

THE NEED FOR A MORE OPEN AND COMPREHENSIVE SENATE RENEWAL PROCESS

By

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Dan Hays was born and raised in Calgary, Alberta and continues to reside there. A lawyer and farmer, he was appointed to the Senate by Pierre Trudeau in 1984 and chaired a number of Senate committees, including the Special Committee on Senate Reform in 2006. He was Deputy Leader of the Government from 1999 to 2001, Speaker of the Senate from 2001 to 2006 and Leader of the Opposition from 2006 to 2007. He is a past President of the Liberal Party of Canada and served as its Platform Co-Chair for the 1997 election. He left the Senate in 2007.

Renewing the Senate of Canada – Difficult but Necessary Choices

The quest to renew the Senate's basic design has been, as Canadians know well, a long, arduous and unproductive venture.¹ The proposal to meet the desire for change, now being implemented by Prime Minister Justin Trudeau and his government, involves a unique and unprecedented Second Chamber appointments process. (An idea that has been studied and not recommended on the reasoning that it would unduly weaken the Senate.²) To honour its election commitments, on December 3, 2015, the government issued a short news release informing Canadians that it would create a non-statutory Independent Advisory Board for Senate Appointments and underlined that "The constitutional roles, qualifications and fundamental functions of the Senate will be maintained under the new, non-partisan, merit-based appointment process." The Minister of Democratic Institutions later stated in her appearance before the Procedure and House Affairs Committee on March 10, 2016: "Canadians have asked for change, yes, but they do not wish our government to enter into constitutional negotiations. This new process delivers on that." The government has not, however, included any of the important and long overdue changes needed to modernize the provisions of the Constitution Act of 1867. They are discussed and commented on herein. In many instances they can, and in others may well be achieved without having to do more than introduce them in a government bill and deal with them in the normal course.

1. The government's reform rests on the premise that merit-based, non-partisan appointees, reflecting Canadian diversity and free of partisan tendencies will improve the Senate's objectivity and thereby its role in the legislative process because partisan, or political if you will, interests will not have been a consideration in their decisions as to the merit of a new law or change to an existing law. Hence its authority and influence will increase within parliament to the benefit of Canadians.
2. The government is to be applauded for making an attempt to overhaul the outdated Senate but there are drawbacks to its standalone reform. Polarising objectivity and partisanship does not do justice to the historical record of the Senate which shows that it has, for the most

part, performed both functions effectively. Legislative outcomes in bicameral systems, as political scientists point out, are essentially political questions. Creating an exclusively “non-partisan” Senate would most likely weaken its role in our democracy to the advantage of the House of Commons and the government of the day. As Professor David E. Smith has said, “partisanship is the *modus operandi* and *lingua franca* of Canadian politics.”³ ***Taking partisanship out of the Senate potentially removes it from political debate*** and relegates it to a role not unlike the Canadian Bar Association, the Canadian Political Science Association and other laudable non-partisan interest groups and commentators, akin to the officers of parliament. It renders the Senate less accountable to the electorate because it leaves the Senate without its historic reasons to organize and conduct its business in politically responsive ways.⁴

3. At this writing, of the 105 Senate seats, there are 27 held by Senators appointed by Prime Minister Justin Trudeau, two Independents, 12 formerly aligned and now sitting as Independents, 41 Conservatives and 21 Independent Liberals, with two vacancies. With the retirement of aligned Senators, that will in the normal course occur later this year, Independents will have a majority in the Senate. ***The government has shared no views on how it sees the chamber functioning following the tipping point when independents will for the only time in our history outnumber partisan Senators.*** An important and useful discussion paper was presented on this question to a symposium sponsored by the Public Policy Forum on September 27, 2016.⁵ It covered in detail how a Senate made up of a majority of independent legislators with veto power over all ordinary legislation might restructure based on regional values. It was not, however, an opportunity to discuss the question of having only independent legislators have the final say on public business without addressing much needed, long overdue, and I would submit relatively straightforward, changes to the *Constitution Act* of 1867.
4. Nor has the government acknowledged the views of Canadians who, when polled, most often express a preference for Senate accountability

