

Notes from an Insider: Some Bold Ideas on Senate Reform

Senator Jim Cowan*

It is a pleasure to be here, and to be on this panel. I want to begin by thanking the organizers for putting together such a serious, thoughtful program.

I thought it might be useful to bring to the discussion the perspective of an “insider” — someone who is on the ground, in the Senate, as both witness and active participant.

Let me declare my interest (which is probably pretty evident). I have a stake in our succeeding in finding a way forward for the Senate, and not because I expect to be there a long time — in fact, I have less than two years before I reach the constitutional age of retirement. I believe the Senate can still serve a useful, indeed important, purpose for Canadians. I have seen its potential “up close and personal,” as they say, but I don’t believe it is reaching anywhere near that potential now. In fact, it is very frustrating and sometimes even discouraging to witness what is going on. Boldness is indeed required for Senate reform, and I suspect that, for some, a good dose of courage may be needed as well. I will be very frank and, hopefully, fair in my comments this afternoon.

To recap briefly where we are: Prime Minister Stephen Harper came to power promising Canadians that he would finally bring about Senate reform. As it turned out, his idea of Senate reform was focused on two things: a form of Senate elections (so-called “consultative elections”), and term limits. He insisted that these

were changes that Parliament could enact alone. However, numerous constitutional experts — some of whom are in this room — warned that he was wrong. The Supreme Court agreed with the experts.

The Prime Minister has tried to spin this by arguing that the Court has made Senate reform impossible: “The Supreme Court has said these are only decisions the provinces can make.” He concluded, “We are virtually stuck in the status quo for the time being.” I disagree with Mr. Harper on both points. I think that, once again on the issue of Senate reform, he is wrong.

Mr. Harper could, if he wished, pursue his chosen Senate reforms. However, to do so, he must engage with the provinces. As the Supreme Court confirmed, that is what is required in our federation. But, that is not something this Prime Minister is prepared to do, on this or any other file requiring federal leadership. He seems to have an almost allergic reaction to sitting down with his provincial and territorial counterparts. His refusal to engage has held us back from advancing on a number of public policy fronts, only one of which is Senate reform.

Accepting that reality, does this mean the Senate is, in Mr. Harper’s words, “stuck in the status quo”? I don’t think so. We have certainly lost years of potential progress — it is now almost 10 years since Mr. Harper came to power and we are no further ahead — but there are ways the

Senate could become more effective, without any need for a constitutional amendment. That is where I believe we need to turn our attention. We have heard a number of very interesting proposals from other presenters; let me address just a few points before I move into my own suggestions for a way forward.

First of all, with respect to Professor Adam Dodek's comments on the residency requirements, I agree that defining residence is not a task beyond our skills. If we senators are legislators entrusted with crafting laws that will affect a myriad of aspects of the lives of Canadians, then this must surely be within our reach. Personally, it has always been clear to me where my residence is — as Professor Dodek said, it's where you vote, pay your taxes, have your health card, etc. If senators don't know where they live, then one has to question how they will address the many serious issues presented to them as senators.

Secondly, should a senatorial position be made a full-time job? Well, it is certainly a full-time job for me. I can't speak for how others divide their time. When I came to the Senate, I thought, like Professor Dodek, that it would be a part-time commitment. I quickly learned I was wrong. It can be a bit misleading to describe the work of a senator by looking only at the days on which the Senate is sitting. That is only one part of our work. I was also very conscious of not wanting any conflict, or appearance of conflict, between my Senate and non-Senate activities. That was an interesting issue because I wanted to represent my region in the Senate without needlessly severing all ties with the various organizations I was involved in, such as Dalhousie University and various not-for-profit organizations, among others.

Third, the partisanship issue is a big one which I will address in detail in these remarks.

Fourth, I have some points concerning Professor Andrew Heard's argument for changing the Senate rules to limit our powers. The most immediate problem is that the Constitution is very clear that the powers of the Senate can only be changed by the 7/50 amending formula: in other words, with the consent of seven provinces

representing 50% of the population. This is section 42(b) of the Constitution.

