

| Canada's Senate: The Need for Reform

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The idea of a Canadian Senate reform has slowly gained popularity over the past few decades for three main reasons: the Senate has become more symbolic than results-driven, the Senate's democratic legitimacy is questionable because it is appointed, and the current form of the Senate maintains and contributes to the growing executive dominance in Canada. A reform of the Canadian Senate could contribute to solving these concerns. This article offers recommendations for the best way to create a Senate that is elected, effective, and equal. An ineffective Senate ultimately leads to a lack of representation of citizen's interests across Canada, making it necessary to consider reform to protect the democracy of Canadian citizens. The following paper will provide further insight into the concerns that the current form of the Senate contributes to, such as the minimally checked powers of the Prime Minister and the control that the Prime Minister maintains over political parties. The original proposal for a Triple-E Senate, however, has many flaws, therefore, alternative methods of reform are examined in-depth. It is suggested that half of the Senate should be elected by Members of Parliament in the House of Commons to ensure a standard of legislative experience, and the other half of the Senate should be elected by Canadian citizens to encourage regional representation and the representation of minority groups.

Au cours des dernières décennies, l'idée de réformer le Sénat du Canada est de plus en plus répandue, ceci pour trois raisons principales. Premièrement, le Sénat est devenu plus symbolique et donc, moins axé sur les résultats. Deuxièmement, sa légitimité démocratique est remise en question puisque les sénateur.rice.s sont nommé.e.s. Troisièmement, le modèle actuel du Sénat maintient et contribue à la dominance croissante du pouvoir exécutif au Canada. Réformer le Sénat du Canada peut aider à résoudre ces problèmes. Cet article émet des recommandations sur la meilleure méthode pour former un Sénat qui est à la fois élu, efficace et égalitaire. En fin de compte, un Sénat inefficace mène à un manque de représentation des intérêt.s partout au Canada; il est

donc nécessaire de considérer des réformes afin de protéger la démocratie des citoyen.ne.s canadien.ne.s. Ce texte éclaire des préoccupations liées à l'organisation actuelle du Sénat, comme le contrôle exercé de façon minimale sur les pouvoirs du premier ministre canadien ainsi que son contrôle des partis politiques. Cependant, il existe de nombreuses failles dans la proposition originale d'un Sénat triple E. Par conséquent, ce texte examine d'autres possibilités de réforme en profondeur. Il est donc proposé que les député.e.s de la Chambre des communes élisent la moitié des membres du Sénat et que la seconde moitié soit élue par les citoyen.ne.s canadien.ne.s afin d'encourager la représentation des régions et des groupes minoritaires.

Introduction

In Canada's legislative branch of government, the Senate was created with the intention of being a chamber of "sober second thought" for bills that were passed through the House of Commons, in addition to having an institution that represented and protected regional interests (Galligan 2018, 77). The Senate's enormous legal powers exist to protect Canadians from legislation that threatens their rights and freedoms (Kennedy 2017, 180). However, in recent years, the Senate has become more symbolic than action-based in Canada's legislative process. This is because, despite their formal powers, the Senate has no legitimacy in Canadian democracy, since Senators are appointed rather than elected (Galligan 2018, 77). Over the years, the growth of executive dominance in parliament has "[limited] the original purposes behind the creation of the Senate" (Kennedy 2017, 180). In this paper, it will be argued that reform is needed in Canada's Senate because its current functionality encourages executive dominance. The proposal for a Triple-E Senate that is elected, effective, and equal, however, has many flaws and needs to be limited.

This article is heavily influenced by the suggestions made in the 1985 Canada West Foundation report, for recommendations for Canadian Senate Reform, the University of Alberta's 2015 "Time for Boldness on Senate Reform" conference, as well as Robert A. Mackay's study on the Canadian Senate. To achieve an ideal Senate reform, the ideas from all three sources should be combined. It is proposed that half of the Senate should be elected by Members of Parliament in the House of Commons to ensure a standard of legislative experience, and the other half of the Senate should be elected by the citizens of Canada to encourage regional representation and the representation of minority groups. This will be argued by examining the theoretical foundations of the Canadian Senate, and by scrutinizing how executive powers control political parties - leading to a lack of representation of the people's interests. As well, the issues that arise when considering Senate reform, specifically a

“Triple-E” Senate, will be analyzed. Lastly, methods of reform will be considered other than the original proposal of a Triple-E Senate.

