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The Canadian Upper House and the Need for Reform, Not Abolition

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This paper describes several issues facing Canada today. The Senate is plagued with problems regarding its effectiveness and current rules for engaging with both the public and our government. Arguments for the complete abolition of the Canadian Senate have been proposed time and time again, however, these are unnecessary. It is important to remember that our Upper House has many important and continually relevant functions; the Upper House needs reform in order to reach its maximum potential, and these options for change is the focus of this paper.

"The Canadian Senate came into existence in 1867 as a result of the British North America Act, becoming the second, or upper, house of the Canadian Parliament. The notion of Senate reform has been discussed since its inception and in fact since the 1960s, there have been twenty-eight major reforms proposed, all of which have failed. From the turn of the twenty-first century, the discussion has once again returned to the federal agenda, with reform or even abolition of the Senate presented as viable options."¹ Ever since the fathers

¹ Tunstall, Lee, and Sarah E. Eaton. "Senate Reform: An Overview." *Canadian Points of View: Senate Reform*, 2015.

of Canadian Confederation sat down and made the decisions that they did, almost every single aspect of the operation of the Dominion's parliamentary system has been called into question. Such is the nature of the democratic state; the needs of the citizenry and our understanding of what smooth democratic operation resembles is constantly evolving. Since 1867, any facet of our democratic institutions can be expected at the discussion table concerning parliamentary reform. Some propose that our Westminster parliamentary system is wildly different than models elsewhere in the world, especially in the terms of party discipline and the number of political parties found within the legislature. However, this paper's focus is on one aspect of parliamentary reform, possibly the most hotly debated in the country's history: the Senate. It is difficult to deny that our Senate is simply not working. Many Canadians are talking about Senate abolition, and none are quick to forget the 2012 Senate expenses scandal, which certainly does not help the case of the Upper House. The Report of the Auditor General of Canada to the Senate of Canada sums up this specific event and why it's so problematic in the context of Canadian opinion: "We concluded that not all Senators' expenses and other Senators' transactions were properly controlled or incurred for parliamentary business and with due regard for the use of public funds."² This general sentiment can be found in many reports on the status of the Canadian Senate: "[...] public opinion polls make it very clear that very few Canadians support the Senate status quo[...]"³ It is difficult to argue; a parliamentary body that misuses public funds is a serious problem, and this is not the only problem with our nation's Upper House. But what is to be done? The best course of action regarding the reform of the Canadian Senate is to transition to the 'Triple E' model designed for this legislative body, as it ensures proper regional representation, effective and accountable membership and the ability for the Senate to continue to perform the actions it does which are useful. This argument will be supported by outlining exactly how the proposed 'Triple E' Senate would be successful, and by demonstrating not only that Senate abolition is the wrong course of action, but that it may also be impossible to pursue.

To begin, it is important to understand exactly what the 'Triple E' Senate model looks like. This paper will address how the model is outlined in the 1992 Charlottetown Accord, although this was not the first place this model was proposed. 'Triple E' is understood as equal, elected and effective. "An equal Senate of 62 members, composed of 6 Senators from each province and one Senator from each territory."⁴ The result of equal membership from each province and from each territory is that the Senate can effectively transition into a House that can be much more receptive of regional concerns, which was intended to be a very important function of the Senate. When it was proposed, the concept of the Senate was a major bargaining chip to bring the West and the Maritimes to the table to talk about Confederation. These regions were immensely concerned that in a unicameral

² "Report of the Auditor General of Canada to the Senate of Canada." 2015. Accessed November 10, 2015. http://www.oag-bvg.gc.ca/internet/docs/parl_otp_201506_e_40494.pdf.

³ Hays, Daniel P. "A New Senate for Canada: A Two-Step Process for Moving Forward on Senate Reform." Accessed November 10, 2015. <http://site.ebrary.com/login.ezproxy.library.ualberta.ca/lib/ualberta/reader.action?docID=10241308>.