I will also say that I believe the Senate has actually been very careful in exercising its powers. Traditionally, we will amend legislation but then, if the elected Chamber disagrees with our amendments, we defer. We give them our best advice, but if that advice is rejected, we accept that. We have the power to defeat legislation, but — again, traditionally — we were very judicious in exercising that power. Since the outbreak of the Second World War, I believe the Senate defeated only 6 bills received from the House of Commons. In all but one case, that being the most recent, this happened only after very extensive public hearings. That recent case was, in my opinion, disgraceful. The Conservative majority in the Senate defeated a bill on climate change that had been passed by the House of Commons, and they did so without a single Conservative senator rising to speak on the bill, and without holding a single committee hearing where Canadians could make their views known. If that is how the Senate is going to exercise its powers, then yes, we have a problem. But, I hope that was an aberration. Looking back, defeating five bills in 70 years — all after extensive public hearings — I think that is a demonstration of restraint and not excess requiring a change in the rules. Certainly, one could debate whether the Senate made the right decision in any given case, but I have not seen evidence that would lead me to advocate that the Senate limit its powers along the lines suggested by Professor Heard.

How can we make a body of individuals appointed to age 75, with an uneven distribution of seats among the provinces and territories, function more effectively? I have read the Supreme Court decision a number of times, and I believe the Court actually gave us a useful roadmap to point us in the direction of ways in which we can improve the Senate without the need for a constitutional amendment. I believe we need to ask what it is that we expect the Senate to do. As an aside, that was a problem I had with Mr. Harper's proposal — it never asked that question. Consequently, I believe this lack of clarity would have likely caused enormous problems of

political gridlock had this proposal succeeded in being pushed through. But I digress.

The Supreme Court clearly enunciated the historical and modern-day role of the Senate in our bicameral Westminster parliamentary system of government. The Court said a number of times that the Senate’s “fundamental nature and role” is that of a “complementary legislative body of sober second thought.” There is a lot packed into that short phrase. The Senate is to be “complementary” to the House of Commons, not a rival. And, the Senate is a legislative body designed to “ensure that they would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons.” Legislative review is our primary responsibility. It is, as I often say, our “job one.” That is the meaning of “sober second thought.” There are other things the Senate does, and indeed has done very well — and I will talk about those later — but those are secondary to our job of legislative review. Unless we do that work well, we will not have any credibility, and frankly, we won’t deserve any.

Conversely, if senators do their jobs well, I think our laws can be better, and the Senate can be an institution that makes a positive contribution to our parliamentary process. In my view, doing the job well means: to take the collective, diverse life experiences of the men and women appointed to the Senate, and I will get to the appointment process later, and apply it to the task of rigorous scrutiny of proposed legislation; to take the time to listen to those Canadians who want to be heard; and, to take the time to think about legislative improvements, propose amendments, test them in committee study and then in debate. Finally, part of the Senate’s contribution is that senators do this job as a chamber of “sober second thought”, that is after the House of Commons has concluded its study. This allows a bit of time for further reflection on the merits or possible problems with a bill, and for that reflection to take place at a bit of a remove from the politically charged atmosphere of the elected House.

But, this is the critical part: this isn’t happening in the Senate today. To do our job well requires a Senate prepared to assert its independ-

ence from the House of Commons, and from the government — and this is simply not the case as it stands now. As our chair, Anne McLellan, can tell us from her experience, governments do not like it when the Second Chamber amends their proposed legislation. Governments have historically tried to control the members of the Chamber, and avoid amendments. But, the control exerted by the current government is in a league of its own. This government maintains an iron grip on its senators, who hold the overwhelming majority in the Senate. What I still find difficult to comprehend is why Conservative senators, with only very rare exceptions, go along with it. These are accomplished individuals, many having come to the Senate after a lifetime of serious, impressive achievements in their chosen field. Yet, they allow themselves to simply take dictation from the government.

Regarding the old notion of Parliament being a place for spirited debate of serious issues — in the Senate these days, debate is sadly one-sided. For example, this was evident during the recent debate of a motion to have the RCMP head up security on Parliament Hill, a proposal that has significant constitutional implications. There were a number of very thoughtful, insightful speeches, but they all came from Liberal and independent senators. The issues raised were not answered by anyone on the government side. They sat stony-faced. And this is the new normal for all matters that come before the Senate. Reasoned critiques of bills presented by witnesses, commentators, or parliamentarians are usually not even acknowledged, let alone answered. In my experience, Conservative senators don’t even bother to engage in debate. They sit silently in their place until the time comes to vote. It would be wrong to say they are gagged; they themselves apply their own muzzles.

The committee process is tightly controlled. Events suggest that the committee witness lists are not finalized until they have been approved by the government. In one recent case, only witnesses who supported the bill were allowed to testify. Witnesses with different views, including the ambassador of an important emerging partner, had their requests to appear denied. Sena-

tors were only allowed to hear one side of the issue — the side the government agreed with. I abstained from that vote. As I told the Chamber, I did not feel that I was in a position to vote, since I was prevented from hearing the opposing arguments.

