

Abolition over Small Fixes:

A Look at the Canadian Senate

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The Senate in Canada is often seen as a controversial and outdated institution. It was created to be an upper house where the monied class could create and debate laws. However, as interest in having the Canadian elite dictate Canadian politics declined, the Senate became an increasingly useless institution, essentially rubber stamping laws, and making few amendments. Recently, several attempts have been made to reform the Senate. Firstly, Stephen Harper's Conservative government tried to establish a system of elected senators.¹ This attempt failed as the judgement of the Supreme Court stated that this change would require a constitutional amendment.² Secondly, Justin Trudeau's Liberal government set up an informal system of nominations and independent senators.³ Upon writing, this system is still in place, but it is based on convention, not law, and is subject to change. While attempts at reforms have been made, none of these reforms are powerful enough to rid the Senate of its unpopularity, ineffectiveness and undemocratic nature. This essay will argue that the Senate should be abolished as its current state is unacceptable, a reform that can be achieved through the constitutional amending formula and that, and small amendments, like Trudeau's plan, are not sufficient to make meaningful change.

Is Meaningful Reform Possible

The first aspect of Senate reform to be examined is whether Senate abolition is possible. Senate abolition is possible, though difficult, through a constitutional amendment. There are two main considerations to be taken into account when considering abolishing the Senate; firstly what constitutional change is required, and secondly how this change would be achieved.

¹ Patrick, Boyer, *Our Scandalous Senate*, (Toronto: Dundurn Press, 2014), 334.

² Boyer, *Our Scandalous Senate*, 162.

³ Boyer, *Our Scandalous Senate*, 355.

The first consideration is what constitutional change would be required to abolish the Senate. In Canada, the federal government is a bicameral government.⁴ This means that in order for a bill to be passed into law, it must be approved in two chambers, the elected House of Commons, and the appointed Senate.⁵ The Senate is a constitutionally entrenched institution, with several sections of the Constitution making reference to it.⁶ Thus, in order to abolish the Senate, or make amendments to it, there must be a constitutional amendment. As outlined in Part V of the Constitution Act 1982 there are two ways of altering the Constitution in regards to federal issues, the general procedure, and the unanimous procedure.⁷ The general procedure requires the consent of the Senate, House of Commons and seven provinces making up 50% of the population of Canada.⁸ The unanimous procedure requires the consent of the Senate, House of Commons and all the provinces.⁹ It was unclear as to which procedure must be used to make amendments to or abolish the Senate. To determine this, a reference question was posed to the Supreme Court in *Reference re Senate Reform* by Stephen Harper's administration.¹⁰ The Supreme Court said that in order to abolish the Senate they must use the unanimous amending formula.¹¹ A high bar for abolition of the Senate is set because of the important role that the Senate plays in the Constitution, as the Senate is part of the constitutional architecture and abolishing it would significantly alter the Constitution.¹² The abolition of the Senate would have a significant impact on the country, and thus the Supreme Court states that the unanimous formula, or in other words the highest bar, must be used.

⁴ Serge Joyal, *Protecting Canadian Democracy : The Senate You Never Knew*, (Montréal: McGill-Queen's University Press, 2014), 67.

⁵ Joyal, *Protecting Canadian Democracy : The Senate You Never Knew*, 107.

⁶ *Constitution Act 1982*, being schedule B to the *Canada Act 1982* (UK) <http://laws-lois.justice.gc.ca>.

⁷ *Constitution Act 1982*.

⁸ *Constitution Act 1982*.

⁹ *Constitution Act 1982*.

¹⁰ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

¹¹ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

¹² *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

The second consideration is how this constitutional change would be practically achieved. Since this high constitutional amendment bar must be met to abolish the Senate, the next question raised is how this would be done. Discussions of constitutional amendments creates public hesitancy. From the 1960s to the 1990s there was a period of mega-constitutional politics where the federal government along with provincial governments attempted to make several changes to the Canadian Constitution, and ultimately failed.¹³ The two main attempts were the Charlottetown Accord and the Meech Lake Agreement which both proposed changes to the Canadian Senate, and ultimately did not get put into place.¹⁴ Instead of attempting to have mega-constitutional politics where several aspects of the Constitution are changed at once, an independent issue system should be considered. This would mean that only one issue would be addressed at a time, and only one question would be put to a referendum. Asking questions with regard to one issue in a referendum would offer clarity to voters, and mean they would make one decision at a time.¹⁵ This simplicity would help to avoid mega-constitutional politics, and create a path for Senate abolition.

