

THE SENATE OF CANADA: RAISONS D'ÊTRE, ISSUES AND REFORM

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This paper examines the Canadian Senate's role within the context of Canada's federal parliamentary system; and argues for reform to address the democratic deficit, western alienation, and political gridlock. The need for an upper legislative chamber is established by the Senate's functions of legislative review and regional representation. Numerous major reform proposals are evaluated, focusing specifically on the selection of Senators, the composition of the Senate and its power to veto legislation. Ultimately, it is difficult to reconcile the Westminster principle of majority rule with a democratized Senate. Therefore, a Senate with curtailed veto powers and more equal provincial government representation through bureaucratic delegations is recommended. Nonetheless, Justin Trudeau's recent Senate reform measures remain unassessed due to their relative infancy.

Introduction

Combining American federalism with British parliamentary government, the Fathers of Confederation established the Senate as the upper house of Canada's bicameral Parliament. Modeled after the British House of Lords, the Senate serves as "an older, conservative influence" on the legislative process,¹ counterbalancing representation by population in the House of Commons. Senators are appointed by the Governor General on the advice of the Prime Minister,² while seats are distributed largely in accordance with the principle of equal regional, not provincial, representation.³ Both houses of Parliament possess the power of legislative initiative, with the exception of money bills which must originate in the

¹Cochrane, Blidook, and Dyck, *Canadian Politics: Critical Approaches*, 596-97.

²*Constitution Act*, C. IV "Legislative Power," s. 22.

³*Constitution Act*, s. 22.

House of Commons.⁴ Although the Senate can only delay constitutional amendments by a maximum of 180 days,⁵ it maintains an absolute veto over all other legislation since the approval of both houses is required for passage.⁶

Despite the important legislative role of the Senate, John N. Turner observes that Canadians “feel that the Senate has outlived its usefulness and has become a superfluous appendix to the political system.”⁷ This is unsurprising given an appointments system effectively controlled by the Prime Minister. Senators lack a democratic mandate and are hampered by political patronage in their ability to represent the regions of Canada, an issue that is especially apparent in the western provinces. As both houses of parliament technically wield equal legislative power, but with minor exceptions, political gridlock pits the unelected Senate against the democratic House of Commons. Interestingly, despite hundreds of proposals and numerous failed attempts at reform, the Senate has essentially remained unchanged since Confederation. Nonetheless, the Canadian Senate serves the necessary functions of legislative review and regional representation, but to address the democratic deficit, western alienation, and political gridlock, this paper argues that reforming the upper house is necessary.

The Senate: Raisons d’Être

The Senate today serves the especially important functions of legislative review and regional representation that distinguishes itself from the House of Commons, and justifies its existence as the upper house of Parliament. In the initial years following Confederation, the first Prime Minister of Canada, Sir John A. Macdonald, described the Senate “as a body of ‘sober second thought’ that would curb ‘democratic excesses’ in the elected House of Commons.”⁸ Freed from the pressure of facing electoral challenge, senators focus more on the non-ideological task of reviewing and improving technical aspects of legislation, which “has become one of the Senate’s most important roles over the years.”⁹ R. A. MacKay concurs with this view, emphasizing the importance of independent and uncontroversial scrutiny of legislation,¹⁰ as does F. A. Kunz, who highlights the Senate’s contributions to policy development through studies and committee work.¹¹ A notable example is the Kirby Report on health care, which made an

⁴*Constitution Act*, s. 53.

⁵*Constitution Act*, s. 31.

⁶*Constitution Act*, s. 55.

⁷Turner, “The Senate of Canada- Political Conundrum,” 57.

⁸“Sober Second Thought.”

⁹Cochrane et al, 597.

¹⁰MacKay, *The Unreformed Senate of Canada*, 110.

¹¹Kunz, *The Modern Senate of Canada: A Re-appraisal, 1925-1963*, 265-66.

impact on guaranteed maximum wait times.¹² It is also important to note the federal nature of the Canadian state, with powers divided between federal and provincial authorities.¹³ Randall White asserts that this division of powers necessitates an equal role for each of the provinces “regardless of disparities in population and ‘natural’ economic power” in the federal legislative process,¹⁴ especially in areas of concurrent jurisdiction. These functions differentiate the Senate from the more politicized and populist House of Commons, which is partisan by nature and is comprised of elected members who represent individual electoral districts across Canada.¹⁵

Although the Senate is historically rooted in the defense of private property rights, abolition of the Senate is an unconvincing alternative to proposals for reform. Former Prime Minister Macdonald insisted that only a bicameral system could protect the rights of minorities,¹⁶ but was in fact primarily interested in safeguarding private property, “as the rich are always fewer in number than the poor.”¹⁷ Even today, Senators must meet a property requirement of \$4,000,¹⁸ while Colin Campbell observes the Senate’s illegitimate defense of corporate interests, and advocates for its abolition as democratic reform would result in political impasse. Nonetheless, Michael Lusztig remarks that the role of the British House of Lords in balancing interests of the aristocracy and the commons has been rendered anachronistic through democratization.¹⁹ Similarly, recent senatorial appointments in Canada have become more diverse and have seen more women appointed to the Senate, providing a wider perspective.²⁰ Many individuals such as Goldwin Smith and the New Democratic Party (NDP) call for the abolition of the Senate,²¹ but even current NDP Member of Parliament, Don Davies, is hesitant to toe the party line. Although there remains a clear deficiency in the Senate’s structure, its aforementioned functions cannot be replicated in the House of Commons, establishing the need for an upper legislative chamber.