As to what the committee decides to do with a bill: well, that too is predetermined. In some committees, Conservative senators actually have scripts from which they read an assigned part. The whole scenario is less like a debate than it is a dance choreographed by the government. In another recent case, senators — including one appointed by Prime Minister Harper — discovered mistakes in a bill that officials, in careful “bureaucrat-speak,” described as “not trivial.” This should have been an example of the Senate doing its job. Instead, the diligent Conservative senator in question found herself removed overnight from the committee studying the bill, and the amendments to correct these obvious mistakes were voted down by the heavy hand of the Conservative majority. When the bill (with mistakes) came before the whole Senate for a vote, another Conservative senator fled from the Chamber, apparently disgusted with what the government was demanding of the Senate. Meanwhile, the Conservative senator who had originally discovered the mistake was made to stand and vote against the amendment she herself had proposed in committee the night before.

These episodes make a mockery of the independent, sober second thought which ought to characterize the Senate’s legislative review process. As I said in the Senate at the time, we are being transformed from a legislative chamber into a \$90 million debating club. Sadly, it seems this will only get worse, not better, in the near future. The media recently reported on the lengths to which the Government is going to control Conservative senators between now and the election expected by this fall. According to the report, no bills, no motions, no speeches, no media comments, not even any tweets, are to be issued without clearance from the office of the Government Leader in the Senate!

There is good reason to include “sober second thought” as part of the legislative process —

it is an extra step that experience demonstrates is needed if our laws are to be the best they can be before they are imposed on Canadians. The government’s position is that the role of the Senate is to pass government legislation. Prime Minister Harper said this quite openly recently, when asked whether he would be appointing senators to fill any of the current 18 vacancies. He said, “We’re able to continue to pass our legislation through the Senate, so from our standpoint the Senate of Canada is continuing to fulfil its functions.” That is not the Senate’s function. It exists to do more than merely rubber-stamp bills at the government’s behest.

Prime Minister Harper famously threatened that if he didn’t succeed in pushing through his chosen reforms of the Senate, then he would want to abolish the Senate. One cannot help but wonder if that remains his goal. He can’t abolish the Senate from our parliamentary democracy; the Supreme Court was clear that such a measure would require the agreement of the provinces. But, is Mr. Harper *de facto* abolishing it, by rendering it completely irrelevant? Prime Minister Harper can only succeed if a majority of senators agree to this proposal in a kind of collective suicide of the Senate.

In view of these instances in which the government has already tried to marginalize the Senate, one can appreciate why I would be very concerned about a rule such as that proposed by Professor Heard, namely that any bill from the House of Commons would be deemed to have received third reading in its original form 6 or 12 months after its introduction. All the government would have to do then is simply wait out the clock after introducing highly controversial legislation. Even if no committee hearings have been held, even if the bill is never brought forward by the government for debate, the bill would simply pass. That proposal would change the Senate from a perceived rubber stamp to a time stamp.

So, the vision I would put forward for reform of the Senate is quite simply this: let the Senate do its job. Who would have imagined that this would be a radical suggestion? Yet, these days, it is. We need to reclaim the independence that was

supposed to be guaranteed by virtue of our being appointed until the age of 75.

Let me be clear, I believe in the political party system. I am a strong proponent of the Westminster parliamentary system, with a government and an opposition. I believe in the value of party politics, and have been a member of the Liberal Party all my life. But, we seem to have erased the line dividing party support from blind party discipline, blurring what Professor David Smith calls the distinction between partisanship and party discipline. This blurring is now preventing the Senate from doing an effective job within our parliamentary democracy.

My caucus colleagues and I have been engaged for the past year in trying to find a new way forward — to rediscover that line, if you will. On January 29, 2014, Justin Trudeau announced his plan to reform the Senate, which he said was focused on removing patronage and partisanship from the Senate. The immediate impact was that senators would no longer be part of the national Liberal caucus. There was some unfortunate confusion about whether or not we were still Liberals. Let me be clear: I am still a member of the Liberal Party of Canada, as are my caucus colleagues. We are still Liberal senators. And that makes sense. My views and outlook on issues did not suddenly change on January 29. But, what did change was that now there is not even a suggestion that Liberal senators take direction from the leader of the Liberal Party of Canada, or his colleagues in the House of Commons. We are truly independent. We recognize and respect that distinction between partisanship and party discipline. While the announcement came as a complete surprise to me and to all my colleagues, we quickly began exploring what this could mean — how we could try to reimagine the Senate, to use our new-found independence to reform the Senate from within.