through election or favour its outright abolition. Nor do they acknowledge the concerns the West has over the fact that the last redistribution of Senate seats occurred in 1915. Furthermore, the Official Opposition has shown a preference for maintaining the 150-year-old Government/Opposition dynamic on which the Senate Rules have evolved. Also of note, the Prime Minister will apparently continue to appoint a Government Representative (a quasi-cabinet position) to facilitate the government's legislative agenda, the Speaker, Usher of the Black Rod and the Clerk of the Senate ... all **by virtue of the Constitutional Convention making these appointments the sole gift of the Prime Minister**. It is fair to assume that future Prime Ministers may not choose to follow this approach given the policies vis-à-vis the Senate of the Conservative Party and the New Democratic Party in the current parliament. In light of the virtual life tenure of Senators, will there be a meaningful choice? Is that the objective or point of the reform?⁶

5. ***The government has not explained the reasons why constitutional negotiations on reforming the Senate if pursued would automatically end in failure.*** Further, **neither the opinion nor approval of parliament was sought before this one-step reform took effect.** Perhaps more importantly, it does not seem to have analyzed the potential impact the new appointment process will have on how public business will be conducted in parliament. Senator Michael Pitfield offered sound advice with respect to efforts to change the constitution in the 1980s, "focusing merely on the change and not on its consequences as far as the eye can see is to invite mistakes and chaos".⁷
6. ***The existing antiquated constitutional provisions relating to the Senate continue.*** Above all, the \$4000 wealth requirement remains in place even though it no longer serves any public policy purpose and often confuses some as to the necessity of also meeting the requirement for a Senator to be resident in the province the Senator represents. In that the Speaker should have the demonstrated confidence of senators, it would be preferable that the Senate Speaker not be appointed only on the advice of the prime minister. Senators

may wish to try to change this convention or procedure in an informal way by making their own preference for Speaker known to the prime minister through a secret ballot and requesting that that senator be appointed. An alternative would be to proceed in a more formal way with an amendment of section 34 of *Constitution Act, 1867* which deals with the appointment of the Speaker. I see no reason why this could not be done through the section 44 amending process. Other sections of the *Constitution Act, 1867*, requiring modernization include matters relating to bankruptcy, loss of seat on being convicted of an indictable offence, age qualification, dual citizenship, attendance, a fixed term for senators, the oath of loyalty (which should include loyalty to Canada) and those relating to seats from Québec. And importantly, it is essential to make timely appointments to fill vacancies when they occur within six months as in the House of Commons.

7. ***The federal government may well be ignoring the spirit of the 2014 Supreme Court opinion which emphasized that the provinces have a constitutional interest in the Senate.*** The present government's failure to openly consult with the provinces somewhat resembles the unilateral actions taken by the previous government. When he appeared before the Special Senate Committee on Senate Reform on September 7, 2006 Prime Minister Harper stated: "The Senate must change and we intend to make it happen. The government is not looking for another report – it is seeking action that responds to the commitments made during the recent federal election." The Harper plans ended in failure and nine years of potential progress on Senate reform was lost.
8. Finally, under this new reform, ***the regional function, the essence of the Senate, may well be further weakened.*** That the Senate was to be the voice of the regions was made very clear in the *Confederation Debates*.⁸ Section 22 of the *Constitution Act, 1867* embodies the principle that the regional function of the Senate is the cornerstone of the Confederation Agreement and makes very clear that senators are constitutionally to be provincial representatives.

