

# *Addressing the Senate's “Triple-Deficit”: The Senate as Driver of its own Reform*

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## **Introduction**

In her keynote address at the 2015 Centre for Constitutional Studies conference “Time for Boldness on Senate Reform,” the Right Honourable Kim Campbell asserted that in order to evaluate any proposal for Senate reform we must ask: what is the purpose of the Senate? And, what do we want it to do? Over the course of the conference, other speakers answered these questions, and we can see their relevance in light of the Supreme Court’s recent engagement with them in the *Senate Reform Reference*.<sup>1</sup> The most frequently suggested purposes of the Senate are: (a) to be a chamber of “sober second thought”; (b) to be a voice for the regions; and (c) to be a check on the majoritarian excesses of the House of Commons.<sup>2</sup> For the purposes of this paper, I will remain agnostic on these questions and on what might be considered “mega-reforms” to the Senate.

Thus, instead of arguing for or against a “Triple-E” Senate, I argue that, whatever one’s position on the Senate (short of abolition), the Senate suffers from a “Triple Deficit”: (1) an integrity deficit; (2) a legitimacy deficit; and (3) a democratic deficit. It suffers from an integrity deficit because of the reputation that the Senate has for not being a particularly demanding job, and, more importantly, because of recent scandals that are a continuation of a history of

scandal which the Senate has never taken concrete steps to address.<sup>3</sup> The Senate suffers from a legitimacy deficit because of the integrity deficit and because of its history of patronage appointments. Finally, it suffers from a democratic deficit for more than the obvious reason that it is unelected. As the Supreme Court stated in the *Quebec Secession Reference*,<sup>4</sup> democracy as it has come to be understood in Canada means more than simply respect for majority will: “[t]o be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution . . . The system must be capable of reflecting the aspirations of the people.”<sup>5</sup> Rather than allowing for public participation and accountability, the Senate has allowed itself to become isolated from the Canadian people. This sense of isolation has exacerbated the Senate’s democratic deficit and has led Canadians to view it as distant, elitist, and out of touch with the people.

Most proposals for Senate reform focus on what others should do to reform the Senate: the Harper government’s proposals concentrate on the federal government and the provinces; the Supreme Court’s decision in the *Senate Reform Reference* emphasized the role of the provinces in making “fundamental changes” to the Senate; and Liberal leader Justin Trudeau’s plan for

Senate reform targets political parties and the prime minister. In all of these reform proposals, the Senate is the object of reform rather than the instigator.

I submit that the Senate must become the subject in initiating and driving reforms to itself. Perhaps in light of the history of the Senate and of proposals for its reform, this is a bold proposition. However, I fear that it instead reflects the depths of the Triple-Deficit to which the Senate has succumbed over the past 148 years. I was heartened by the presentations of my co-panelists Senator James Cowan and Professor Andrew Heard whose proposals focussed squarely on what the Senate should do to reform itself. My thesis is simply that the Senate must convert itself into a modern and accountable democratic institution. It must drag itself — kicking and screaming, if need be — into the 21<sup>st</sup> century. In this spirit, I offer five proposals on a spectrum ranging from least to most bold.

## 1. Defining residency: Welcome to the 20<sup>th</sup> century!

To begin, the Senate must actually define and enforce the residency requirements for qualification. Of course, this is but one aspect of the Duffy scandal: Prime Minister Harper appointed broadcaster Mike Duffy to the Senate to represent Prince Edward Island even though Duffy had not reportedly lived on the island for over 20 years. Duffy lived in Ottawa, although he had a vacation cottage on the island. Duffy got into serious trouble for reimbursement of questionable Senate expenses and the Prime Minister's then Chief of Staff, Nigel Wright, personally reimbursed Duffy for \$90,000 in expenses that Duffy had to repay the Senate. This led to a criminal investigation by the RCMP, with charges being laid against Duffy; his trial began in the spring of 2015. These other elements of the Duffy scandal are more salacious, perhaps even criminal, but what concerns me here is the constitutional residency requirement.

I specifically say “welcome to the 20<sup>th</sup> century” because the Senate is more than 100 years overdue in defining the residence requirements

for qualification. These requirements and the responsibilities of the Senate itself are contained in the *Constitution Act, 1867*, formerly known as the *B.N.A. Act*. The name “*B.N.A. Act*” is symbolic of the problems of the Senate which for far too long has acted — at the level of the institution, and at the level of the individual members therein — as if we were still in the 19<sup>th</sup> century “British North America.”