¹²MacLeod and Chodos, “The Senate Committee Study.”

¹³*Constitution Act*, C. VI “Distribution of Legislative Powers.”

¹⁴White, *Voice of Region*, 63.

¹⁵*Constitution Act*, C. IV “Legislative Power,” s. 37.

¹⁶*Parliamentary Debates on the Subject*, 44.

¹⁷Macdonald, October 11, 1864, quoted in “Hewitt Bernard’s Notes,” 98.

¹⁸*Constitution Act*, s. 23 (4).

¹⁹Lusztig, “Federalism and Institutional Design,” 39-40.

²⁰Cochrane et al, 600.

²¹Barnes et al., “Reforming the Senate of Canada: Frequently asked Questions,” 28; “How Not to Reform the Senate.”

Selection of Senators: The Democratic Deficit and Political Accountability

Being appointed on the advice of the Prime Minister, Senators lack a popular mandate, while citizens are unable to hold Senators accountable. It is difficult to justify the Senate's great legislative powers without any mechanism to ensure the Senators' political accountability to Canadian citizens. The appointment system lacks transparency, and is often an exercise in political patronage, as senatorial vacancies are mostly filled by "party hacks," characterizing the Senate as a "home for the aged" and "pension scheme for retired party warriors." Identifying the corporate connections of many Senators, Campbell also criticizes the "one-sided review which takes place in a legislature created by a political system which bends over backwards to ensure that business has preferential access to the policy process." More recently, Senators Mike Duffy, Patrick Brazeau, and Pamela Wallin have been accused of illegitimate expense claims,²² and despite internal disciplinary action by the Senate, voters have no opportunity to hold them accountable at the ballot box.

The election of Senators may improve political accountability, but it may also worsen political deadlock, while proposals calling for provincial appointment offer an imperfect alternative. An elected Senate has been proposed by the Macdonald Commission,²³ the Special Joint Committee of the Senate and of the House of Commons on Senate Reform,²⁴ and the Alberta Select Special Committee on Senate Reform.²⁵ Depending on the electoral system adopted, smaller political parties not currently represented could be elected to the Senate, as current and past Prime Ministers mostly make partisan appointments,²⁶ while left wing parties boycott the Senate for ideological reasons.²⁷ However, supported by greater electoral legitimacy, the Senate could be emboldened to take a more active legislative role, reversing its tradition of self-restraint and increasing the potential for stalemate between the houses of Parliament. Frederick C. Engelmann argues that "a double instead of the present single popular mandate...flies in the face of the principle of majority rule,"²⁸ Instead he recommends a German Bundesrat style system of appointment by provinces.²⁹ Alternatively, the Prime Minister could make nominations with provincial input, such as the case of Alberta and its Senate

²²"A Chronology of the Senate Expenses Scandal."

²³Macdonald, "Royal Commission on the Economic Union."

²⁴Canada, Parliament, Senate and House of Commons, Special Joint Committee of the Senate and of the House of Commons, *Special Joint Committee on Senate Reform*.

²⁵Anderson, "Strengthening Canada, Reform of Canada's Senate."

²⁶Albinski, "The Canadian Senate: Politics and the Constitution," 380.

²⁷Cochrane et al, 598.

²⁸Engelmann, "A Prologue to Structural Reform," 668.

²⁹Engelmann, 673.

nominee elections.³⁰ However, a provincial appointment system does not resolve the issue of political patronage; this system simply transfers the problem from the federal to the provincial level.

To combat the effects of patronage, Justin Trudeau's Liberal government implemented a merit-based system of non-partisan appointments through the newly-established Independent Advisory Board for Senate Appointments,³¹ yet this is a stop-gap solution while its efficacy remains to be seen.

Composition of the Senate: Western Alienation

The Senate has failed to effectively represent regional interests, especially those of the western provinces, which have historically had an estranged and difficult relationship with Ottawa. For some years since joining Confederation, the Western provinces "did not have equal representation with the other three regions in the Senate,"³² while feeling "exploited and treated as an economic colonial hinterland of central Canada."³³ This sentiment persists in the 21st century; policies such as the National Energy Programme are still viewed as excessive federal control over western resources for the benefit of the east.³⁴ It is difficult to ignore the fact that Prince Edward Island has ten Senators representing a population of 512 thousand, while over 4.8 million British Columbians are represented by only six Senators.³⁵ ³⁶ As a result, "the prevailing western Canadian sentiment is a determination to remove all vestiges of its historical colonial relationship with central Canada,"³⁷ with western provinces adamant in their desire for reform.