Why We Should Be Interested in Senate Reform

9. To begin, it is a sad but obvious fact of Canadian parliamentary life that ***Senate renewal suffers greatly from a lack of sustained interest*** from just about all segments of society which is a major factor behind the failure of further modernization and comprehensive reform. This is most unfortunate.
10. The importance of Senate reform is best addressed from four perspectives:
 - i. The first would be the legislative perspective. The Canadian Senate shares constitutional equality of power with the House of Commons as derived from both section 17 and the introductory paragraph of section 91 of the *Constitution Act, 1867*. As Professor Danielle Pinard has written “No sector of state regulation may escape the necessary and uniform approbation of the Senate.”⁹ As the Supreme Court of Canada stated in 2014: “The Senate is one of Canada’s foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation.” The powers of the Senate impact on all legislation passed by parliament with potential societal effects. In a representative democracy, it is only reasonable that the people of Canada have a say in how that power is exercised.
 - ii. Secondly, ***bicameralism as a parliamentary system matters a great deal***. Few have championed bicameralism more than the French philosopher Montesquieu who asserted that “the legislative body being composed of two parts, they check on one another by the mutual privilege of rejecting.” (*The Spirit of the Laws*, 1748) John Stuart Mill also favored bicameralism and stated that “the consideration which tells most, in my judgment, in favour to two chambers...is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult.” (*Representative Government*, 1861). What is important to note is that neither Montesquieu nor Mill were looking for the

“best” form of government: they were searching for a system that discourages the worst. Nor did they see a two-house design as one which the chambers would be permanently at war with each other: the two houses were to be complimentary.

Besides being a check on power, the benefits of bicameralism are also seen to include improving the representative quality of parliament and providing redundancy and quality control to ensure proper scrutiny of the legislation proposed.¹⁰ A political system is obviously enhanced by an efficient and effective system of bicameral government. Canada’s challenge is to make its present system of weak bicameralism stronger and more effective while avoiding gridlock.

- iii. Thirdly, despite their general inexperience with and understanding of second chambers and consequent lack of interest in renewing the Senate, ***the provinces have an important stake in Senate reform.*** Two of the principles Canada’s constitution is based on are 1) federalism, and 2) a national parliament made of two houses, one representing the people and the other representing the geographic regions. If legislation is to be adopted, it needs the approval of both houses. As the Supreme Court opinions of 1980 and 2014 make clear, any real change to the Senate’s architecture, characteristics or fundamental nature and role invites the interest and participation of provinces.

Yet, the premiers have historically paid little attention to Senate reform. Most of the major proposals have come from the federal government: the Molgat-McGuigan joint committee (1972); Bill C-60 (1978); the Pepin-Roberts task force (1979); the Molgat-Cosgrove joint committee (1984); the Macdonald Commission (1985) ... the tabling of a resolution in 1985 (later withdrawn) by the Mulroney government to amend the constitution to limit Senate powers to a 30-day suspensive veto on Money Bills and 60 days on everything else in response to C11 (1985), a Borrowing

Bill being delayed by the Senate pending the government's tabling of Estimates on which it was based; the Beaudoin-Dobbie joint committee (1992); and Bills S-4, C-43, C-20 and C-7 (2006-12).

There have been exceptions, clearly demonstrating ***the provinces have from time to time been concerned about reforming the upper house***. In 1978, the British Columbia government published a report recommending the Senate be turned into a body like the German Bundesrat with the provinces having exclusive authority over who represents them. In 1985, the Alberta Legislature's Select Committee issued a report on an "elected, equal and effective" Senate. The provinces have also taken action in the courts with respect to the constitutional legality of federal legislation proposing changes to the Senate, for example, the 2012 reference by the Charest government to the Québec Court of Appeal regarding Bill C-7, and of course, the 1980 and 2014 Supreme Court references. How and when to engage the interests of the provinces in Senate reform is one of the important challenges the country faces.