Section 24 of that Act provides that the Governor General shall summon “qualified persons” to the Senate. Section 23 defines the qualifications for senators and requires, among other things, that senators must be “resident” in the Province for which they are appointed. Section 31 provides that a senator becomes disqualified if he or she “ceases to be qualified in respect of Residence.” Section 33 provides that “If any Question arises respecting the Qualification of a Senator or a vacancy in the Senate the same shall be heard and determined and by the Senate.” These sections are three of only sixteen constitutional provisions that deal exclusively with the Senate. It is not as if the issue of qualifications for the Senate has never arisen. Indeed, one of the most famous cases in Canadian constitutional law involves this issue: *The Persons Case*<sup>6</sup> dealt with whether women were “persons” who could be qualified for summons to the Senate under section 24 of the *Constitution Act, 1867*. Between 2004 and 2012, *The Persons Case* was featured on the \$50 bill as part of the Bank of Canada's *Canadian Journey Series*.<sup>7</sup> Even before the bill was in circulation, *The Persons Case* was an important part of the Senate's history. It remains so: there is a statue on Parliament Hill of the Famous Five triumphantly displaying the judgment of the Privy Council.

Thus, it cannot be said that the issue of Senate qualifications was somehow an obscure constitutional issue that had never arisen. It had achieved prominence within the Senate since at least 1927 when the Government of Canada initiated the reference that became known as *The Persons Case*. In the nearly 100 years since then, the Senate has done nothing to clarify other requirements for qualification or disqualification in the Senate, including residency. In failing to

prescribe any rules for determining residency, the Senate has shirked its constitutional duty and is guilty of constitutional negligence. In so doing, it has invited court intervention which threatens the autonomy of the Senate in this matter. In a future court challenge to a senator's qualification on the basis of residency, a court will afford no deference to the Senate's failure to act on this matter. The suggestions that residence is either self-defining or too difficult to define are both utterly without merit. The law defines residence all the time for the purposes of taxation, voting, health insurance, etc.

My 13 year-old son, Ben, is a dedicated baseball player who has competed in Little League tournaments in each of the last four summers. Little league has a five-page policy entitled "Residence and School Attendance Player Eligibility Requirements."<sup>8</sup> The term "residence" is defined and proof of residence is determined by providing three documents from a list of 17 acceptable options. To be clear, a ten- to thirteen-year-old child playing little league baseball must produce more proof of residence than a prospective senator summoned by the Governor General to represent one's province in Canada's Senate.

Strangely, the Senate has addressed the issue of residency elsewhere. According to the *Senators' Travel Policy*,<sup>9</sup> which was provided to me by the Senate Communications Office, each year each senator must submit a "Declaration of Provincial/Territorial Residence and National Capital Accommodation" with the following supporting documents: a driver's license, a provincial health card, and a notice of assessment from the Canada Revenue Agency.<sup>10</sup> These requirements seemingly have nothing to do with the constitutional requirement of residency, but this is not, in fact, entirely true. It is possible that these filings could be evidence either in support of or inconsistent with the constitutional residency requirement.

The Senate continues to reinforce the Triple-Deficit by way of its ability to determine residency for the purposes of reimbursing its members for expenses, but not for the purposes of determining qualifications under the Constitution.

## 2. Making the Senate a full-time job

The Senate has a serious legitimacy deficit; it needs members who are wholly committed to the job and to the institution. The Senate must move to ban outside employment and the earning of outside income.<sup>11</sup> Senators earn an annual salary of \$138,700, with life tenure until age 75, and a pension. Those who hold leadership positions earn bonuses on top of this.<sup>12</sup> According to media reports, senators received a 2.7% raise effective April 1, 2015, bringing their base salary to \$142,400. This is more than five times the increase that the Conservative government offered to public sector employees.<sup>13</sup> To most Canadians, this is a lot of money: in 2012, the median annual family income in Canada was \$74,540.<sup>14</sup> Moreover, to many, work in the Senate does not appear particularly demanding. In 2012, the Senate sat for 88 days; in 2013, for 76 days; and in 2014, for 83 days.<sup>15</sup> Senators also have committee work, but unlike MPs they do not have constituencies to return to. Perhaps, in light of my first point regarding residency, they should.

Many senators do not treat the Senate like a full-time job. According to a 2013 *Globe and Mail* report of senators' financial disclosure statements, 46 of 99 senators have other jobs.<sup>16</sup> In addition to contributing to the Senate's legitimacy deficit, this practice also raises problems of conflicts of interest. Media reports that a considerable number of senators earn a significant amount of income from outside sources.<sup>17</sup> The Senate should amend the *Ethics and Conflict of Interest Code for Senators* to ban or severely restrict the earning of outside income through other employment or paid service on corporate or other public boards.