Overall, a constitutional and practical bar must be met in order to abolish the Senate. The Supreme Court has outlined how important the Senate is to constitutional architecture, and how the unanimous formula must be used. Practically, a referendum could be used to simplify the process. Abolishing the Senate is difficult, but possible through a constitutional amendment and referendum.

¹³ Peter Russell, "The End of Mega Constitutional Politics in Canada?" in *The Charlottetown Accord, the Referendum, and the Future of Canada*, eds. Kenneth McRoberts and Patrick Monahan (Toronto: University of Toronto Press, 1993), 213.

¹⁴ Boyer, *Our Scandalous Senate*, 320.

¹⁵ Ian Peach, "How Do You Solve a Problem Like the Senate?" *Inroads* (Ottawa), no. 38 (2016): 70, <http://proxy.lib.trentu.ca/login?url=https://www.proquest.com/magazines/how-do-you-solve-problem-like-senate/docview/1746615676/se-2?accountid=14391>.

The Current System is Unacceptable

The second aspect of Senate reform that must be examined is why changes should be made as Canada's current system is unacceptable. Two considerations as to why the current Senate is unacceptable are; the Senate is undemocratic and is wastefully expensive.

The first consideration is that of the undemocratic nature of the Senate. The Senate is not elected by the people, but rather is appointed by the Prime Minister. While the Prime Minister is elected, they are only directly elected by their constituents, and members of their party, not Canadians as a whole. The Prime Minister is then put in charge of appointing individuals to the Senate.¹⁶ In recent history, senators have been party loyalists of whatever party the Prime Minister was leader of, and were often journalists, or expert fundraisers.¹⁷ Some changes have been made to make the Senate appear more independent and move away from the party model, but this base is still within the Senate. As the senators are not elected by the people, they lack public legitimacy, support and a mandate. The people do not get a say in who their senators are, despite the great deal of power senators hold. This system of nominations is an undemocratic system, and it is unfitting for a democratic country like Canada.

The second consideration is the wastefully expensive nature of the Senate. The Senate is an incredibly expensive institution to run and operate. In the 2019-2020 budget the Senate was allotted \$114 million in operating costs.¹⁸ This is an increase from 2014-2015 where it cost \$85.4 million.¹⁹ Senator office budgets have additionally increased from 185,400 to \$222,480 a year.²⁰ Senators also have a budget for their own expenses, including office, living, hospitality and

¹⁶ David Gusow, "The Real Problem with Senate Appointments," Canadian Parliamentary Review 41, no. 4 (2018): 16, https://link.gale.com/apps/doc/A576210780/AONE?u=ocul_thomas&sid=bookmark-A ONE xid=86f60d54.

¹⁷ Dan Leger, *Duffy: Stardom to Senate to Scandal*, (Halifax, Nova Scotia: Nimbus Publishing Ltd., 2014), 72.

¹⁸ John Paul Tasker, "The cost of the Senate has soared in the last five years," CBC News, <https://www.cbc.ca/news/politics/tasker-cost-of-the-senate-has-soared-by-a-third-last-five-years-1.5359368>.

¹⁹ Tasker, "The cost of the Senate has soared in the last five years."

²⁰ Tasker, "The cost of the Senate has soared in the last five years."

travel expenses.²¹ From July 01, 2021 to September 30, 2021 senators collectively spent \$654,097.28.²² Renovations currently underway to build a new Senate chamber are projected to cost taxpayers around \$219 million dollars.²³ These numbers demonstrate how expensive the Senate is to run. For doing little, senators are well paid, are being built a new office, and have an abundance of additional funding. If the Senate were to be abolished all ongoing costs relating to it would be removed. This demonstrates how wastefully expensive the Senate is, for comparatively few benefits.