The provinces are not necessarily disinterested in the potential benefits a reformed Senate would bring to Canadian democracy, namely: a greater representation of this country's diversity, improved policy making, the more balancing of power and a stronger federalism.¹¹ It is more likely that the provinces would see the upper house's primary function as offering protection within the areas parliament legislates. The practice of having "federal regional ministers" within the cabinet has never effectively ensured that provincial interests were taken care of. Given the fact that Ontario and Québec hold almost two-thirds of Canada's population and an overwhelming majority of seats in the House of Commons, the smaller provinces may look to the Senate for the protection of minority regions. Québec would most likely have a different interest: it would want protection against the demographic reality that its overall population, in relation to the rest of Canada, is decreasing. Ontario may be more interested in

the Senate providing effective sober second thought and a degree of protection against hasty legislative action by the House of Commons. The West would want protection in the field of natural resources. It is fair to assume that no province would want the Senate to totally usurp the powers of the House of Commons. On the other hand, they would want the Senate's check to be credible enough so that its voice in parliament is not ignored in the exercise of power.

- iv. Finally, from a national perspective, ***Canadians have an interest in Senate reform because it is a national institution with national responsibilities.*** Since senators have great constitutional power, Canadians have an interest in ensuring more popular representation in the Senate and holding senators accountable to those that it serves.

A Proposed Way Forward

11. I would like to suggest that a more substantive process of modernizing the Senate could begin by parliament reviewing the antiquated sections of the *Constitution Act, 1867* and making the appropriate amendments. Although as suggested above, some of these changes could be made by parliament legislating on its own. ***The spirit of the 2014 Supreme Court reference suggests that meaningful reforms require discussion with the provinces.*** If a province objects to a particular modernization proposal, and the government does not want to engage in a negotiation with the province, its option is to not proceed. **But not to try is a missed opportunity.**
12. Comprehensive reform obviously includes much more than this. ***Action will have to be taken at some point to address the Senate's lack of legitimacy and accountability by providing the broad legislative powers it possesses with a more democratic basis.*** The question of ***revising the distribution of seats also needs to be addressed.*** Canada's demography and economy have changed dramatically since the last redistribution of Senate seats in 1915. British Columbia and Alberta now represents close to 25% of the country's total population and have

a special importance to the national economy which could not have been anticipated at the time of Confederation. Yet these two provinces have only 10% of the Senate seats. This imbalance will continue to grow which inevitably will produce even more frustration with the Senate. Clearly, there must be a more equitable and effective representation of provincial interests reflected in the composition of the Senate.

13. The important and ***necessary discussion of Senate reform will only begin by first dismissing the assumption that discussions with the provinces will end in failure.*** It is imperative, however, that the negotiating framework be designed to encourage pragmatic accommodation as discussed and well explained by former Senate Speaker Pierre Claude Nolin.¹² The great success stories which define the history of Canada attests to the value of this winning strategy of working towards the accommodation of diverse interests: Confederation itself, the creation of universal health care, equalization and the entrenched values of bilingualism and biculturalism. There is a clear need that the Prime Minister and Premiers learn from the mistakes of the past and work to achieve a strong consensus, however long it takes. We should be encouraged by the fact that the premiers despite their differences were able to come to an agreement for a National Energy Strategy for Canada at their summer meeting in St. John's in 2014. Such an outcome was undoubtedly the product of compromise which is symbolic of how our country has survived, remained united and prospered. I believe that in this same spirit the Prime Minister and premiers, if they can be engaged, will be able to agree on a plan for a reformed upper house for Canada.
14. If the provinces are unable to act, the more ambitious phase of renewing the Senate calls for a process to facilitate the development of a proposal or alternate proposals that reflect the views of concerned governments, experts, and interested Canadians and will become subject to the rigours of constitutional amending process. To achieve this, the government is encouraged to appoint a royal commission with broad powers of consultation to receive input from expert witnesses,

affected stakeholders and the general public. This should be followed by all party discussions at both the federal, provincial and territorial levels and with First Nations.

