
The Senate – An Essential House of Parliament

Speaker of the Senate Noël A. Kinsella

The Senate plays a critical role in the form and function of the Canadian Parliament. In this article, the Hon. Noël A. Kinsella highlights the Senate's role as a regional counterweight to representation by population, an independent source of legislative review, an excellent source for investigative policy studies, and a place where appointments can sometimes balance disparities in representation of the Canadian population in the elected chamber. This article is revised from remarks made to the 31st Canadian Presiding Officers' Conference in Ottawa.



Yet again the Senate is at the centre of a constitutional debate. Last November, the Supreme Court of Canada sat three days hearing arguments on the Senate, dealing with various issues about its reform or abolition. These questions were brought forward by the federal government to

clarify the parameters of possible changes or reforms to the Senate. In brief, the government wants to know what it can do without involving the constitutional amending formula of either 7/50 or unanimity. This concentrated attention is not new: in Quebec City in 1864, the Fathers of Confederation devoted six days to the topic of the Senate.

Whatever the outcome of the reference to the Supreme Court, it is safe to say that the Senate is here for the foreseeable future – and this is a good thing. The Senate fulfills a useful function that is necessary to effective lawmaking, proper policy development and sustained national cohesion. A brief review of the structure and composition of the Senate first may be helpful.

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Structure

The normal membership of the Senate now totals 105. Originally there were 72 with 24 for each of the three regions that comprised Canada at the time of Confederation. As the country grew, adjustments were made to accommodate the addition of new provinces. An amendment to the British North America Act by the Parliament at Westminster in 1915 added a fourth region, the western division. The provinces of Manitoba, Saskatchewan, Alberta and British Columbia were each allocated six senators. An increase of six more seats was made when Newfoundland and Labrador joined Confederation in 1949. Three other seats were added over the years, one for each of the territories.

The regional structure of the Senate was devised to accommodate the less populous provinces. Without it, there would have been no Confederation in 1867. Then as now, Canada was challenged by an uneven population distribution. Over 60 per cent of our people now inhabit just two provinces, Ontario and Quebec. This is the demographic imbalance that also had to be effectively addressed by the Fathers of Confederation in order to ensure for healthy regional representation and, in the case of Quebec, its distinct linguistic, legal and religious features. The solution to these challenges was the Senate. By insisting on regional equality, the interests and characteristics of the different parts of the country were acknowledged and given appropriate weight within a bi-cameral parliament.

The long mandate of senators – originally appointed for life but since 1965 to the age of 75 – was

designed to guarantee independence and autonomy. Appointment would ensure that the Senate was neither accountable to nor subject to outside pressures. In this respect, senators are in some ways similar to judges of our federal courts. They too are appointed for a fixed term and it is this feature that ensures the independence that keeps the judges free of any improper interference from the government or Parliament. The independence of senators today is still real, but it is tempered by political allegiances and also by self-restraint. The modern Senate recognizes that it must yield to the will of the Commons when there are sustained differences over legislation, unless there is a credible compelling reason not to. This self-restraint is part of the evolution and transformation that has occurred with the Senate over the years. This transformation coincided with the expansion of the vote, the growth in the role of government and the increased activity of members of the House of Commons as ombudsmen for their constituents. The modern Senate is no longer the Chamber of a wealthy elite. Instead, it has become, in a meaningful sense, the Chamber of constitutional rights and minority interests, and not just in regional representation. The Senate has a higher percentage of women members with 38 per cent currently as opposed to the 24 per cent in the House of Commons. It also tends to have a higher representation of Aboriginal and visible minorities members. The Senate uses its power to meet the obligations of Parliament to consider legislation thoroughly and to develop effective public policy. In carrying out these functions, the Senate continues to act as a complementary body to the House of Commons and, as such, it maintains its importance and relevance to the effective governance of the nation.

In summary, the advantages often cited for creating bicameral legislatures speak of their ability to offer representation of diverse constituencies, to facilitate greater or longer deliberation, to require a second look at legislation, and to provide enhanced oversight of the executive. The purpose is to build in a level of redundancy – but not necessarily repetition. Many argue that second chambers possess a significant capacity to act as a persuasive institutional advisor, by forcing legislation to be re-thought or re-written, by informing a particular debate with a certain level of wisdom and by allowing for greater public participation than is possible with one chamber alone.

The Senate contributes to Parliament's work and to the nation in many ways. These include legislative review, policy development and fostering national cohesion.

Legislative review

A basic purpose of any Parliament or Legislature is to examine legislation. In our federal Parliament, the adoption and enactment of any bill requires the approval of the two Houses. In practice, of course, priority in Parliament is given to Government bills, although other members can initiate bills.

