and the reasoning for its creation. In addition, this paper will argue in favour of Senate reform and it will examine the advantages for Canada that establishing an Upper House of Parliament that is elected, equal, and effective may have.

Arguably there is no institution in Canada that has attracted more criticism and calls for reform than the Senate. The predicament of the Senate is quite curious considering the fact it was key to the confederation of Canada. Established by the authors of the constitution, the Senate was intended to be a chamber of 'sober second thought' and a forum to represent the minority voices across the country.¹ But the very nature of the institution led to criticism from its very inception.² The Senate is composed of unelected senators, appointed by the Prime Minister, and they keep their seats to the age of 75. This arrangement has led to a "Triple deficit" in which the Senate is now lacking legitimacy, integrity, and democracy.³ Today the Senate couldn't be further from what the Fathers of Confederation (in this paper also referred to as 'Fathers') intended as it now merely acts as a stamp of approval to the House of Commons. Senate reform is long overdue, and it is time Canada

¹Forsey, *A people's Senate for Canada*, 4.

²Boyer, *Our scandalous Senate*, 4-28.

³Dodek, *Addressing the Senate's Triple-Deficit*, 39-45.

established an elected Upper House of Parliament. Canada has evolved immensely from the country created in 1867, and the Senate needs to be able to reflect this. In 1867 the understanding of democracy was different, so it's possible to see how the original design of the Senate has resulted in the institution's modern problems. Canada needs a Senate similar to that of Australia and based on the 'Triple E' principles; therefore, this paper will argue that an elected Senate with fair representation across Canada is needed to improve Canadian democracy and to finally re-establish effective checks and balances in Parliament.

The Canadian Senate was an integral component in the discussions that took place among the Fathers of Confederation over a century and half ago.⁴ The establishment of the Upper House was of such immense importance to the Fathers of Confederation that not establishing the Senate would have been a "deal breaker", leading to the end of negotiations.⁵ The establishment of an Upper House was intended to be a check and balance for the powers of the House of Commons and Cabinet.⁶ At the time it was believed that the members of the Commons, Senate, and Cabinet would be prone to desires of increasing their wealth and power.⁷ The underlying theory of the Westminster model is that good governance is derived from bringing together the perspectives of three different actors; the monarchy, aristocracy and the democratic commons.⁸ The pessimistic reasoning of the theory regards "Cabinet ministers as potential tyrants, the ambitious leaders in the lower house as potential demagogues, and senators as potential oligarchs".⁹ With all three branches acting in their own self-interest it was believed there'd be a system of checks in place and thus an aversion of despotism by "the one, the few, and the many".¹⁰ The Fathers were well aware of the various types of upper houses around the world, having cited various constitutions.¹¹ But the underlying theory of the Westminster model led to the creation of the Senate as a non-hereditary but appointed body, with an age and property requirement to fortify aristocratic like control by well-educated elites.¹² For the Fathers, the Senate had the duty to delay and obstruct legislation deemed to be too radical or oppressive of minorities.¹³ Interestingly the Fathers of Confederation did not use the word 'democracy' to describe this arrangement they had created¹⁴, because 'democracy' means doing

⁴Forsey, 4.

⁵Forsey, 4.

⁶Forsey, 5

⁷Ajzenstat, "Bicameralism and Canada's Founders," 4.

⁸Levy, "Reforming the Upper House," 28.

⁹Ajzenstat, 6.

¹⁰Ajzenstat, 6.

¹¹Ajzenstat, 4.

¹²Forsey, 5.

¹³Ajzenstat, 4.

¹⁴Ajzenstat, 4.

what the majority wants.¹⁵ The Senate was to be a house where the diversity of the minority populations and the various interests of the confederated provinces would be reflected.¹⁶ The Fathers of Confederation had well meaning, and for their time, liberal intentions with the Senate. Unfortunately, the institution they created has failed to fulfil its duty due to the flaws of its design.

