

Reforming Canada's Senate: a pragmatic approach

Imagine an Upper House that does not shy away from speaking truth to power and to the people.

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IMAGINE an Upper House of Parliament:

- Where support for an idea or proposal is achieved through persuasion based on the quality of arguments presented to a group of independent, public-spirited men and women who reflect the diverse perspectives of Canadians;
- Where Senators are encouraged to take both a nation-wide and long-term view that takes into account the regional and cultural variegation of our huge land mass;
- Where facts, reason, experience and values count for more than a party leader's opinion and the whips of party discipline;
- Where decisions are not made on the basis of whether something is merely politically expedient and whether the people can be made to swallow it;
- Where civility is expected, cheap shots scorned, and respect is based on the power of ideas and the willingness to cooperate to achieve consensus;
- Where democratic legitimacy is based not on party-driven, leader-focused elections, but on the professionalism, dedication and integrity of the members and the openness and transparency of their work;
- In short, imagine an Upper House that does not shy away from speaking truth to power and to the people.

Introduction and background

When Parliament resumes on March 3, after the prorogation announced on Dec. 30, 2009, Senate reform will be back on the Harper government's agenda.

Harris MacLeod reported in *The Hill Times* (Jan.18, 2010) that, "The Tories will introduce two bills, one that will seek to abolish the status quo of Senators serving until age 75 and instead would impose term-limits, and the other would put in place a process whereby Senators would be elected at the provincial level." An earlier *Globe and Mail* story noted that, "After taking office in 2006, the Conservatives proposed

a bill to limit Senators' terms to eight years—which was to precede a bill that would establish Senate elections—but it died as Liberals in the Senate insisted there should be 12-year terms and that such a constitutional change must be negotiated with the provinces,"(Jan. 5, 2010).

Because we are taking a highly pragmatic approach to Senate reform, we accept the constraint that it would be impracticable to propose changes that would require a constitutional amendment or would otherwise have to be endorsed by the provinces. For example, we are not proposing any change in the allotted number of senators by province or in the Senate's powers, which are already essentially equivalent to those of the Commons.

Jeffrey Simpson points out that the Supreme Court of Canada, in a 9 to 0 decision in 1979, said that "Ottawa could unilaterally do almost nothing to the Senate. In particular, Ottawa could not unilaterally abolish the Senate, change the powers of the Senate, alter the number of Senators from each province or fiddle with the method of [selecting] Senators," (*The Globe and Mail*, Jan. 7, 2010).

Andrew Potter writes that the extensive study by political scientist Campbell Sharman disputes the belief "that the Canadian Parliament is a degenerate bicameral system, with a lofty Upper House that looks rundown and antiquated compared to the vigorous Triple-E (equal, elected and effective) senates found in Australia and the United States."

Sharman says that, "it's actually more accurate to say that Canada is a unicameral system with the Senate as a vestigial Parliamentary organ," (*Ottawa Citizen*, Jan. 11, 2010).

We believe that the historical record shows the Fathers of Confederation designed the Senate that way in order to ensure that the elected Commons would be the pre-eminent House of Parliament.

Our central goal is to build on the strengths of the Senate. Thus we agree with Potter, who states that an appointed Senate "does not affect the near-total dominance of the Commons, in representative legitimacy, democratic accountability, and effective political authority." Further, what the Senate "does best is the old idea of serving as a chamber of sober second thought: effective scrutiny of legislation and inquiry into the activities of the government and its various agencies."

We believe that the best way to modernize the Senate and improve its effectiveness is to constrain the unfettered power of the Prime Minister to advise the Governor General to appoint people to the Senate. The manner in which people are currently selected by the Prime Minister for appointment is the single most important reason that the Senate has no legitimacy in the eyes of Canadians.

How could it when the record batch of 18 appointees in December 2008 was described by columnist James Travers as follows: "a Prime Minister who promised to do things differently has delivered a disappointingly familiar mix of flacks, hacks, defeated candidates and fundraisers"? (*Toronto Star*, Dec. 23, 2008). A *Halifax Chronicle-Herald* editorial said the appointments were a matter "of rewarding party

loyalists, the better to encourage others to run, raise money, organize for your party and back your leadership. It's about putting in order Conservative morale and defences for the political war..." (Dec. 24, 2008).

Columnist Lou Clancy called it "another Senate pig-out." He also noted that in 1996, Stephen Harper had this to say about the Senate: "Canadians ... are ashamed the prime minister continues the disgraceful, undemocratic appointment of undemocratic Liberals to the undemocratic Senate to pass all too often undemocratic legislation," (*Toronto Sun*, Dec. 28, 2008).