Overall, the current structure of the Senate is unacceptable. The Senate is undemocratic and unaccountable, as well as wastefully expensive. These aspects demonstrate that the Senate needs to be changed, and in order for this change to be meaningful, there needs to be a constitutional amendment.

Why Should the Senate be Abolished

The third aspect of the Senate that will be examined is why the change that should be made to the Senate is abolishing it. When people discuss the Senate they often discuss making many small changes. However, as demonstrated in the previous section, the Canadian Senate is broken, and small changes are not enough to fix its fundamental structure. Instead of small changes, the Senate should be abolished completely. There are three considerations to this that will be discussed; the precedent for this, why current small changes are insufficient, and why the Senate should be abolished rather than altered.

²¹ Senate of Canada, “Expenses for July 01, 2021 to September 30, 2021,” Transparency and Accountability, <https://sencanada.ca/en/ProActive/Summary/Senators>.

²² Senate of Canada, “Expenses for July 01, 2021 to September 30, 2021.”

²³ Government of Canada, “Restoring and modernizing the Senate of Canada Building,” Projects, <https://www.tpsgc-pwgsc.gc.ca/citeparlementaire-parliamentaryprecinct/rehabilitation/conference-eng.html>.

The first consideration that will be examined is the precedent for abolishing an upper chamber of parliament and creating a unicameral government. When the provinces were created they had legislative councils.²⁴ These councils were similar to the Senate, in that they were non-elected bodies that reviewed legislation before it got passed into law. These were seen as both a cost and an inconvenience as they were required to pass laws twice, as well as a left over from the direct colonialism era.²⁵ Over time, every province eradicated their upper houses.²⁶ Ontario, Manitoba, New Brunswick, PEI, Nova Scotia, Newfoundland, Quebec and British Columbia all abolished their upper houses between 1867 and 1968.²⁷ Once these houses were abolished, nobody really noticed their absence.²⁸ Provinces abolishing their upper houses set the precedent in Canada for unicameral legislatures, or in other words, parliaments with only one house. Provincial governments are largely thought to be effective, and there are few complaints about their lack of an upper house. This demonstrates the federal government could also function with only the House of Commons, and no Senate. The precedent of Provinces abolishing their upper chambers demonstrates that the Canadian system is functional with one house, and thus there is no need to create an altered Senate.

The second consideration is how current small changes, like Trudeau's system, do not change the fundamentals of the Senate, and instead of these small changes the Senate should be abolished. Justin Trudeau as the Liberal leader implemented a two step Senate reform plan. The first part of the plan occurred in 2014, when the ties between Liberal senators and the Liberal Party of Canada were dropped.²⁹ These senators were ejected from the Liberal caucus and party,

²⁴ Boyer, *Our Scandalous Senate*, 170.

²⁵ Boyer, *Our Scandalous Senate*, 170.

²⁶ Boyer, *Our Scandalous Senate*, 170.

²⁷ Boyer, *Our Scandalous Senate*, 187.

²⁸ Boyer, *Our Scandalous Senate*, 170.

²⁹ Stephane Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," *Constitutional Forum* 24, no. 2 (2015): 62, https://link.gale.com/apps/doc/A430393970/AONE?u=ocul_thomas&sid=bookmark-AONE&xid=67700d35.

and became independent senators.³⁰ The second aspect of his plan occurred in 2015 after the Liberal party won the federal election.³¹ This aspect involved a system being created to nominate senators based on merit through using an independent advisory committee.³² Once the advisory committee had chosen the nominees, the Prime Minister would be responsible for making them officially senators.³³ Proponents of this plan argue this greatly improved the Senate, as it increased the quality of senators and made them independent from party control.³⁴ This plan is thought to have been primarily chosen and structured in this way in order to avoid having to go through the constitutional amendment process.³⁵ While this plan did change the Senate, it did not change the fundamental structure of it. It is still an appointed body, and the Prime Minister has ultimate control over who enters the Senate. The Senate is unaccountable to voters, and senators are nearly unremovable as they do not stand for election and hold the position until retirement. While Trudeau's system was an attempt to change the Senate without having a constitutional amendment, it is not sufficient. Trudeau's plan demonstrates that in order to have meaningful and lasting change, the Constitution must be amended, and as small changes are not sufficient to make the system effective.