It is then from the history of the Senate's creation that we find the root cause for all its ills today. The Senate lacks the ability to evolve with an ever changing Canada, the institution has seat allocations which divide Canada into four regions with 24 seats each (plus a few seats for Newfoundland and the three territories).¹⁷ The population growth of Western Canada since Confederation, and the inability of the Senate to accommodate this has led to severe under representation in the Upper House for the West, especially the provinces of British Columbia and Alberta.¹⁸ Furthermore, the Senate being an institution of patronage appointments,¹⁹ where senators serve until the age of 75, has led to a complete loss of accountability, resulting in numerous scandals.²⁰ The issues have accumulated into the Senate now suffering from a massive deficit of legitimacy, with critics saying it represents no one.²¹ The Senate is cursed by having been designed specifically for the Canada of 1867. The Senate was designed for a time where Canadian society was much less egalitarian than today and more deferential to authority.²² The diversity that the Fathers intended on protecting in 1867 is no longer reflected in the reality of modern Canadian society because Canada has become increasingly more diverse over the past century and half. The Fathers of Confederation were all, as the name obviously suggests, old men. To them 'diversity' consisted of Europeans only, and the minority they wanted to protect was only that of the White, Catholic, Francophones in Quebec.²³ In fact women, First Nations peoples, and non-Europeans were entirely excluded from the process of confederation.²⁴ It is hard to imagine that any one of the 36 Fathers would have imagined in 1867 that the country they created would go on to pioneer the concept of multiculturalism, and therefore become one of the most religiously, culturally, ethnically and, linguistically diverse countries on earth. By looking at the history, how can the Senate possibly be an effective institution, capable of protecting diversity and minorities?

¹⁵Forsey, 4.

¹⁶Forsey", 4.

¹⁷Barnes et al, *Reforming the Senate of Canada: frequently asked questions*, 22.

¹⁸Smith, *The Democratic Dilemma Reforming the Canadian Senate*, 3.

¹⁹Smith, *The Senate of Canada and the Conundrum of Reform*, 17.

²⁰ Boyer, *Our scandalous Senate*, 119- 143.

²¹Smith, *The Canadian Senate in Bicameral Perspective*, 3-21.

²²McRae, *Louis Hartz's Concept of the Fragment Society and Its Applications to Canada*.

²³Forsey, 4.

²⁴Forsey, 4.

By having a system in which appointments to the Senate are made by a Prime Minister who formed government based on the majority, makes true and fair representation of minorities impossible. This is proven by the history of Canadian parliamentary firsts. Whether it be racial minorities like Asian-Canadians, religious minorities like Sikh-Canadians, the LGBT community, or even Women, what is common among all the aforementioned minority groups is the duration of time it took for them to receive representation in the Senate. The first person from each of those minority groups was appointed to the Senate well over a decade after the first member from those communities was elected to the House of Commons.²⁵ This is clear evidence that leaving the representation of minority groups to be at the will of the Prime Minister has not worked. In addition, by having an Upper House which has no democratic legitimacy, the House of Commons which acts on behalf of the majority, has become the sole house with power in Parliament. The design choices made 150 years ago have led to a complete failure of the vision of the Fathers of Confederation. The Senate is now more than ever in dire need of reform. An elected Senate with equal representation across Canada could effectively serve all Canadians, and it would check the power of the majority in the House of Commons thus improving Canadian democracy.

The immense power that the House of Commons now wields is precisely what a system of bicameralism in Canada was supposed to avoid. Bicameralism implied a “class-based fear of democracy, or mob rule, [which is] inherent in the mixed government tradition.”²⁶ The Senate is in dire need of reform in order for the institution to be able to fulfill its intended purpose of being a check and balance to the legislative powers of the Cabinet and Commons. The solution to the problems plaguing the Senate isn’t as simple as abolishing it. The Senate is an important piece of the country’s constitutional frame work.²⁷ And in a time where the power of the Prime Minister is only increasing,²⁸ abolishing or even leaving the Senate as is, would obviously be a very unwise and careless course of action. The Senate cannot remain as an unelected chamber because the current arrangement has allowed the power of the Prime Minister to grow so great that some people have referred to Canada as an “elective dictatorship.”²⁹ Abolishing the Senate is similarly an awful proposition, as evidenced by the fact that “virtually all other major federations of any significant size have found it necessary to establish and maintain bicameral federal legislatures.”³⁰ Of the few unicameral legislatures around the world most have not fared well for minority groups. Federations with a single house have

²⁵Canada. The Library of Parliament Information and Documentation Branch. “*Firsts in Canadian Parliamentary History*.”

²⁶Lusztig, *Federalism and Institutional Design*, 41.

²⁷Dodek, 625.

²⁸Savoie, *The Rise of Court Government in Canada*, 635-64.

²⁹Cosh, *Elected dictatorship*, 6-10.

³⁰Watts, “Bicameralism in Federal Parliamentary Systems,” 87.

resulted in the dominance of majority groups and increased the insecurity of minorities.³¹ In federations with a single house there has been a detrimental impact on getting a consensus on issues with the diverse groups that compose a federation.³² That is why only an elected Senate would allow the institution to effectively serve its intended purpose of representing minorities, which in a modern and multicultural Canada couldn't be of more importance.