Reflecting our British parliamentary inheritance, most government legislation originates in the House of Commons. Over the course of a session, which can last a few weeks, months or several years, scores of bills may be introduced in the Commons by the government. Among these are certain to be supply bills which are, in practice, never amended by the Senate. Any other legislation, however, including budget implementation bills, are liable to a thorough review by the Senate, which can adopt, amend or reject them. The process of review is structurally similar to that followed in the Commons: there are three readings with committee consideration usually following second reading debate on the principle of the bill. The object of the Senate's study is to improve the bill where it can. While rejection is possible, it is neither a primary option nor a likely outcome. After all, most government bills arrive in the Senate as a legislative measure already adopted by the Commons.

In the political environment that has developed over the last 40 years or so, party discipline in the Commons guides all of its activity, including the study of legislation. When the bill comes to the Senate, the dynamics can be somewhat different even when the government has a majority. Debate, for example, might focus on a specific element of a bill highlighting a particular aspect that might have been inadequately examined or entirely overlooked by the Commons. While it must be admitted that party discipline is also present in the Senate, its exercise is more limited and it does not prevent Senators from raising important issues in debate.

An example of this occurred in 1999 when the Senate looked at a bill updating extradition procedures. The bill had been tagged as a "housekeeping" measure and had gone through the Commons in quick order. Upon arriving in the Senate, the focus of the debate soon concentrated on the authority of the Minister of Justice and Attorney General to allow extraditions to jurisdictions with capital punishment – which had been abolished in Canada. As often happens in the Senate, debate crossed party lines. The government succeeded in resisting pressure to amend the bill, but while it won the battle in the Senate, it lost the war in the courts. Senators actually take pride in the frequency



with which the courts make reference to debates in the Senate and its committees, and by raising such issues the Senate can bring attention to aspects of legislation that are sometimes not properly considered elsewhere.

This example shows that the Senate can choose to focus on aspects of legislation different from the focus in the House of Commons. This is an example of the complementary role the Senate can play in the legislative process.

In a more recent example, immediately before prorogation, the Senate was dealing with the controversial Bill C-377, relating to public disclosure of union expenses. The bill was brought to the Senate from the House of Commons. Debate in the Senate was quite intense, and transcended party lines. Amendments were proposed at third reading, and the acceptance of one of them resulted in significant changes to the bill. Prorogation intervened before the two houses reached agreement. This bill has been revived in its original form and is now once again in the Senate, which has not yet decided how to proceed.

These examples deal with direct challenges and changes to legislation. Another way that the Senate can

act to advise and to indirectly influence legislation is through the tool of pre-study. This is a practice whereby Senate committees can study the subject-matter of bills that are still before the House of Commons. In this way the Senate can begin its detailed consideration of a bill and make recommendations before receiving it. Amendments can be made early in the legislative process to reflect this input, and the Senate can deal with the bill without jeopardizing the calendar of legislation.

Observations are another procedural tool available to the Senate. In addition to proposing amendments, Senate committees can attach comments to a report on a bill. These observations may reflect concerns expressed during the hearings or identify points that are beyond the actual scope of the bill. Through the use of observations committees can highlight issues that need to be addressed and can help to ensure that commitments made during public hearings will not be lost. Observations are for information purposes only, and carry no procedural weight. They can be a powerful tool for committees, reminding the government that, even if the Senate is letting a bill pass without amendment, the situation will be monitored and progress is expected.

Such practices and tools allow the Senate to influence the legislative work of Parliament, to give voice to concerns that were overlooked in the House of Commons, and to follow-up on issues and commitments over a period of several years. All these features enhance and strengthen Parliament in its role as a legislative body.

Estimates

It is also important to mention the contribution the Senate makes to Parliament's work on the estimates. In the House of Commons, review of the estimates is divided among different committees depending on their portfolios. Each committee is tasked with reviewing a part of the estimates and reporting back by a set date. If a committee does not report back in time the estimates are deemed adopted by the committee and the process leading to the supply bill follows largely automatically.

In the Senate, the review of the estimates is not dispersed among different committees. Instead, it is focused in the National Finance Committee. In light of the Commons' control of the public purse, neither the committee nor the Senate actually adopt the estimates. The National Finance Committee does, however, conduct an in-depth review of them, inviting ministers, Treasury Board officials and other stakeholders to testify before tabling its report in the Senate. This report is then debated and voted in the Senate, providing background and context for considering the supply bill. The National Finance Committee also tables a series of reports on specific aspects of the estimates throughout the year, providing sustained and focused parliamentary attention.

This focused approach for dealing with the estimates that the Senate has adopted allows for comprehensive and consistent analysis. Continuity of membership, a standard feature of Senate committees, allows senators on the National Finance Committee to become quite knowledgeable about the budgetary and financial cycle; they learn to understand the format of the blue books and the technical information they include. Observers of Parliament have noted that in many fiscal years, the Senate may be the only body within Parliament to actually conduct public hearings and prepare a

substantive report on annual government spending. Appearing before the Commons Government Operations and Estimates Committee, Professor Paul Thomas, for example, has noted that the Senate does useful work with the estimates,¹ focusing on an aspect of parliamentary business that, although dull and complex, is essential to the promotion of sound and responsible governance.