Literature review

Theoretical foundations of the Senate

Article text goes here. The desire for Senate reform was popularized in the 1980s as a “means for dealing with Western alienation” (Galligan 2018, 78). In other words, the Western provinces of Canada are frustrated by the lack of representation that they receive within the current federal government– leaving the citizens to feel alienated from “political representatives, [and] processes of political decision-making” (Lawson 2005, 128). Historically, Western provinces felt alienated from national policymaking because their predominantly conservative interests were underrepresented due to Liberals dominating federal elections and holding office for most of the post-war years. (Galligan 2018, 78). Despite the constitution guaranteeing each section of Canada be represented in the Senate, appointments are made by the government in office. For many years, the dominating Liberal governments appointed mostly Liberal Senators, consequently making the West feel like their interests were not being adequately met (Ibid). The lack of representation of Western Canada has made the idea of Senate reform a primary objective of the West (Lusztig 1995, 39). However, the idea of reform has been debated and inhibited because it is not clear what the “proper role of an upper house in a federal liberal democracy” might be (Ibid). Therefore, to clearly promote a method of reform that will benefit the most Canadian citizens and residents, it is important to understand the responsibilities and foundations of the Senate.

There are three theoretical foundations that the upper chamber rests on: legislative review, the mutual veto-authority principle, and federal representation (Ibid). In summary, legislative review is the Senate’s ability to supervise legislation passed from the House of Commons without the ability to veto a bill, and mutual veto-authority provides a countervailing power, so one chamber of parliament does not become dominant (Lusztig 1995, 39-40). While the Senate has to provide equal regional representation, it does not have to represent equally. By appointing Senators, the government compromises its ability to equally represent regional interests at the federal level (Lusztig 1995, 42). For example, a Liberal Prime Minister can appoint a liberal Senator to represent the conservative-dominated West.¹ It is significant to note that the Senate does not see this as an issue. The Senate website states that they have “evolved from defending regional interests to giving voice to underrepresented groups” (Senate of Canada, 2021). However, regional interests should not have to be renounced to represent

¹ Under new rules, it’s possible for a Senator to be politically liberal, but not a member of the Liberal party since Trudeau disbanded the Senate Liberal caucus.

minority groups. The political interests of one group should not be forgone for another. The Canadian Senate should be structured in a way that can adequately meet the interests of both regions and underrepresented groups. Since the twentieth century, legislative review has become the primary role of Canada's Senate; thus, the idea of reform is to re-implement the other two foundations in a new Senate (Lusztig 1995, 40).

Balancing executive dominance

Another reason reform is desirable is to provide a counterweight to executive dominance. The position of Prime Minister "tends to enjoy powers to a degree that may be unhealthy in a democratic society" (Bakvis 2018, 61). As Bakvis explains, there is an "ever-increasing concentration of power in the center," including the Prime Minister, Cabinet, and other central agencies (Ibid). There are four main reasons for the increase of prime ministerial powers over the past few decades. The first reason is that the Prime Minister and Cabinet no longer work by the principle, "*primus inter pares*" or "first among equals" (Bakvis 2018, 64). This leads to fewer decisions being made within the Cabinet, and more made between the Prime Minister and senior officials. Second, the Prime Minister in Canada exercises their control more extensively through party discipline compared to other countries under the parliamentary system. The Prime Minister uses coercion to enforce party discipline and ensure that their political party votes together. If Members of Parliament (MP) do not follow the advice of the Prime Minister, they face repercussions like losing funding and support from their political party. The third reason the Prime Minister has excessive power is that they have the responsibility of appointing Senators. Prime Minister Justin Trudeau tried to remedy this issue in 2016 by establishing a non-partisan "Independent Advisory Board for Senate Appointments," (Government of Canada 2021). Trudeau's intention was to "restore public trust in the Senate and move towards a less partisan and more independent Senate" (Ibid). The Advisory Board provides advice to the Prime Minister on who to appoint for Senate. While Trudeau's efforts are an important step in creating a more independent and efficient Senate, the Prime Minister still has the final decision of the appointing process, so a completely non-partisan Senate cannot be guaranteed. Moreover, Trudeau has been the only Prime Minister to appoint Senators with the new process, so it cannot be ensured that future Prime Ministers will follow the advice of the Advisory Board.