Only the 'Triple E'; "elected, equal, and effective"³³ proposition for Senate reform will be able to fix the institution and allow for fair representation. The Senate being an appointed body has led to Prime Ministers appointing people based on patronage due to past partisan work.³⁴ An elected Senate is needed in order to restore the chamber's capacity for dissent and 'sober second thought'. Due to being appointed, Senators lack democratic legitimacy, and are unable to adequately represent the people of Canada.³⁵ Senators elected either directly or indirectly (by provincial legislatures) would be able to effectively stand up for regional interests and challenge the power and the rule of the majority in the Commons. The importance of 'Triple E' is further evident with how Canada is currently experiencing a shift in the concentration of the country's population. The population of Western Canada is increasing³⁶ while in the Maritimes it is decreasing.³⁷ Since the Senate has a fixed number of seats for each Canadian region, as the population of the already underrepresented West increases the proportion of representation will inevitably decrease. Reforming the Senate and making it an elected house could also, so to speak, be like 'killing two birds with one stone'. An elected Senate would finally resolve the issues of Senate reform, and it could be the solution to electoral reform as well. The Senate could become the chamber of Parliament that is elected proportionally. This system would not only allow for regional representation; it would also allow minority voices to potentially gain seats in Parliament without being impeded by 'first past the post'. This system would be quite similar to the Senate of Australia, which would be a great model for Canada to adopt.

Australia's Senate was the first popularly elected Upper House in the world, and it is currently the chamber of Australia's Parliament that is elected proportionally.³⁸ Following Australia, Canada could create a system in which the Senate would serve as a contrasting institution to the Commons. The House of Commons could be the

³¹Watts, 87.

³²Watts, 87.

³³Dodek, *Fidelity, Frustration, And Federal Unilateralism*, 636.

³⁴Macfarlane, *Unsteady Architecture*, 889.

³⁵Watts, 87.

³⁶Government of Canada. "Components of population growth, by province and territory (Alberta, British Columbia, Yukon, Northwest Territories, Nunavut).

³⁷Government of Canada. "Components of population growth, by province and territory (Newfoundland and Labrador, Prince Edward Island, Nova Scotia, New Brunswick).

³⁸Smith, 22.

chamber for representing the majority, while the Senate through proportional representation and equal distribution of seats could serve as a forum for the voices of all regions and minorities. Those who are against adopting an Australia like system base their argument on the fear that the Canadian Senate would dominate Parliament.³⁹ This fear is unfounded, because despite being elected the Australian Senate's primary purpose is still legislative review.⁴⁰ This is due to the fact that "one of the fundamental tenets of the Westminster system is that the lower house constitutes the confidence chamber."⁴¹ Instead, what should be feared are the propositions to either abolish the Senate or to keep it as is, because those options would only weaken Canadian democracy. So if Canada were to follow the Australian example, the Canadian Senate's duty for legislative review would not be altered by elections and Canada would adopt a vibrant healthy democracy. In addition, those who oppose the Australian model often cite increased deadlock as their primary concern. But they fail to realise that the entire point of an elected Senate is to counter and to stand guard against unwarranted government action. The recent changes to the national anthem of Canada are a prime example of the power a government can wield thanks to the current system. The anthem was changed without consultation or consensus of Canadians, yet there was nothing the unelected Senate could do to counter the will of the government other than to delay the passage of the bill. That is why an elected Senate is a great proposition. What such an arrangement would do is create a system of checks and balances, and it would limit the power of the Prime Minister.⁴² This is evident with how the Australian Senate's elected and equal representation is effective because "there is no question that the Australian Senate can stop government in its policy tracks and force a compromise".⁴³ Reforming the Senate to allow it to gain legitimacy and power, would help to preserve the rights of all Canadians from across the country. It would be a great system to hear the voices of minority groups and those in lesser populated areas. It would also check the power of the Commons and Cabinet thus ultimately contribute to the betterment of the Canadian Democracy.

The Senate is an institution that has faced harsh criticism for over a century, and it's about time the institution is reformed. Canada has evolved immensely since 1867, with power now resting solely in the hands of the people. 150 years of evolution has resulted in the current arrangement where the House of Commons is the sole institution with legitimacy to make legislation. The Senate today is facing a 'triple deficit' and only elections can fix that. An elected and equal Senate modeled on Australia's example would allow for a complementary arrangement with the Commons as the voice of the majority, and the Senate as the voice for

³⁹Smith, 28.

⁴⁰Lusztig, 40.

⁴¹Lusztig, 42.

⁴²Savoie, 635- 64.