⁴ "The Charlottetown Agreement: A Response to the Critics." Accessed November 10, 2015. http://www.ceocouncil.ca/wp-content/uploads/archives/OCT_1992_ENG_Charlottetown_Agreement_A_Response_to_the_Critics.pdf.

system the massive relative populations of Ontario and Québec would drown their voices in the system of representation by population of the Lower House. With the 'Triple E' model, all regions of Canada would be able to effectively voice their concerns at the federal level without having to worry about the overwhelming influence of party discipline in the House of Commons. This piece would ensure the return of regional representation to the legislative system, which was the intent of the Senate upon its creation: "Senators to be elected, either by the population at large, or by the members of the legislature. Election of the Senators to take place at the same time as elections to the House of Commons."⁵

The second working function of the 'Triple E' system corrects the next large problem that the population has with the current model of the Senate; namely, the fact that it is devoid of any sort of real accountability for its actions. With elected Upper House representatives, the praise and blame rests firmly on the shoulders of the Premier who appointed them, or the populace that voted for them, depending on the method used. This is further strengthened by the 8 year term limits that would be imposed upon Senators. Under 'Triple E,' Senators are forced to respond to the concerns of their constituencies if they wish to be re-elected, instead of being allowed to continue to serve until the age of 75, with no questions asked. "The idea is that Canadians should have an upper house for our federation, as is the virtually universal practice in major federations around the world. The serious flaw (there are others) lies in the manner of appointing its members."⁶ Bicameral systems with two chambers filled with elected members is common place all around the world; it is not a radical idea or a new step in the advancement of the Westminster model.

The third component of the 'Triple E' Senate model is concerning its effectiveness, and this pertains to its ability to stop legislation that comes out of the House of Commons. This piece will be addressed in greater detail later, but for the sake of effectiveness as it relates to regional representation, this paper will look at the National Energy Program (NEP) in the 1980s. Regardless of individual stance on the Alberta oil industry, it serves as an example of where an effective Senate serving constituents would become useful for addressing regional concerns at the federal level. The goals of the NEP program were: "security of supply and ultimate independence from the world oil market; opportunity for all Canadians to participate in the energy industry; particularly oil and gas, and to share in the benefits of its expansion; and fairness, with a pricing and revenue-sharing regime which recognizes the needs and rights of all Canadians."⁷ These goals were manifested as federal incentives for businesses to explore in the North for alternative sources of energy, a policy that badly hurt the Alberta oil industry. This is what the effective portion of the 'Triple E' Senate model would be capable of doing. It would have the power to wield "a 30 day suspensive veto with respect to "supply bills",⁸ and "a veto over bills that result in

⁵ "The Charlottetown Agreement: A Response to the Critics."

⁶ Gibson, Gordon. "Challenges in Senate Reform: Conflicts of Interest, Unintended Consequences, New Possibilities." *Public Policy Sources*, no. 83 (2004).

⁷ MacEachen, Allan J. "The Budget." 1980. Accessed November 10, 2015.
<http://www.budget.gc.ca/pdfarch/1980-plan-eng.pdf>.

⁸ "The Charlottetown Agreement: A Response to the Critics."

fundamental tax policy changes related to natural resources.”⁹ Under this model, the Upper House would have the power to actually alter the legislative process and ensure that the concerns of all regions are addressed by other than just the partisan membership of the Lower House.