Policy Studies

As an investigative chamber, the Senate can serve as an "incubator" of ideas. Because of the relative stability of its membership and the less partisan environment in the Senate, senators are able to spend more time undertaking investigative studies. They can concentrate and focus their efforts, think ahead, and consider long-term perspectives and needs in a given area. This continuity and consistency has allowed the Senate to become the corporate memory of Parliament.

Policy work in the Senate is performed by committees composed of individuals who are directly integrated into the system of national governance. Senators are not academics or policy wonks who can think up bright ideas without being able to do follow-up, or who

do not have to worry about implementation. Senators will take the recommendations and work performed by committees and can apply them on an on-going basis. Senators are well placed to ensure that policy recommendations are not forgotten.

The Senate's broad thematic committees

approach issues in a holistic way. The Senate has a tradition of championing public policy issues, often tackling controversial or politically sensitive topics. From the landmark Croll report on poverty in Canada, to the Davey report on mass media, Senate inquiries represent an important addition to the chamber's purely legislative role. These early examples illustrate a pattern that has become ever more characteristic of the Senate's work. Such policy studies provide background knowledge to allow senators to review bills more intelligently, and they create opportunities for the indirect initiation of legislation.

The Senate's important contribution to policy studies has been recognized for more than 50 years. Assessing the Senate over a period going back to the 1920's, F.A.

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Kunz noted that the real value of such work:

lies in the long-term educative effect produced by the accumulated evidence and information of their proceedings. Instead of being a cure-all, they are rather a contribution to the study of the subject and form the basis of further discussions in Parliament, in the departments of government concerned, and in the public at large. Their most obvious use is in areas where the problems are either still too rudimentary, or too controversial, or too elusive and bid for simple and straightforward solutions²

The value of the Senate's contributions to policy development continues to be recognized by observers of Parliament, and it is something in which senators take great pride.

National Cohesion

The third vital function of the Senate, the fostering of national cohesion, is one that has been present from the time of Confederation. The structure of the Senate was an essential part of the agreement leading to Confederation, providing a house in which the less populous regions have a level of representation greater than their portion of the population. In large part, Canada came to be a nation because the Senate was agreed upon as an appointed body to represent the regions.

New Brunswick is a smaller province which provides an illustrative example, having 10 members in each house. In the Commons that is only a tiny portion of the membership. It is a far larger portion of the Senate's membership, giving New Brunswick senators a greater opportunity to articulate the needs and perspectives of their province. The same can be said about other provinces.

Moreover, without the Senate, the proportion of parliamentarians from Quebec would, over time, probably fall ever further below what is seen as the important bar of 25 per cent representation in Parliament. The voice of Quebec in the federal Parliament, so vital to ensure that its linguistic, legal and historic character are reflected and understood, would become increasingly marginal. Such a state of affairs could have serious effects on Canada over the longer term.

The role of the Senate in fostering cohesion across Canada is not, however, limited to providing a voice for less populous geographic areas. The Senate plays a similar role when it comes to minorities. Prime Ministers can use appointments to ensure that the full richness of Canadian society is well represented

in Parliament. Senators recognize that a major part of their role is encouraging, assisting and protecting minorities and communities of interest, whether they are cultural, linguistic, educational, professional, economic or charitable causes of one kind or another. The role is fluid and adaptable, but important.

Conclusion

Any observer of Canadian politics knows that the discussion of how to change the Senate started with Confederation, and has continued in the national discourse ever since. A range of plans have been proposed, and the institution has evolved over the course of its history.

However, when discussion rages about how to change the Senate, too often little attention is given to the roles the institution plays in Parliament, and how they could be affected by reform.

Put most simply, the Senate can act as a bit of a brake in Parliament, making sure that all views are canvassed, and also bringing a longer-term perspective. The Senate reviews legislation, advises and looks into issues in more depth. The Senate can provide guidance and suggestions to the House of Commons and to the Executive based on experience and expertise.

Basic features of the Senate help it perform these varied roles. The guaranteed length of senators' mandates ensures that attention can be sustained over a lengthy period of time, without the interruptions of the election cycles. Appointment can help reduce the level of partisanship within the upper chamber and increase the numbers of under-represented groups in the elected Commons. The fact that for most Senators' membership in this body marks the final step in already successful careers also contributes to the very different nature of the institution.

None of this is to say that the Senate cannot be changed. But as Canadians consider their upper house and what role they wish for it, it is imperative that they understand what they currently have, so that they can discuss how they can build on the strengths of the body.

Notes

- 1 House of Commons Standing Committee on Government Operations and Estimates, *Evidence*, 41st Parliament, 1st Session, May 7, 2012, p.13.
- 2 F.A. Kunz. *The Modern Senate of Canada: A Re-appraisal, 1925-1963*. University of Toronto Press, Toronto, 1965, pp. 265-66.