15. There are three main areas of Senate reform: the method of selecting senators; the distribution of seats; and Senate powers. They are inseparably linked. I feel that if the provinces are expected to come up with a proposal for remedying the problems with the Senate, a review should be made of the Charlottetown Accord. Despite its many serious flaws, it meshed all three areas of reform and remarkably achieved unanimous provincial and federal agreement. Although it was rejected in a referendum, I feel that the compromises which were agreed to at Charlottetown are a great example of what can be accomplished by the federal, provincial and territorial governments working together. The Accord still holds out the promise that agreement can be achieved and a provincial proposal for substantive Senate reform developed.
16. ***On the selection of senators***, the Charlottetown Accord proposed that they be elected, either directly by the people or by the provincial legislatures. Regarding the allocation of seats, the Accord proposed that seats be distributed on the basis of provincial equality, with each province having six seats, and the territories each having one. It also stated that additional seats be awarded to aboriginal voters and that seats in the Commons be better distributed on the basis of population. However, there would be guarantees that Québec would be assigned no fewer than 25 per cent of the seats in the House of Commons and that no province or territory will lose seats. Admittedly, this left some important business to be completed.
17. With respect to powers, Charlottetown recommended that while the Senate will be influential over some types of legislation particularly bills affecting the French language or culture and tax policy changes related to natural resources, it would otherwise have had diminished powers. For example, revenue and expenditure bills could be subject to a 30-day suspensive veto. If a bill was defeated or amended by the Senate within this period, it could be repassed by a majority in the House of

Commons. As well, the Senate would have power to delay ordinary legislation for only up to thirty days.

18. Other options must also be put on the table. In place of a solely elected Senate, ***the provinces could consider establishing a hybrid house of elected and appointed senators.*** Respecting the distribution of seats, instead of provincial equality, the premiers may wish to have seats awarded on the basis of a population criterion which would involve large, middle-sized and small provinces, not unlike the Bundesrat. Regarding the powers of a renewed Senate, there may be other ways to protect the primary role of the House of Commons than the complex changes to legislative powers put forward by Charlottetown. For example, the present constitutional powers could remain intact but adequate procedural rules and other machinery put in place to discourage gridlock and encourage compromise and clarify as to when the Senate can use its powers. Free conferences are useful for resolving many of the disagreements on legislation to avoid deadlock.

Conclusion (to be completed)

19. I acknowledge that the political will to muster the necessary support from all stakeholders may not be easy to find. As always, the goal must be to improve the quality of governance and increase national unity within Canada. **The Senate has a large role to play in achieving these goals.** It is better that discussions take place during a relative period of normalcy of federal-provincial relations as opposed to one of crisis. The long Senate reform journey will be worthwhile and the results more valued if Canadians, through traditional processes and public consultation, have been given the opportunity to become informed and engaged in the reform process.

¹ The debate started early, beginning with a motion in 1874 in the House of Commons that “the present mode of constituting the Senate is inconsistent with the Federal principle of our system,” and was followed by another debate in 1906 in which it was proposed that “the constitution of the Senate should be brought into greater accord with the spirit of representative and popular government.” At the 1887 Interprovincial Conference, Québec Premier Honore Mercier called for an elected Senate. Sir Robert Borden is said to have mulled over an elected Senate in 1914. There were many demands of its complete abolition in the 1930s. From the mid-1960s through to the ‘90s, a number of efforts, including detailed white papers, extensive committee studies, proposed bills and the appointment of commissions, were made to change the constitutional design of the Senate, some coming from the federal arena and others from the provincial. Virtually none have been acted upon and one in particular ended in notable failure. The Charlottetown Accord which was endorsed unanimously by the federal and provincial government put forward a comprehensive proposal for Senate reform including that senators be elected either by the public or by the provincial assemblies, but was defeated in a national referendum in 1992. There were some successes, such as in 1965 limiting the term senators could serve from life to age 75 and, in particular, The Constitution Act of 1982. The Supreme Court of Canada 56 has also made determinative contributions providing judicial opinions on the constitutionality of various reform options in 1980 which were essentially enforced in its 2014 opinion.