The third consideration that will be examined is the question of why abolishing the Senate is a better system than altering the Senate. Senate amendments are easier to achieve than abolishment, as they require a slightly lower constitutional bar. However, altering the Senate would only serve to make it more confusing, and would not make it more effective. This is for three main reasons; senators would not have to stand for re-election, two elected houses would bring deadlock, and there is a fear of a "Frankensenate". The first concern is senators would not

³⁰ Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 62.

³¹ Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 62.

³² Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 63.

³³ Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 64.

³⁴ Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 64.

³⁵ Dion, "Time for boldness on Senate reform, time for the Trudeau Plan," 61.

have to stand for re-election in many alteration plans. Making the Senate elected would mean they are elected for life, while other more comprehensive plans elect senators for longer terms and prevent them from standing for a second election.³⁶ The question is then asked, what is the good of being elected if there is no requirement to stand for re-election. Not having elections would remove the pressure for senators to follow the mandate of the people, as they would not have the threat of losing the next election to pressure them.³⁷ The second concern is two elected houses would bring deadlock. If the Senate was an elected body it would be beholden to party politics, and may mean the Senate, and the House of Commons have different parties holding the majority at the same time.³⁸ If this was the case it would bring deadlock and prevent the passage of legislation causing the government to be less efficient, slower, and politics would become more complex as there are more actors involved.³⁹ The third concern is there may be a creation of a “Frankensenate”. During the constitutional amendment process there is often an urge to give every province something.⁴⁰ This may result in many concessions being given and the Senate being a combination of ideas, rather than one coherent body, resulting in a “Frankensenate”.⁴¹ All three of these concerns could be avoided by abolishing the Senate outright and relying solely on a unicameral government involving an elected House of Commons.

Overall, the best solution is to abolish the Senate, rather than amend it. There is precedent for an abolishment of upper chambers as demonstrated through the example of the provinces. Abolishing the upper chambers in the provinces had no noticeable negative impacts on the

³⁶ "Time to consider abolition of the Senate," *Canadian Parliamentary Review* 36, no. 4 (2013): 8, https://link.gale.com/apps/doc/A358698700/AONE?u=ocul_thomas&sid=bookmark-AONE&xid=ce6b5cae.

³⁷ "Time to consider abolition of the Senate," 8.

³⁸ Roger Gibbins and Robert Roach, *A New Senate for a More Democratic Canada*, (Calgary, Alberta: Canada West Foundation, 2010), 10.

³⁹ Aengus Bridgman, "A Nonpartisan Legislative Chamber: The Influence of the Canadian Senate," *Party Politics* 27, no. 5 (September 1, 2021): 1011, doi:10.1177/1354068820911345.

⁴⁰ Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004.) 173.

⁴¹ Gibbins and Roach, *A New Senate for a More Democratic Canada*, 10.

provincial governance, and could involve no noticeable negative impacts on the federal legislative process. The current small changes, as demonstrated by the Trudeau system, are not sufficient to create meaningful change. In addition, amending the Senate comes with many costs and complications, all of which could be avoided by abolishing the Senate completely. While abolishing the Senate would be a complicated process, it would result in a simpler government and legislative process.

Considerations with Senate Abolishment

The third aspect of Senate abolishment that will be examined is considerations with Senate abolishment. The Senate is a central institution to the legislative process in the federal government, and its abolishment would not be without impact, or fears from the public. However, there are several ways this impact can be mitigated. There are three main considerations; a Prime Minister with a majority government would have ultimate power, the Senate has useful Senate committees, and the needs of provinces need to be protected.

The first consideration which will be examined is how Prime Ministers with majority governments would essentially have ultimate power. In the current party system in Canada when a party has a majority they are able to use party control to get any bill they want passed. The Senate currently is thought to be a check on this power, as well as the Governor General. This double check is unnecessary. If the Senate was abolished, and a Prime Minister used party control to pass a bill not in the interests of Canadians, the Governor General could use their powers of disallowance and reservation to prevent this law from being passed.⁴² The Governor General already possesses this power, and so this would occur if undesirable legislation passed the House of Commons. The powers of the governor general prevent the Prime Minister from

⁴² *Constitution Act 1982.*

passing legislation not favourable to the Canadian public, and thus the Senate is not needed to be a check on executive power.

