

Time for Boldness on Senate Reform, Time for the Trudeau Plan

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As it currently stands, there are three bold options on the table when it comes to reforming the Canadian Senate: make it an elected body, abolish it, or make it more independent and less partisan. Only the third option, proposed by Liberal leader Justin Trudeau, is the realistic option: the other two don't stand a chance.

Why? Because the first two options would both require constitutional amendments, as confirmed by the Supreme Court in its April 25, 2014 decision. The Court ruled that Parliament cannot change the nature of the Senate unilaterally. Making it an elected chamber would require the agreement of Parliament and the concurrence of seven provinces representing 50 percent of the population of the provinces (the 7/50 rule); abolishing the Senate would require the unanimous agreement of Parliament and the ten provinces.

There is no majority concurrence required for making the Senate an elected chamber. Unanimity among provinces for abolition is out of reach. At least one province, Quebec, has declared that it will not enter into constitutional negotiations on the sole issue of Senate reform. And, there is the *Regional Veto Act*, which gives veto power over constitutional changes to the five regions of Canada.

We saw what happened to Prime Minister Stephen Harper's claim that an elected Senate does not require changing the Constitution: the

Supreme Court rejected it. The Prime Minister is also wrong in believing that an elected Senate, if at all possible, would be desirable without requiring other institutional changes. Why? For one, the current distribution of senators by province results in Alberta and British Columbia being significantly under-represented. This under-representation of our two most western provinces would become untenable in the context of an elected Senate if the latter exercised its constitutional powers to their full extent rather than with the moderation shown, since Confederation, by a Senate bereft of any electoral legitimacy. Furthermore, it is irresponsible to even think of establishing an elected Senate without having formulated a conflict resolution mechanism. The example set by the US Congress has amply demonstrated that conflict is unavoidable between two elected Houses, since they can both speak legitimately on behalf of the citizens and are both equally capable of paralyzing one another.

All pre-Harper prime ministers have opposed moving to an elected Senate without the constitutional amendments needed to rebalance the distribution of senators per province and the division of roles between the Senate and the House of Commons. Prime Minister Stephen Harper's unilateral reform project was irresponsible, especially for Alberta and British Columbia; thankfully, he finally sought the Supreme

Court's opinion after years of pressure from the Liberal opposition.

Now, what about abolishing the Senate? We know it is impossible without amending the Constitution. But even if it was possible, it would not be the best choice for Canadians in that it would deprive Canada of what the Fathers of Confederation wanted the Senate to be: an upper chamber that scrutinizes House of Commons bills with rigour and self-restraint in order to improve them — the famous Chamber of “sober second thought.”

The Senate has been playing that valuable role since Confederation. That is, until Prime Minister Harper began subjecting the Upper House to a relentless and unprecedented level of partisan discipline. Between 1994 and 2008, for example, the Senate amended 9 percent of the bills approved by the House of Commons and only explicitly rejected two out of 465 bills.¹ Those numbers do not include the many amendments suggested by senators to House members — and adopted by the House of Commons — even before the bills are officially submitted to the Senate. And, let us neither forget nor undervalue the many policy papers and guidance documents, always useful and often outstanding, which have been produced by senators.

Having said that, it is clear that Canadians are fed up with the ethical and financial scandals that have been caused by the actions of some senators. Canadians are no longer willing to tolerate the patronage and rabid partisanship — raised by Prime Minister Harper to unparalleled levels — that smears the Senate's reputation and discredits its usefulness. Reforms are needed to bring back our Senate to what it is meant to be: the Chamber of sober second thought.

The Liberal Party of Canada has committed to ensuring that the Senate can fulfill the responsibilities intended by the Fathers of Confederation: to scrutinize legislative proposals in order to detect their errors, shortcomings and inaccuracies and, based on its findings, to suggest useful amendments. In the words of John A. Macdonald: “It must be an independent house having a free action of its own, for it is only valuable as

being a regulating body, calmly considering the legislation initiated by the popular branch and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people”² Or, in the words of Justin Trudeau, the Senate must be “a place of sober, second thought. A place that allows for reflective deliberation on legislation, in-depth studies into issues of import to the country, and, to a certain extent, provide a check and balance on the politically-driven House of Commons”³

It is of the utmost importance that the Senate plays its constitutional role, as an upper chamber attuned to the needs and aspirations of the regions and minorities of our diverse country, including First Nations and official language communities. The Senate must be more level-headed and more independent, not motivated by partisanship. It must be composed of high-level, competent, ethical, and highly qualified legislators appointed through a non-partisan process.

So, there you have it: a more independent Senate. That is what Liberal leader Justin Trudeau has pledged to deliver. The “Trudeau Plan” consists of two phases: the first one has already been completed, and the second will be implemented if the 2015 federal election results in a Liberal government.

The first phase was completed on January 29, 2014. On that day, senators ceased to be members of the Liberal caucus; since then, the caucus only includes Members of Parliament. Henceforth, senators have no formal or organic ties with the Liberal caucus or the Liberal Party of Canada. As private citizens, they are obviously entitled to support any political party of their choice. In this way, senators have been “liberated” from partisan work and better able to focus on their parliamentary and legislative work. Justin Trudeau invited Stephen Harper to do the same with his own Conservative senators. Unfortunately, though perhaps unsurprisingly, the Prime Minister refused.