When this topic is discussed, the alternative view to Senate reform is typically Senate abolition. This is certainly an option; there is no reason as to why Canada couldn't stay afloat with a unicameral legislature. This being said, there are some major issues and roadblocks to Senate abolition which quite simply make 'Triple E' Senate reform the drastically better option. To commence with the most concrete problem, Senate abolition is, at its core, most likely impossible. This is outlined in the Constitution Act of 1982 which is interpreted as meaning that the abolition of the Senate would not follow the usual '7/50' amending procedure, outlined in section 38 of the Constitution Act, which requires: “resolutions of the Senate and House of Commons; and [...] resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.”¹⁰ Instead, the abolition of the Senate would require the majority support in all ten provincial legislatures, the House of Commons and the Senate itself. This is the beauty of the 'Triple E' model; it requires no constitutional amendment whatsoever. “In particular, some proponents of a Triple ‘E’ Senate (equal, elected, effective) argue that at least the ‘elected’ E could be achieved without constitutional change. Elections could be held for the purpose of identifying ‘nominees,’ and prime ministers could routinely appoint the election winners, without the formal power of appointment being altered. The effect would be the gradual replacement of the existing Senate with a body composed of ‘elected’ senators.”¹¹ The method by which the Senators are elected isn't really important; the Provinces would be able to decide the exact method which is most appropriate for their province. While the other ‘E’s of the model would eventually require minor reform, the step towards this model beginning with elected as described above would be the first step needed to bring about the Senate change needed. Moving past concrete barriers for the abolition cause, there are very real reasons as to why Canada should keep the Senate. Already covered, the regional representation of voices at the federal level is something that we would lose if we moved to a unicameral system. However, it extends further than just a loss of voice. It is sometimes said that no one in the democratic world has more power than a Canadian Prime Minister with a majority government.¹² This comes as a result of our Lower House's strict party discipline, which is known for its ability to quickly pass legislation. In a unicameral system, this effect would only be compounded and perhaps not for the better. Any Prime Minister in a majority government could effectively and efficiently pass whatever legislation he or she pleases, as party discipline would ensure, as it always has, that no member of your party would vote against your ambitions. This is quite obviously

⁹ "The Charlottetown Agreement: A Response to the Critics."

¹⁰ "A Consolidation of the Constitution Acts 1867 to 1982." 2013. Accessed November 10, 2015. http://laws-lois.justice.gc.ca/PDF/CONST_E.pdf.

¹¹ Stilborn, Jack. "Senate Reform: Issues and Recent Developments." 2008. Accessed November 10, 2015.

¹² Blythe, Dion. Lecture, University of Alberta, Edmonton, October 13, 2015.

not tremendously democratic, but this process does come down to citizens' personal preferences regarding a democratic versus efficient government. Again, this only scratches the surface of the issue posed by Senate abolition. The Senate also currently performs a function described by Sir John A. MacDonald as: "[...] the Upper House [...] which has the sober second-thought in legislation [...]."¹³ MacDonald defines it in the context of the Upper House as such: "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."¹⁴ Sober second thought is concerned about "hasty or ill considered legislation," which is not an uncommon occurrence in the House of Commons. The Senate regularly corrects errors in the legislation originating from the House. Without the Senate, the task of interpreting what the House meant despite the errors in its legislation would fall upon the already overly taxed Supreme Court of Canada. The legislative branch should be the part of our government that is concerned with errors in legislation; this is not the task of the judiciary. These aforementioned reasons are why abolition quite simply isn't a viable response to the Senate problem in Canada.

Canada needs a legislature that is capable of representing the concerns of all of the provinces equally and effectively. These members need to be elected and accountable for their actions to ensure that we have a response to senators that break the rules and a method to prevent representatives from sitting until they are forced to leave. Finally, there is no need to abolish the Senate when it quite clearly performs useful functions, and at that, functions that we would be hard-pressed to replace should we decide that the House of Commons is the only legislative body we need. The Senate model is capable of furthering their current work under the 'Triple E' model by ensuring power is properly diffused between the two houses of our legislative system. This way, there is not enough power concentrated in one body of government. Furthermore, under the proposed new system, our Senate can ensure that a less experienced House of Commons makes fewer errors in bills that are passed. The Canadian Senate may be a slightly out-dated body, but this is not cause to kick it to the curb. With the right push, Canada's Upper House could become the shining model of equal, elected and effective that would fit the needs of a unique federalist nation such as Canada.

¹³ "Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada." Accessed November 10, 2015.

<https://ia802205.us.archive.org/26/items/parliamentarydeb00canarich/parliamentarydeb00canarich.pdf>.

¹⁴ "Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada."

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