We instituted several changes immediately. First, there are no more “whipped” votes in our caucus. Every vote, from the most minor private member’s bill to budget bills, is now a free vote. We then realized that since we don’t need to reach a common position on legislation, we no longer needed to hold caucus meetings behind

closed doors to thrash out a common position. So, we agreed that on most Wednesdays we would open the doors to our caucus meetings, and invite experts, the media, and the Canadian public to join us as we examine particular issues. These open caucuses have been very successful. We have used them to allow people to come forward, people whose voices are not otherwise being heard in the current politicized climate on Parliament Hill. We also, by the way, always invite members of all parties and both Houses to join us. I am happy to say that this invitation has been accepted by a few members from other parties. We also opened up our Senate Question Period, inviting Canadians to send in questions they would like us to ask the government on their behalf. Again, this has been successful in giving Canadians a direct voice in the Senate.

These are initiatives we have put in place, and that we believe have the potential to improve the way in which the Senate works for Canadians. We would welcome other ideas. And of course, this has all been done without any constitutional amendment.

I am sure there are other ideas out there on how we could make the Senate more effective without amending the Constitution. I referred earlier to the other roles that the Senate plays, in addition to that of legislative review: the policy studies, regional representation, and representation of minorities. I am confident there are improvements we could make that would enhance how we fulfil those roles for Canadians.

As soon as the Supreme Court issued its decision on the *Senate Reference*, we began to explore all these avenues, and invited Conservative senators to join us in this process. Unfortunately, many of them are not interested. And, even those who are interested are often handcuffed by the government. Indeed, a leading Conservative senator, now the Speaker of the Senate, Pierre Claude Nolin,¹ introduced a motion to establish a special committee to examine ways and means of modernizing the Senate without touching the Constitution. We supported this initiative. The government did not, and indeed refused to even allow it to come to a vote.

This is the sad reality. But the saddest part of all is that it wouldn't happen without the acquiescence of Conservative senators. But that is also the hopeful aspect. If and when they decide to stop acquiescing and to begin to do the work they are in the Senate to do, then we have the possibility of our vision for reform becoming a reality; the Senate can fulfil its intended role in our parliamentary democracy. So, the bold vision I would propose for the Senate is to enable a Senate that has the will, the freedom, and the resources to do the job the Supreme Court confirmed for the institution.

Before I conclude, I want to address the appointment process. Elections are now off the table, at least for the foreseeable future. But, I don't believe that we are stuck with the "status quo," as Mr. Harper has argued. At an interesting symposium recently held in Ottawa about the future of the Senate, someone pointed out that the procedure by which prime ministers have selected people to recommend to the Governor General for appointment to the Senate is simply the process chosen and used by Sir John A. Macdonald. This same process has continued ever since, but there is nothing in the Constitution that mandates how this is done.

That, in turn, means that other methods could be adopted. I have often suggested that we could learn from the process used for judicial appointments throughout Canada at both the federal and provincial levels. Mr. Trudeau announced last year that, if he is elected, he will put in place an open, transparent, and non-partisan public process for appointing and confirming senators. Indeed, he challenged Prime Minister Harper to match him in establishing such a process and also to separate Conservative senators from the Conservative national caucus, thereby allowing them their rightful independence.

I am convinced that we are not locked into the status quo; there are steps we can take, right now, to significantly improve the Senate. But, it will take political will. And, I admit, it will take courage. I do not pretend it will be easy for a Conservative senator to oppose this government; we have seen that it is a pretty big bus that many people have found themselves tossed under.

It is a huge honour to be named a senator. That honour carries with it a responsibility to do one's best for Canadians — not for a particular political party, or for a particular prime minister, but for our country. That is our job, and I am convinced that if we do it, then that will go a long way to effect the "bold Senate reform" many Canadians want and deserve.

Notes

- * Senator Jim Cowan is the Leader of the Opposition in the Senate. He was appointed to the Senate in 2005 by the Governor General on the advice of Prime Minister Paul Martin to represent the province of Nova Scotia. This paper is the text of Senator Cowan's presentation at the Senate Reform Conference.
- 1 These notes were presented at the Senate Reform Conference in March, 2015. Sadly, Senator Nolin died on April 23, 2015.