Since the Senate is not elected, Senators do not have to worry about a confidence vote to maintain their positions, meaning there is little party discipline and they are able to vote freely; however, Senators who are appointed that have no official political experience often align themselves with the party of the Prime Minister (Bakvis 2018, 70). This leads to an ineffective Senate as they do not adequately critique bills passed by the House of Commons (Ibid). Lastly, without an elected Senate or a check on party discipline in the House of Commons and Senate, there are few meaningful checks and balances on executive dominance, aside from

the media and provincial powers under a federal system (Ibid). Trudeau has also made progressive changes to promote Senators to vote freely. In 2019, Trudeau dismantled the "Senate Liberal caucus" to cut ties between the Liberal party and its Senators (Global News 2019). The new "Progressive Senate Group," - which consists of nine Senators who do not sit as party members - only has "loose affiliations" left with the Liberal party, like their values, and the Senators are now allowed to vote freely without the threat of party discipline (Ibid).

However, enhancing democracy by lessening party discipline or by creating more counterweights to executive power, does not necessarily mean there will be a "diffusion of power" (Bakvis 2018, 70). For example, if party discipline was reduced and MPs were granted more free votes, the Prime Minister's power would be decreased and spread more widely in the House of Commons rather than being concentrated in one person (Ibid). This "diffusion of power," however, does not automatically make Parliament more "accountable or transparent" (Ibid). There is also no guarantee that democracy would be enhanced because academic evidence suggests that MPs who lack parliamentary experience are more susceptible to party discipline (Ibid). They're also unable to "scrutinize and effectively critique government action" (Ibid). Therefore, the implementation of a free vote does not automatically equate to dispersing Prime Ministerial power if MPs are still susceptible to the Prime Minister's influence. To create a reformed Senate that is effective in remaining impartial from the influence of the Prime Minister, legislative experience should be a prerequisite for elected Senators. This is a crucial requirement for the Senate to maintain independence from Prime Ministerial powers.

Critique of the Triple-E Senate

The idea of a Triple-E Senate was introduced in 1981 by the Canada West Foundation but gained popularity when it was re-proposed by the subcommittee of the Alberta legislature in 1985 with the objective of reforming Canada's Senate into one that is "elected, effective, and equal" (Lusztig 1995, 36). As Lusztig explains, the "Triple-E proposal attempts to inject both the mutual veto-authority principle and federal representativeness" into Canada's Senate (Lusztig 1995, 43). However, the reoccurring proposal of a Triple-E Senate may not necessarily be helpful for regional agendas, especially those of the Western provinces (Lusztig 1995, 36). According to Cody, advocates for the original Triple-E Senate proposal often understood equal representation to mean that all of Canada's provinces would enjoy "equal constitutional status" (Cody 1995, 23). However, provincial equality in the Senate is unlikely as "Canada's constitution and many federal-provincial programs treat the provinces differently" (Ibid). Cody argues that complete equality of representation in the Senate is not required for the upper house to effectively perform their responsibility of preventing legislation from the House of Commons which only represents the interests of the larger provinces (Ibid). An elected Senate, however, is necessary for an effective Senate. With less party discipline, Senators would be able to better represent regional interests and veto or amend legislation that does not apply to the interests

of all provinces, especially in the case of majority governments (Lawson 2005, 132). Reforming the Senate so that seats are allocated according to population is also not an ideal solution, as this would give the larger provinces more seats in the Senate (Ibid). It may be argued that the Senate should cater to what most Canadians want. However, to restate the Senate itself, they have “evolved” to “[give] voice to underrepresented groups” (Senate of Canada 2021). While the Senate was specifically referring to minority groups like “Indigenous peoples [and] visible minorities,” the importance of representing groups other than the majority was expressed, nonetheless (Ibid). The current structure of the Senate inadequately represents the interests of smaller regions, like the Western provinces, and a reform is required to provide adequate representation. The proposal for the classic Triple-E Senate, however, will likely unsatisfy the desire for equal regional representation.

It has also been suggested that a Triple-E Senate would only decrease party cohesion and minimize the likelihood of majority governments ultimately making the Senate less effective (Lusztig 1995, 44). An elected Senate, however, would make the upper house more legitimate in Canadian democracy, and create an “effective check” on executive dominance in the House of Commons (Lusztig 1995, 43). Nevertheless, the notion that the “elimination of party caucuses will overcome partisanship and promote regional representation in the Senate” remains a problem (Lusztig 1995, 44). One major purpose of political parties is to cover the cost of campaigns (Ibid). To effectively campaign across provinces in a country that is geographically massive, the Senate candidates would require help from an organized political party (Ibid). This would promote partisanship because the party would expect allegiance in return for helping the Senators’ campaign. Therefore, if Canada’s Senate became elected instead of appointed, partisanship would be unlikely to decrease because the Senators would still be dependent on a political party (Ibid). As well, a reform would most likely increase public spending due to more elections, which is against the agenda of the West who are often advocates for decreased spending by Parliament (Lusztig 2005, 47).