The primary purpose of this prohibition would be to attempt to address the Senate's legitimacy deficit ensuring senators' primary and sole commitment to the Senate. It would also address the integrity deficit. The prohibition on outside employment would serve a prophylactic function by reducing the possibilities for conflict between a senator's private and public interests. It would also reduce the opportunities for indi-

vidual abuses that arise when public funds are exploited for non-Senate business.

### 3. Reducing partisanship

If the Senate wants Canadians to take seriously its role as a chamber of sober second thought, it must move to reduce partisanship. Using the Senate for partisan purposes contributes to its legitimacy deficit and undermines the Senate's independence. In November 2013, I suggested that the Senate could require senators to sever all ties with political parties, although I thought that possibility unrealistic at the time.<sup>18</sup> However, in January 2014, Justin Trudeau expelled the Liberal senators from the Liberal parliamentary caucus.<sup>19</sup> This is a good first step.

At the CCS conference, there was much discussion about the distinction between partisanship and party discipline. Beginning with the Right Honourable Kim Campbell, it was asserted that partisanship could not be curbed. Others focussed on the problem of party discipline. Senator James Cowan (Liberal) spoke of the liberating effect of being “unseated” (or expelled) from the Liberal Parliamentary caucus: the Liberal senators no longer have to achieve consensus on any particular issue. This was a powerful moment for me. But, with all the proposals for “free votes” or “three line votes” over the past 20 years, I may be excused for expressing skepticism. Democratic reform initiatives are always proposed by the opposition (the Reform Party, the Martin Liberals, the Harper Conservatives), but once that opposition succeeds in reaching government, they tend to dispense with such reforms. Thus, the test of the proposed Trudeau reforms will be whether Justin Trudeau actually carries out his promised reforms when he has something to lose from them.

However, while such reforms are necessary, I do not think that they are sufficient. Knowing what we know now about the Senate and about the temptations and the abuses of power in Canada, how would we counsel the Fathers of Confederation to create a chamber of “sober second thought”? If we wanted to create an independent body of “sober second thought” that was

not tethered by the passions of politics of the day, certainly we would liberate these senators completely from partisan politics. It is simply not sufficient to believe that it is possible to free partisans from party discipline and that this would go far enough towards addressing the Senate's Triple-Deficit.” For the Senate to survive, let alone thrive, it must do more than return to some non-existent halcyon age; it must become better than it has ever been. While it may be impossible to take the politics out of politicians, it is certainly possible to prohibit politicians from participating in the most partisan of activities.

The Senate should prohibit its members from holding any official position with a political party or related entity (such as its fundraising arm). Both the Conservative and the Liberal parties have used the Senate as a convenient perch for chief fundraisers, campaign chairs and party activists. That should end. Both parties have also appointed persons to the Senate on the understanding that they would assist in partisan activities such as electioneering or fundraising. The Senate should prohibit its members from participating in an electoral campaign or engaging in any fundraising activity. Senators should be like the Speaker of the House of Commons: formally partisan, but distant from the most overtly partisan activities in order to retain the confidence of all members and of the public.

### 4. Transparency now!

The Senate should make itself the most transparent body in Canadian government, an admittedly low standard. There is a popular perception that the Senate is full of “fat cats” — lazy-but-loyal politicians who continue to pad their personal wealth on the taxpayer's dime while doing little work. The Senate needs to show Canadians that its members are hard at work.

The Senate must move quickly and boldly to open itself to public scrutiny. In recent years, the public confidence in the Senate has reached new lows because of the Senate expenses scandal. That scandal can be explained in part because of an utter lack of transparency and a complete failure of accountability. Most problematic is the Sen-

ate's Committee on Internal Economy, Budgets and Administration which routinely operates *in camera*. As Louis Brandeis so famously wrote: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>20</sup>

Here is what the Senate should do, forthwith: it should televise and webcast all proceedings. Currently, the Senate only broadcasts committee hearings. Senators and others argue over whether televising Senate debates would have a negative impact on the quality of debate in the Senate chamber. It is asserted that televising House of Commons debates has led to showboating or theatrical performance. This assertion blames the medium instead of the messenger. The reality is that we live in an unprecedented era of open access, as anyone with a child who has learned how to operate a smartphone can attest. We have school-cams, nanny-cams, cop-cams, etc. We should also have Senate-cams. The House of Lords does and so should the Senate of Canada.<sup>21</sup> Proceedings and information about the Senate should be instantly available and accessible. The Senate fails to grasp the extent to which the public expects that public business will actually be both open and accessible. To members of the Canadian public, accessible means viewable on their smartphone. If Canadians can bank and watch hockey on their smartphones, they should be able to watch their public representatives in action and access information about them on a new, yet-to-be-created "Senate of Canada App."