Alberta's "Triple-E Senate" proposes elected and equal representation of provinces, but partisanship may remain an issue; the appointment of non-partisan bureaucrats offers an interesting alternative. Equal representation similar to the US Senate would allow for enhanced provincial representation regardless of population. However, Paul C. Weiler argues that "[e]lected senators will feel precisely the same pressures to dampen expression (and votes) of regional dissent as MPs do now."³⁸ This suggests that western Liberals and cabinet ministers would not want to follow James Richardson — who disagreed with the party on official language policy — into political exile. Province-wide elections could potentially be expensive, and

³⁰*Alberta Senatorial Selection Act.*

³¹Canada, "Assessment Criteria."

³²McKenzie, "Western Alienation in Canada," 2.

³³McKenzie, 2.

³⁴McKenzie, 8.

³⁵Statistics Canada, *Table 051-0001*.

³⁶*Constitution Act*, s. 21.

³⁷Weiler, "Confederation Discontents and Constitutional Reform," 255.

³⁸Weiler, 264.

senatorial candidates would likely rely on the support of political parties to fund campaigns. Thus, Senators would largely vote according to the party line, as evident in the Australian Senate in which Senators “subordinate regional interests to partisan considerations.”³⁹ However, the German Bundesrat model of appointed — instead of elected non-partisan delegations of the provincial bureaucracy — could ensure an articulation of provincial interests consistent with provincial leadership, and “[g]ive Canada one capability it now lacks: a place in which representatives of federal and provincial bureaucracies could meet regularly.”⁴⁰ A distribution of seats weighted according to provincial population sizes, but skewed to benefit smaller provinces could also be especially appealing to the western provinces.

Powers of the Senate: Political Gridlock

The unelected Senate may reject the democratic will of the House of Commons by vetoing legislation, especially when different political parties control majorities in each of the two legislative chambers. Between 1867 and 1960, the Senate, in most instances controlled by the opposition, exercised its veto on over 100 bills,⁴¹ such as the Old Age Pensions bill in 1925. MacKay contends that the Senate never really goes against the democratic will when clearly expressed, as the “appointed upper house labours under the handicap that it has no political foundation.”⁴² Recent experiences suggest otherwise. The Goods and Services Tax would not have passed had Mulroney not made the controversial move to advise the appointment of eight additional Senators.⁴³ A bill requiring sexual assault law training for judges presently being considered in the Senate is also being blocked through delay tactics despite unanimous approval in the House of Commons.⁴⁴ This suggests that despite Mackay’s observations, the threat of an absolute veto by the undemocratic Senate is not merely theoretical, but real; a reliance on the self-restraint and stasis of agency is poor design.

Retaining the power of absolute veto would require the strengthening of the Senate’s mandate, but reconciliation with the Westminster principle of majority rule may prove challenging, even with the reduced power of a suspensive veto. A case in point is the Australian Senate, which operates as an elected upper chamber that may veto bills passed by the lower house. Engelmann draws attention to the Australian constitutional crisis of 1975, in which the “deadlock-resolving

³⁹Lusztig, 43.

⁴⁰Engelmann, 673.

⁴¹MacKay, 62.

⁴²MacKay, 62.

⁴³Cochrane et al, 602.

⁴⁴“Globe Editorial.”

mechanism of the Australian constitution blew a fuse” and resulted in “the first dismissal of a government in the history of first-world British parliamentary government since the dismissal of the Fox-North ministry by George III in 1783.”⁴⁵ He further elaborates that “the mitigation of the suspensive veto may well be drowned out by the partisanship of senators,” as Senators could still employ the suspensive veto, or even delaying tactics to pressuring a government enjoying the confidence of the lower house into a snap election.⁴⁶ An alternative proposal is a weakened variation of the German Bundesrat.⁴⁷ The Senate would have no power to veto federal matters, preserving the principle of responsible government. However, it would maintain a veto on matters of joint or overlapping jurisdiction, allowing for provincial input.

Conclusion

Despite numerous attempts at reform, the Senate of Canada has remained largely unchanged since Confederation. Some advocate for outright abolition, arguing that the Senate undermines democracy, but this paper takes the position that an upper legislative chamber should be preserved as its role in legislative review and regional representation are crucial and fundamentally distinct from that of the House of Commons. This paper further suggests that reforms should be made to address the particularly pertinent issues of the democratic deficit, western alienation, and political gridlock. There is no single perfect solution that could resolve all three issues, and it is particularly difficult to reconcile majority rule with a democratized Senate. Nonetheless, this paper ultimately favors a Senate likened to a weakened variation of the Bundesrat system as Engelmann proposed.

Furthermore, this paper acknowledges limitations in its assessment of Senate reform. A comparative approach could be taken to further assess how upper legislative chambers function in various political systems. The merits of abolition could also be given more attention, instead of assuming the suitability of bicameralism, while the efficacy and relevance of unicameral systems could be evaluated. An alternative approach could be taken to analyze each reform proposal as a whole. Finally, this paper is unable to make a proper assessment of Justin Trudeau’s reforms due to their relative infancy, and further research will be needed to study their implications on the operation and behavior of the Senate.

⁴⁵Engelmann, 668-669.

⁴⁶Engelmann, 669-670.

⁴⁷Engelmann, 673.

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