As Lawson explains, it is important to note that the classic proposal for a Triple-E Senate would require a constitutional amendment, and has therefore lost its allure in recent years - causing more “modest” proposals for a Senate reform to be made (Lawson 2005, 132). For example, the Canadian West Foundation suggested that the Prime Minister appoint Senators who were “previously elected in the provinces or regions” (Ibid). This would increase democratic legitimacy in the Senate, as well as regional representation. This proposal will be examined more in-depth below.

Alternate recommendations for Senate reforms

Currently, one of the main issues that need to be addressed when considering Senate reform is maintaining independence from Prime Ministerial power. In 1985, the Canada West

Foundation (CWF) created a detailed report making recommendations for a Canadian Senate reform, based on the experiences of Australia's reform into an elected Senate (Galligan 2018, 80). They determined four main problems that arise with a reform: the "effects of proportional representation, the problem of combining responsible government with an elected Senate, measures for ensuring the independence of the Senate, and methods coordinating elections for both Houses of Parliament" (Galligan 2018, 83). More recently, in March 2015, the University of Alberta held a "Time for Boldness on Senate Reform" conference, which allowed "academics, legal practitioners, Senators, and interested members of the public" to create a conversation and discuss the logistics of a Senate reform, where three main goals for a reform were determined (Burton and Patten 2015, 2). First, the Senate and the House of Commons are not meant to compete, but to support each other; Second, the Senate should maintain its role as a chamber of "sober second thought" by reviewing and refining legislation passed in the House of Commons and; third, the Senate should be non-partisan and free from influence by the government (Ibid).

The CWF report determined that the only way the Senate could be effective in representing different regions of Canada is if it was free from party discipline and "adversarial party politics" (Galligan 2018, 90). The government would only be responsible to the lower house and would not require the confidence of the Senate; therefore, there would be little need for partisanship and discipline, allowing Senators to be independent and to vote freely without restrictions from a party caucus (Ibid). Trudeau has achieved this by dismantling the "Senate Liberal caucus" but it is unknown if his efforts will be maintained under a different government (Global News 2019). An elected Senate would also create independence, as well as legitimacy - but the struggle would be to maintain its neutrality. If Senate leaders are ministers in the government's Cabinet, this would contradict one of the purposes of an elected Senate, which is to represent regional interests without the influence of party discipline (Galligan 2018, 82). The report suggested that Senators be "constitutionally barred from accepting Cabinet appointments unless they resign immediately" followed by pursuing election into the House of Commons (Ibid). The 2015 conference dived deeper into this idea, suggesting that Senators should be free from public opinion as elected politicians' decisions are often concerned with being re-elected (Burton and Patten 2015, 3).

While they aim to lessen executive dominance, both arguments have limitations. There is a difference between partisanship where Senators have values and beliefs that align with a political party and being coerced by party discipline. The CWF report and the University of Alberta conference make political partisanship appear unacceptable because it will prevent Senators from effectively fulfilling their responsibilities. However, partisanship cannot be completely erased from the Senate because those who want to serve as Senators, have intentions that are aligned with platforms of a political party even if they do not work for the political party directly. For example, an individual with no political or legislative experience

could independently campaign to become a Senator, but their platform will be influenced by their past political decisions, such as consistently voting conservative or liberal in previous elections. It is finding a way to keep the Senate independent from party discipline that is the problem. The idea that Senators should remain free from the influence of the public is also not likely to manifest. The flaw of an elected Senate is that it encourages Senators to act in ways that benefits their re-election rather than focusing on specific platforms that best suit regional interests. However, an elected Senate would achieve the goal of decreasing executive dominance by minimizing party discipline as much as possible.

To solve the issue of combining responsible government with an elected Senate, the CWF report proposed that the principle of responsible government would be maintained and protected by giving the House of Commons a veto power where they could override the Senate's decision to reject legislation if they had an "unusual majority" (Galligan 2018, 86). The report does not specify what an "unusual majority" is; however, it does state that the government would have to gain support from at least one of the opposition parties (Ibid). The report rejected the idea of keeping a single-member plurality for elections because it produces an unequal Senate. The form of proportional representation, where the percentage of seats for each party is equal to their percentage of the popular vote, was also rejected because it is based on party interests rather than regional interests (Galligan 2018, 83). Instead, the "single transferable vote" proportional representation system was recommended, where each voter would rank the candidates in order of preference to "enhance representative pluralism" (Ibid). The largest downfall of this election system, according to Galligan, would be the "complexity of processing votes" (Ibid). In addition, the CWF report also recommended that elections for the Senate be held concurrently with those for the House of Commons to prevent an excessive number of elections (Galligan 2018, 92).