Along these lines, the Senate should post the attendance records of every senator on every vote, every debate, and every committee meeting. Many municipal councils, public bodies, and public corporations already do this. It was suggested at the conference that the Senate does disclose this information, but it does not readily appear on the Senate's website. I had to e-mail the communications department at the Senate to find out if this information existed and where it could be found. I was advised that attendance and voting results of senators are available in the Journals of the Senate and that if members of the public wish to review the attendance record of senators they have to attend in person at the Senate Communications Directorate. This is woe-

fully inadequate. Today, if information cannot be found on a homepage or in a 30-second Google search, it may as well not exist.

The Senate should also post the whereabouts of senators on its website which would be accessible on a Senate of Canada app. This app would show that senators are either engaged in Senate business in the Senate (or elsewhere in Ottawa), in Senate-related business outside of the Red Chamber (for which taxpayers are paying their travel), or in private business.

Furthermore, the Senate should post all senators' expenses on its website. Currently, the Senate of Canada only posts a single-line item reporting on all expenses reimbursed to senators by quarter.<sup>22</sup> This is insufficient by any comparative standards. The House of Lords publishes far more detailed information.<sup>23</sup> Paradoxically, the Senate Ethics Officer who oversees the *Ethics and Conflict of Interest Code for Senators* discloses more particulars of her expenses than the senators she is charged with overseeing (to be clear, the Senate Ethics Officer does not oversee Senate expenses, but as discussed in the next part, she or someone else should).<sup>24</sup>

The Senate, as an institutional whole and as a body composed of individual members, should open itself up to more public engagement. The Senate is supposed to represent various regional interests, but it is hard to see how it actually does this in practice. The Senate could hold hearings, meetings, or town halls in locations across Canada. It could use social media to engage with Canadians. For example, the House of Lords has a "Lords Digital Chamber"<sup>25</sup> where members of the House discuss issues, parliamentary business and popular matters (such as football) with members of the public. Such popular engagement would not hurt the Senate.

## 5. The need for independent oversight

The Senate needs independent oversight. It has failed miserably to regulate the conduct of its members. This is a sad conclusion that I take no joy in making. The Senate is an indepen-

dent constitutional body, but it must surrender some of its autonomy in the name of preserving its independence and fostering public confidence. The Senate has utterly failed in terms of expenses and financial expenditures. This failure was so acute that it necessitated the involvement of the Auditor General to review every senator's expenditures. This decision reflected a chronic problem with the lack of oversight in the Senate which will not disappear once the Auditor General completes his job.

The Auditor General should either be given continuing jurisdiction to review Senate expenditures or such jurisdiction should be transferred to a strengthened Senate Ethics Officer who would be able to hire the necessary staff to conduct such audits. My preference would be for the latter because I think it would be better to have a single, independent official overseeing the ethics and conduct of all senators. However, because both the Auditor General and the Senate Ethics Officer are appointed by the Prime Minister, I see the virtue in separating oversight functions between these two appointees to reduce the risk of a single weak office-holder capitulating to the wishes of the Prime Minister and/or the Senate.

## Conclusion

The Senate faces a serious crisis of public confidence that I have characterized in terms of a Triple-Deficit. It will take bold steps to arrest this crisis, but I believe the initiative must come from the Senate itself. That is the best chance that we have to build a new Senate that is faithful to its old ideals.

## Notes

- \* Co-founder of the Public Law Group and Associate Professor, Faculty of Law, University of Ottawa. This paper is based on an address given at the "Time for Boldness on Senate Reform" conference held by the Centre for Constitutional Studies at the University of Alberta on March 13-14, 2015. Thanks to my co-panelists the Hon. Senator James Cowan, QC, Professor Andrew Heard, and the panel moderator, the Honourable Anne McLellan,

PC, OC, AOE. Thanks to Stephen Bindman for reading several earlier drafts of this paper and providing helpful comments. The paper is dedicated to the Right Honourable Kim Campbell, PC, CC, OBC, QC in appreciation for her public service and for her support for me in my career before I even knew what that career would be.