Quickly and decisively, Justin Trudeau made the most significant Senate reform since Confed-

eration. He accomplished more Senate reform in one morning than Prime Minister Harper did after nearly a decade in office. And, the Liberal leader will advance even further on the path to reform if Canadians elect him as their Prime Minister.

The second phase of the Liberal Senate reform will provide for the establishment of a non-partisan senatorial appointment process, so that the Senate is made up of outstanding, highly qualified and devoted legislators.

Some constitutional experts have suggested that a useful way to proceed would be to establish a Senatorial Advisory Council such as the one that selects certain members of the United Kingdom's Upper Chamber. The proposed Council would be tasked with providing the Prime Minister with informed, objective advice on possible Senate appointees. Personally, I think this is a model that can be considered among others.

Under this model, the Council would base its recommendations on sound, objective, non-partisan criteria. The recommended candidates would have to demonstrate a comprehensive list of qualities: exceptional competence, indisputable connections with the province, a history of outstanding service to their communities, an exceptional work capacity, flawless honesty and integrity, open-mindedness, the wisdom and sound judgment expected of a legislator, and full understanding of what a chamber of sober second thought is supposed to do — namely, proposing improvements to legislation without disputing or usurping the legitimate lead role of the elected House in a democracy. Care would be taken to ensure fair representation of women and minorities, including First Nations and official language minority communities who have historical ties to the Senate.

How might the proposed senator selection process work? Here's a possible model. In keeping with constitutional convention, the Prime Minister would make the final recommendation to the Governor General, based on a short list prepared by the Advisory Council. Should the Prime Minister feel unable to name anyone from the short list, he/she would have to provide

the reasons to Parliament and ask the Advisory Council for a new short list.

An Act of Parliament enacting such a selection process would be fully constitutional. It would not change the “. . . Senate's fundamental nature and role . . .” a nature and role that, according to the 2014 Supreme Court opinion, Parliament has no right to alter unilaterally.⁴ In contrast, the Court confirmed that making the Senate an elected chamber would fundamentally alter its nature and role, thus requiring that the 7/50 provincial approval threshold be met.⁵

The Court noted, in its 2014 opinion, that “. . . the framers of the *Constitution Act, 1982* extended the constitutional protection provided by the general amending procedure to the entire process by which senators are ‘selected’”.⁶ That means that the entire process must be considered in order to assess whether or not it changes the fundamental nature and role of the Senate. If the entire process only aims to make the Prime Minister's choices less partisan and more objective, as the Trudeau proposal does, it does nothing to change the fundamental nature harmonize with the Court's definition of the Upper House's fundamental nature which is: “. . . to provide ‘sober second thought’ on the legislation adopted by the popular representatives in the House of Commons”⁷; to be “. . . a thoroughly independent body which could canvass dispassionately the measures of the House of Commons”⁸; to be “. . . a *complementary* legislative body, rather than a perennial rival of the House of Commons in the legislative process”⁹; and, to be removed “from a partisan political arena”¹⁰.

That being said, I believe it would be wise to experiment with the new process before entrenching it in an Act of Parliament, in order to test its uptake.

To conclude, I will just say that Justin Trudeau's commitment to giving Canada an effective, less partisan, and more independent Upper House is realistic and much needed. Without having to change a single word in the Constitution, it will deliver a Senate populated with senators who have the skills, knowledge, and ability to fulfill the task assigned to the insti-

tution by the Fathers of Confederation: to scrutinize and improve upon the legislative work of the House of Commons. The Trudeau Plan for Senate reform will deliver a Senate that is worthy of the pride and confidence of Canadians: a true chamber of sober second thought.

It is indeed time for boldness. It is time for an effective and nonpartisan Senate; it is time for the Trudeau Plan for Senate Reform.

Notes

* Notes for an Address by the Honourable Stéphane Dion, P.C., M.P., delivered on March 14, 2015, at a Conference entitled “Time for Boldness on Senate Reform,” held by the Centre for Constitutional Studies, Lister Centre, University of Alberta, Edmonton.

1 Andrew Heard, “Constitutional Doubts about Bill C-20 and Senatorial Elections” in Jennifer Smith,

ed, *The Democratic Dilemma. Reforming the Canadian Senate*, Institute of Intergovernmental Relations, School of Policy Studies, Queen’s University (Montreal & Kingston: McGill-Queens University Press, 2009) at 81-96.

2 Janet Ajzenstat, “The Origins of the Canadian Senate” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal & Kingston: McGill-Queen’s University Press, 2003) at 13.

3 Justin Trudeau, “Major Announcement: Ending partisanship and patronage in the Senate”, *Liberal Party of Canada* (29 January 2014), online: <<https://www.liberal.ca/major-announcement-partisanship-patronage-senate/>>.

4 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 at para 52 [*Senate Reform Reference*].

5 *Ibid* at para 53.

6 *Ibid* at para 65.

7 *Ibid* at para 15.

8 *Ibid* at para 57.

9 *Ibid* at para 58.

10 *Ibid* at para 57.