² See Jeanette Money and George Tsebelis, “Cicero’s Puzzle: Upper House Power in Comparative Perspective”, *International Political Science Review*, 1992, 13 (1), 25-43.

³ *The People’s House of Commons: Theories of Democracy in Contention*, 2007, p. 8.

⁴ See *The Future of Freedom*, Fareed Zakaria, p. 94.

This may seem like a small point, but parties are the mechanism through which people in modern societies express, reconcile, and institutionalize their moral and political values. The historian of American democracy Clinton Rossiter once wrote, “No America without democracy, no democracy without politics, no politics without parties.” His statement is true everywhere.

Without parties, politics becomes a game for individuals, interest groups, and strongmen.

⁵ *A House Undivided: Making Senate Independence Work*, Hugh Segal and Michael Kirby, Canada's Public Policy Forum, (<http://www.ppforum.ca/events/house-undivided-making-Senate-independence-work>).

⁶ *Renewing the Senate of Canada: A Two-Phased Proposal*, Senator Dan Hays, May 25, 2007, *After Word* June 27, 2007. At page 19, footnote 20, on the question of Prime Ministers of the day appointing independent Senators and sharing appointments with opposition parties as in the United Kingdom:

As we know, this has not been the Canadian tradition. In the appointments made to the Senate by Prime Minister Mackenzie King, only two of the 103 were not Liberals. Under Prime Minister St. Laurent, only three of the 55 appointments were not Liberals. Under Prime Minister Diefenbaker, only one of the 37 appointments was not a Progressive Conservative. Under Prime Minister Pearson, only one of the 39 appointments was not a Liberal. Under Prime Minister Pierre Trudeau, 11 of the 81 appointments were not Liberals. Prime Minister Clark made 11 appointments to the Senate and all were Progressive Conservatives. Under Prime Minister Mulroney, only two of the 51 appointments were not Progressive Conservatives. Under Prime Minister Chrétien only three of the 75 appointments were not Liberals. Under Prime Minister Martin, five of the 17 appointments were not Liberals.

Prime Minister Harper appointed 56 Senators, all of whom were of his Party, and left 22 vacancies when the government changed in 2015.

In the normal course and if he serves two terms ending in 2023, Prime Minister Justin Trudeau will have had the opportunity to appoint at least another 42 Senators.

⁷ Michael Pitfield, "An Appointed Chamber Will Always Lack Credibility", *Canadian Parliamentary Review*, Vol. 7, No. 1, 1984.

⁸ The Premier at the time, Sir E.P. Tache, stated the following: “When the gentlemen who composed the Conference met, they had to lay down a broad basis, as it were, for the foundation of their superstructure. Well, it so happened that the cornerstone was that which concerned the representation in both Houses. It was agreed on the one hand that in the House of Commons of the Confederate Government representation should be according to numbers, and that in the other branch of the Legislature it should be fixed that the representation should be equal for all the provinces, that is to say, Upper Canada and Lower Canada and the Maritimes, grouped into one, should each be allowed to send the same number of representatives, so as to secure for each province its rights, its privileges, and its liberties.” (p. 234) George Brown stated: “In maintaining the existing sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it was quite natural that the protection of those interests, by equality in the Upper Chamber should be demanded by the less numerous provinces.” (p. 88) John A. Macdonald said: “In order to protect local interests, and to prevent sectional jealousies, it was found requisite that the three great divisions into which British North America is separated, should be represented in the Upper House on the principle of equality.”

⁹ *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, 2006, p. 493.

¹⁰ See Samuel C. Peterson and Anthony Mughan (ed.), *Senates: Bicameralism in the Contemporary World*, 1999.

¹¹ See two articles sponsored by the Canada West Foundation, “Beyond Regionalism: The Rest of the Senate Story”, October 26, 2000; and “A New Senate for a More Democratic Canada”.

¹² *Accommodation as a Canadian Tradition*, Senator Pierre Claude Nolin, Summer 2008/Canadian Parliamentary Review