- 1 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.
- 2 *Ibid* at paras 15-16; and see papers of David Smith and Lori Turnbull, among others, in this collection.
- 3 See generally J. Patrick Boyer, *Our Scandalous Senate* (Toronto: Dundurn, 2014) and Claire Hoy, *Nice Work: The Continuing Scandal of Canada's Senate* (Toronto: McClelland & Stewart, 1999).
- 4 *Reference re Secession of Quebec*, [1998] 2 SCR 217.
- 5 *Ibid* at para 67.
- 6 *Edwards v Canada (Attorney General)*, [1930] AC 124, 1929 UKPC 86 (BAILII) <[http://www.bailii.org/uk/cases/UKPC/1929/1929\\_86.html](http://www.bailii.org/uk/cases/UKPC/1929/1929_86.html)>.
- 7 <<http://www.bankofcanada.ca/banknotes/bank-note-series/canadian-journey/>>.
- 8 Little League Baseball, Softball and Challenger, "Residence Eligibility Requirements," online: <[http://www.littleleague.org/assets/forms\\_pubs/tournaments/residence-eligibility-requirements.pdf](http://www.littleleague.org/assets/forms_pubs/tournaments/residence-eligibility-requirements.pdf)>.
- 9 Parliament of Canada, "Senators' Travel Policy", <<http://www.parl.gc.ca/Content/SEN/Committee/412/ciba/rep/rep07jun14A-e.pdf>>.
- 10 *Ibid*, Appendix C at 31.
- 11 Under section 5 of the *Ethics and Conflict of Interest Code for Senators*, adopted by the Senate on June 16, 2014, senators who are not ministers of the Crown "may participate in any outside activities, including the following, as long as they are able to comply with the principles of the Code and fulfil their obligations under it:
  - (a) engaging in employment or in the practice of a profession;
  - (b) carrying on a business;
  - (c) being a director or officer in a corporation, association, trade union or not-for-profit organization; and
  - (d) being a partner in a partnership.
 <<http://sen.parl.gc.ca/se0-cse/eng/Code-e.html>>.
- 12 Parliament of Canada, "Indemnities, Salaries and Allowances," online: <<http://www.parl.gc.ca/Parlinfo/lists/Salaries.aspx?Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98>>.
- 13 Kathryn May, "MPs, senators get bigger raises than public servants" *Ottawa Citizen* (13 March 2015), online: <<http://ottawacitizen.com/news/>>

- national/raises-for-politicians-beat-those-offered-to-public-servants>.
- 14 Statistics Canada, “Median total income, by family type, by province and territory” <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil108a-eng.htm>>.
  - 15 <<http://www.parl.gc.ca/parlinfo/compilations/HouseOfCommons/SittingDays.aspx?Chamber=b571082f-7b2d-4d6a-b30a-b6025a9cbb98>>.
  - 16 Josh Wingrove, “Twelve senators with lucrative side jobs”, *Globe and Mail* (9 November 2013), online: <<http://www.theglobeandmail.com/news/politics/globe-politics-insider/senator-pay/article15357223/>>.
  - 17 *Ibid*; and see Joanna Smith, “Many Canadian senators make money outside the Senate”, *Toronto Star* (4 July 2013), online: <[http://www.thestar.com/news/canada/2013/07/04/many\\_canadian\\_senators\\_make\\_money\\_outside\\_the\\_senate.html](http://www.thestar.com/news/canada/2013/07/04/many_canadian_senators_make_money_outside_the_senate.html)>.
  - 18 Adam Dodek, “Senate, heal thyself”, *The Globe and Mail* (12 November 2003), online: <<http://www.theglobeandmail.com/globe-debate/senate-heal-thyself/article15379279/>>.
  - 19 Justin Trudeau, “Major Announcement: Ending Partisanship and Patronage in the Senate”, (29 January 2014), online: <<http://www.liberal.ca/major-announcement-partisanship-patronage-senate/>>.
  - 20 Louis D. Brandeis, *Other People’s Money: and How Bankers Use It* (New York: F.A. Stokes, 1914) 92.
  - 21 Parliamentlive.tv: House of Lords, <<http://www.parliamentlive.tv/Lords>>.
  - 22 Parliament of Canada, Senate Financial Reports: Quarterly Expenditure Reports 2014-09-01/2014-11-30, <<http://sen.parl.gc.ca/SenProactiveDisclosure/SenatorExpense.aspx?dateRange=2014-09-01%20/%202014-11-30&language=E>>.
  - 23 House of Lords, Allowances and expenses claims 2014/15, <<http://www.parliament.uk/mps-lords-and-offices/members-allowances/house-of-lords/holallowances/hol-expenses04/>>.
  - 24 Parliament of Canada, Office of the Senate Ethics Officer: Proactive Disclosure, <<http://sen.parl.gc.ca/seo-cse/eng/ProactiveDisclosure-e.html>>.
  - 25 “Lords Digital Chamber: Connect to members of the House of Lords”, <<http://www.lordsdigitalchamber.co.uk/>>.