Robert A. Mackay also wrote a study on the Canadian Senate which argued that half of the Senate should be elected by MPs in the House of Commons (Kennedy 2017, 181). His suggestion would allow each section of Canada to elect its own Senator. This would promote proportional representation and would set a standard of experience for the Senate by only including candidates with "adequate experience in federal and provincial legislatures and cabinets" including former and retiring Senators (Ibid). The other half of the Senate would be appointed as it is now; however, candidates would come from groups "representing eminence in fields of activity other than party service" (Ibid). This is a solution to make the Senate representative of the different regions of Canada, in addition to setting a standard of knowledge for Senators to promote "well-informed discussion and adequate national investigations" (Kennedy 2017, 182). Mackay's proposal is relevant because it takes into consideration the importance of Senators requiring a level of excellence and experience to sit in the upper house. However, his suggestions are not beneficial for lessening executive dominance. If Senators were elected by MPs -assuming it would not be a free vote - this would

increase party discipline and ultimately the power of the Prime Minister, especially if the vote for Senate occurred during a majority government. As mentioned above, individuals with no parliamentary experience are more easily influenced by Prime Ministerial powers, and appointed Senators would most likely align themselves with the political party of the Prime Minister- thereby reinforcing the current, ineffective structure of the Senate.

At the University of Alberta conference, it was suggested that each province would have six Senators, with extra seats for larger provinces to account for the differences in population (Burton and Patten 2015, 3). While this is a constructive idea that would improve on the current structure of the Senate and allow for more consistent regional representation, it does not promise equal representation. Smaller regions like the East Coast and the Prairies would continue to be minimized in their effectiveness at the Senate level against larger regions. This proposal would be more effective if Senate elections occurred at the provincial level, rather than the federal level because it would promote a more accurate representation of regional interests. By reducing the influence of political parties on Senators, the Senate would be able to effectively meet its responsibility of legislative review, without the threat of party discipline. It was also proposed at the conference that a reformed Senate should be more inclusive of “groups that are underrepresented in the House of Commons” (Burton and Patten 2015, 5). It should be acknowledged that the Canadian Senate generally has a decent track record of consistent francophone representation (Tardif and Terrien, 2009). However, their representation of “women, people of colour, new Canadians, Canadians with disabilities, and Aboriginals” has been less than sufficient (Ibid). This is one of the most pertinent and important additions that could be included in a reformed Canadian Senate. To create these changes, it is important that Canadian citizens are made aware of the complex power structures and limited resources that inhibit minority Senate candidates. To get minorities to run for Senate, there would have to be social incentives to enable them to do so. For example, the federal government could create bursaries or funding to encourage minority candidates to campaign, or provide government-assisted work leaves, so candidates can afford to take time off work during their campaigns. This would allow the campaigning process to be more accessible for all individuals, while adding “important voices to the legislative process that, in the past, have not been adequately heard” (Ibid).

Conclusion

To achieve an ideal Senate reform, the ideas from the CWF report, the University of Alberta conference, and Robert Mackay should all be combined. Canada’s Senate requires a reform because the current state of the Senate encourages executive dominance, and with the Prime Minister’s minimally checked powers, they can control political parties, resulting in a lack of representation of citizens’ interests across Canada. However, there has to be a limit to what a Triple-E Senate entails. Ensuring that Senators have legislative experience makes the Senate as

a whole less susceptible to the influence of Prime Ministerial power; Therefore, half of the Senate should be elected by MPs in the House of Commons if it can be ensured that it would be a free vote. What's more, not allowing Senators to be in Cabinet is a necessity to maintaining the independence of the Senate. The other half of the Senate should be elected by the Canadian citizens to encourage regional representation as well as the representation of minority groups. Giving the House of Commons veto power to reject decisions made by the Senate would accommodate the possible lack of legislative experience in the Senate, while also respecting the notion of responsible government. Lastly, by using a "single transferable vote" method, regional representation would be maximized. With these suggestions, the Senate would be able to effectively exercise their responsibility of legislative review, while providing a countervailing power against executive dominance, and equally representing the many regions of Canada.

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