⁴³Smith, 22.

minorities. Leaving the Senate as is or abolishing it is a careless course of action. An elected Senate is an absolute must, for Canada to have a vibrant and healthy modern democracy. The Fathers of Confederation had admirable intentions with wanting to protect the rights of minorities and all Canadian regions. Unfortunately, the arrangement they created with an appointed Senate has failed to work. The Senate needs to be fair, elected and, effective in order to represent all Canadians. A Senate that works is 150 years overdue.

BIBLIOGRAPHY

- AJZENSTAT, JANET. "Bicameralism and Canada's Founders: The Origins of the Canadian Senate." In *Protecting Canadian democracy the Senate you never knew*, edited by Serge Joyal, 3-30. Montreal, Quebec: McGill-Queen's University Press, 2003.
- BOYER, J. PATRICK. *Our scandalous Senate*. Toronto, Ontario: Dundurn, 2014.
- CANADA. LIBRARY OF PARLIAMENT INFORMATION AND DOCUMENTATION BRANCH. "Firsts in Canadian Parliamentary History." (November 30, 2003). Accessed February 16, 2018.
<https://web.archive.org/web/20031130142031/http://www.parl.gc.ca:80/information/about/people/key/Trivia/trivia.asp?lang=E&cat=ef&hea=firsts&subcat=Sen>. Archived Webpage
- CANADA. LIBRARY OF PARLIAMENT. PARLIAMENTARY INFORMATION AND RESEARCH SERVICE. *Reforming the Senate of Canada: frequently asked questions*. By André Barnes, Michel Bédard, Caroline Hyslop, Sebastian Spano, Jean-Rodrigue Paré, and James R. Robertson. Ottawa, Ontario: Library of Parliament, 2011.
- COSH, COLBY. "Elected dictatorship: can Parliament be made an adequate instrument of democracy? Easily." *Alberta Report* (December 16, 1996): 6-10.
- DODEK, ADAM. "Addressing the Senate's "Triple-Deficit": The Senate as Driver of its own Reform." *Constitutional Forum* 24, no. 2 (April 2015): 39-45.
- DODEK, ADAM. 2015. "The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism." *McGill Law Journal* 60 (2015): 623-672.
- FORSEY, HELEN. *A people's Senate for Canada: not a pipe dream!* Black Point, Nova Scotia: Fernwood Publishing, 2015.
- GOVERNMENT OF CANADA. "Components of population growth, by province and territory (Alberta, British Columbia, Yukon, Northwest Territories, Nunavut)." Government of Canada, Statistics Canada. September 28, 2016. Accessed March 4, 2017. <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo33c-eng.htm>.
- GOVERNMENT OF CANADA. "Components of population growth, by province and territory (Newfoundland and Labrador, Prince Edward Island, Nova Scotia, New Brunswick)." Government of Canada, Statistics Canada. September 28, 2016. Accessed March 4, 2017.
<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo33a-eng.htm>.

- LEVY, GARY. "Reforming the Upper House: Lessons from Britain." *Constitutional Forum* 23, no. 1 (January 2014): 27-39.
- LUSZTIG, MICHAEL. "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada." *Publius* 25, no. 1 (1995): 35-50.
- MACFARLANE, EMMETT. "Unsteady architecture: ambiguity, the Senate Reference, and the future of constitutional amendment in Canada." *McGill Law Journal* 60, no. 4 (June 2015): 883-903.
- MCRAE, K.D. "Louis Hartz's Concept of the Fragment Society and Its Applications to Canada." 17-27. Accessed February 14, 2018. <http://www.afec33.asso.fr/sites/default/files/images/Etudes%20Canadiennes/1978-5/05-02K.D.%20Mc%20RA.pdf>.
- SAVOIE, DONALD J. "The Rise of Court Government in Canada." *Canadian Journal of Political Science / Revue Canadienne De Science Politique* 32, no. 4 (1999): 635-64.
- SMITH, DAVID E. *The Canadian Senate in Bicameral Perspective*. Toronto, Ontario: University of Toronto Press, 2003.
- SMITH, DAVID E. "The Senate of Canada and the Conundrum of Reform." In *The democratic dilemma reforming the Canadian Senate*, edited by Jennifer Smith, 11-26. Montreal, Quebec: Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, 2009.
- SMITH, JENNIFER. *The democratic dilemma reforming the Canadian Senate*. Montreal, Quebec: Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, 2009.
- WATTS, RONALD. "Bicameralism in Federal Parliamentary Systems." In *Protecting Canadian democracy the Senate you never knew*, edited by Serge Joyal, 67-104. Montreal, Quebec: McGill-Queen's University Press, 2003.
-