The second consideration that will be examined is that the Senate currently has useful Senate committees. These Senate committees serve to “scrutinize bills, to study issues and to examine government spending proposals”.⁴³ However, these tasks do not necessarily need to be done by senators, and could instead be done by the House of Commons bolstered with external expertise.⁴⁴ In addition, after the Senate is abolished there could also be discussion around changing the electoral system in Canada, and this could serve to make the political system less partisan, or make space for smaller parties. These smaller parties could serve to bring more diverse, and specialized viewpoints to the committees, something the Senate would have previously had to seek out. Overall, the Senate committees, while useful, could be replaced by similar committees in the House of Commons serving a similar purpose, and thus the Senate is not needed for its committees.

The third consideration is how to protect the needs of the provinces. Currently, due to the way senators are chosen, there is an enhancement for the maritimes, which have few seats in the House of Commons, but many seats in the Senate. Some are concerned if the Senate was abolished they would lose this voice.⁴⁵ However, the voice regions have in the Senate is not currently very strong, as senators are elected by the Prime Minister, not provinces themselves, so it is not guaranteed they represent the broader interests of the province.⁴⁶ In addition, in the past there have been cases, such as with Mike Duffy, where senators were officially from a province, but had not lived there for several years.⁴⁷ This may mean they are no longer in touch with the

⁴³ Senate of Canada, “Committees,” 44th Parliament, 1st Session (November 22, 2021 - Present), <https://sencanada.ca/en/Committees/>.

⁴⁴ Gibbins and Roach, *A New Senate for a More Democratic Canada*, 9.

⁴⁵ Peach, “How Do You Solve a Problem Like the Senate?” 71.

⁴⁶ Peach, “How Do You Solve a Problem Like the Senate?” 71.

⁴⁷ Peach, “How Do You Solve a Problem Like the Senate?” 71.

interests of the people in the province. As such, the Senate is not an effective body for regional representation. However, lack of regional representation could be remediated through an increase in the number of first ministers meetings, where the Premiers and the Prime Minister meet to discuss provincial issues.⁴⁸ The Premiers are the best placed to discuss regional issues, as they are elected by the people in their province, and have an intricate knowledge of its current situation. The Senate is not an effective form of regional representation, but this could be achieved through more frequent first ministers meetings.

Overall, the Senate does not provide any specific skills or services that could not be replaced by existing institutions. The Governor General could use their powers of disallowance and reservation to protect against legislation pushed through by a majority government that was not in the interest of Canadians. House committees with external experiences could be used to fill in the gaps left by the abolished Senate committees. First minister meetings, and the Premiers could be used to provide regional representations perceived as lacking. These three things would replace the services the Senate currently provides, but in a more effective manner. Thus, Senate abolition would not cause Canadians to be lacking in anything, and thus should be done.

Conclusion

Overall, Canada should abolish the Senate. This would be difficult constitutionally, as it would require the use of the unanimous formula, but through the use of a one-question referendum, it could be achieved. The fundamental structure of the Senate is flawed, as it is undemocratic and ineffective, and small changes, like the ones implemented by Trudeau, do not change the fundamental structure. This demonstrates that a constitutional amendment is needed, as small changes, like the ones implemented by Trudeau, are not sufficient, and an amendment is

⁴⁸ Patrick J. Monahan, *Meech Lake : The Inside Story*. (Toronto: University of Toronto Press, 2019), xiii.

the only way of creating meaningful change. There is a precedent for abolishing the upper house, and this lies in the example of the provinces, which demonstrate having a unicameral system is functional. Additionally, small and incremental amendments are impractical, and likely to cause more problems. While there are considerations, services currently provided by the Senate could be provided by other existing institutions. Abolishing the Senate seems like an extreme action as it is fully removing a Canadian institution. While it would be a large change to the way the Canadian federal system functions in theory, in practice it would change very little. Abolishing the Senate would simplify the legislative process, and make it less costly, without losing out on its effectiveness. Changing the constitution by abolishing the Senate, would have overwhelmingly positive implications, and therefore should be implemented.

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