The only way to change the selection process without a constitutional amendment is to establish an independent commission with legislated criteria for selecting appointees.

Independent Senate Appointments Commission: the nuts and bolts

The government should introduce a bill to set up an independent Senate Appointments Commission (SAC) to recommend candidates to the PM, who would then advise the Governor General to make the appointments. The SAC would be similar, but not identical, to the House of Lords Appointments Commission (HOLAC), whose "role is to select new independent members of the House of Lords and to vet party-political nominations put forward by the political parties." The HOLAC selects "independent members on merit and on their commitment to the work of the House of Lords," (HOLAC website).

We propose that the SAC have 11 members selected by the federal government, and that the chair be a retired judge. The other 10 members, one from each province, would be persons of high reputation who also have demonstrated a deep knowledge of public affairs. Members would serve for a seven-year term (like most officers of Parliament) and the terms would be staggered to ensure continuity. Because of the small workload—we estimate that an average of five or six appointments would be made each year—only a small annual honorarium would be paid plus a reasonable per diem for the days devoted to SAC work. A small staff (perhaps only an executive-secretary) would be provided to assist the members of the SAC. The SAC could draw upon government officials (like those who vet nominees for the Order of Canada), and the RCMP to conduct confidential investigations of potential nominees. The SAC might find it useful to build up a small "bank" of potential nominees for appointments expected in the next year or so.

The criteria for nomination specified in the legislation would emphasize outstanding attainment in a profession or occupation, and/or a substantial record of interest in and contributions to public affairs. The objective is to appoint men and women of real accomplishment seriously interested in effective public policy—rather than partisan advantage, although former partisans would not be excluded. We want Senators to reflect the diversity of Canada, and be able to provide a regional perspective where that can improve the quality of federal laws. We believe that the interests of the provinces are well-represented by the premiers, and that there are already established mechanisms through which their views can be made known to the federal government.

The legislated criteria that SAC must follow in selecting nominees are in addition to the basic qualifications set out in Sec. 23 of the Constitution Act, 1867. The qualification that a Senator must be resident in the province for which he or she is appointed has led some to question whether new Senators Mike Duffy and Pamela Wallin were really residents of Prince Edward Island and Saskatchewan, respectively (see Teresa Wright, *The Guardian, Charlottetown*, Dec. 24, 2008; and James Wood, *Saskatoon Star-Phoenix*, Dec. 31, 2008). Canadians, particularly those in professions like journalism, move around a lot, and we would not want to see this qualification interpreted so narrowly that otherwise qualified people would not be selected as nominees by the SAC. Sec. 33 of the 1867 Act provides that only the Senate can determine whether the residency requirement has been met or not. Since Sec. 44 of the *Constitution Act, 1982*, allows Parliament to amend the Constitution in housekeeping matters, the residency qualification *could* be clarified by a simple act of Parliament.

Potential nominees could be proposed to the SAC in the following ways: by friends or associates; by a provincial government; application by the potential nominee; and by the SAC itself based on its own research (with the agreement of the nominee).

The SAC would meet when necessary to select imminently qualified residents from a province to fill any Senate vacancy. The SAC would then submit a list of at least three qualified persons to the Privy Council, and the Prime Minister would advise the Governor General to appoint one of the persons on the list, or return the list to the SAC with written reasons why none of the nominees are suitable. The SAC would then submit a new list. The lists and the PM's written reasons should be made public to ensure transparency.

Conclusions

The quality of appointments to the Senate affects the effectiveness, credibility and legitimacy of that much maligned institution. This inhibits the work of the Senate in making constructive changes to legislation from the elected Commons and in holding the government to account. By constraining the Prime Minister's prerogative to select appointees, we believe the Senate will become far less partisan, and be better able to contribute to the work of Parliament as whole. At the same time, an appointed Senate will *not* take power away from either the democratically elected House of Commons or the provincial premiers.

The type of reform we're proposing is both far simpler to implement and more respectful of democracy than the pseudo-elections proposed by the Harper government. Our proposals are also not open to constitutional challenge by the provinces.

We believe democracy requires that a partisan body be subjected to periodical elections for it to be held accountable to citizens. We do not believe that a non-partisan body, whose members have been appointed for their knowledge, experience and devotion to the interest of all Canadians, need to be held accountable through elections. Instead, their work must be open and transparent and subjected to the

criticism of the public and the public's elected representatives. In a future article, we discuss the ways an appointed Senate can function as a non-partisan body.

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