

**‘Abolition Difficult, Reform Impossible, Status Quo Unacceptable’:
Can Canada Fix Its Senate?***

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Introduction

It is a great pleasure and privilege to be here today, in the Australian Senate, to tell you about the travails of the Canadian Senate. The title of my lecture—‘abolition difficult, reform impossible, status quo unacceptable’—is from a tweet posted by Brad Wall, the Premier of the Canadian province of Saskatchewan. Mr Wall is so exasperated with the Senate his government passed a resolution supporting its abolition.* I agree with Mr Wall about one thing; the status quo is indeed unacceptable. But I disagree with his assertion that reform is so difficult to achieve we are better off scrapping the Senate. I think modest but meaningful reforms are achievable in the short run, and I am not giving up hope of significant reforms in the long term. I will begin by outlining what’s wrong with Canada’s Senate. Then I will discuss recent attempts to fix it and explain why they failed. I will argue that abolition is next to impossible and extremely reckless. In contrast, I contend, reform is difficult but certainly not unattainable.

What’s wrong with Canada’s Senate?

The vast majority of Canadians think the Senate in its present form is unacceptable. Public opinion research illustrates a profound level of distaste for the Red Chamber, as it’s called. A survey conducted in January of this year found that only a third of Canadians think the Senate performs a necessary and useful political function.† According to another poll, 50 per cent of Canadians want to get rid of the Senate altogether, 43 per cent want it reformed, and only seven per cent feel the Senate should be left as it is.‡

There are four reasons why so many citizens, and politicians, think the Senate needs an extreme makeover. The first is a recent spending scandal that implicated, and embarrassed, the government of the day and discredited the parliamentary system. Second, senators are appointed, not elected, thus the Senate is seen as an anachronism in a modern democracy. Third, fairness in representation is an ongoing concern, especially in my region, Western

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 8 August 2014.

* Brad Wall, ‘Time to consider abolition of the Senate’, *Canadian Parliamentary Review*, vol. 16, no. 4, 2013.

† Ipsos, News & polls, 2 January 2014, <http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6376>.

‡ Angus Reid Global, ‘Should the Canadian Senate be abolished? 50% surveyed say yes’, 8 November 2013, <http://www.angusreidglobal.com/polls/48846/should-the-senate-be-abolished-50-of-canadians-surveyed-say-yes/>.

Canada. Fourth, many argue that the Senate in its present form is not an effective parliamentary institution. As one commentator asserted, rather brutally, Canada's Senate is a 'colonial relic' with 'negligible significance'.[§] Why such strong words about Canada's upper house?

The scandal

Let's begin with the scandal, which is the major factor propelling increased support for doing away with the Senate. The controversy centred on the bad behaviour of four senators, three of whom were appointed by the current Prime Minister, Stephen Harper, and were members of his party, the Conservative Party of Canada. All four of these senators made improper claims for housing and travel expenses.

Senators are allowed to claim a housing allowance of \$21,000 per year if their primary residence is more than 100 kilometres from Ottawa, Canada's capital city. Three of the senators at the heart of the scandal claimed this allowance even though they lived in Ottawa and spent little time in their primary residence. One of them, Mike Duffy, actually stayed in hotels when he was in his home province! Also, a couple of these senators claimed travel expenses for trips that were not actually about Senate business. For example, Mr Duffy used Senate dollars to pay for travel devoted exclusively to campaigning for the Conservative Party during the 2011 election.

We are talking about roughly half a million dollars—a small amount when you consider that over \$100 million per year is required to fund the Senate's business, including senators' salaries and allowances. So why were people so incensed despite the fact that this is not a lot of money, and the senators were required to pay it back? Well, a report by a pollster hired by the government to look into Canadian's reactions to the scandal said people are 'frustrated to think that public servants used Canadians' hard-earned tax dollars to live lush lifestyles while taxpayers personally struggled to make a decent living'.^{**} This study also found that Canadians believe representatives from both houses of parliament are cheating on their taxpayer-funded expense claims. In short, Canadians think the Senate scandal is evidence of a pervasive culture of corruption and entitlement, and of unlawful behaviour by public officials. Fraudulent expense claims are a criminal offense; indeed, the four senators are under investigation by the RCMP, Canada's national police service. Fraud and breach of trust charges have been laid against three of the senators, with more charges pending.

The spectacle of parliamentarians breaking the law is problematic for the governing party, which appointed three of these four senators. Perhaps even more damningly, the Prime

[§] Abbas Rana, 'Senate a "colonial relic," should be abolished: former Tory MP Boyer', *Hill Times*, 23 June 2014, <http://www.hilltimes.com>.

^{**} Dean Beeby, 'Government polls Canadians about Senate scandal; most fed up with "rich politicians"', *Globe and Mail*, 14 February 2014.

Minister's Office (PMO) was directly implicated in events that occurred after the scandal broke. The government tried to quell the controversy by announcing that Mr Duffy agreed to voluntarily repay his improperly claimed expenses. But a television station revealed that PM's chief of staff, Nigel Wright, personally footed the bill for Mr Duffy, writing a personal cheque in the amount of \$90,000 to cover Mr Duffy's reimbursement. Although Mr Wright resigned when this story broke, and Prime Minister Harper denied knowing anything about his chief of staff's involvement, it all seemed rather sordid. The PMO gave no explanation for Mr Wright's generosity. Mr Duffy claims it was an attempt to shut him up, and he also maintains that the PMO tried to whitewash a Senate report into the expense claims controversy. Regardless of the veracity of Mr Duffy's assertion, it seemed the highest levels of government were trying to cover up, or at least mitigate, the scandal. Here is an example of a typical news headline: 'On cheque to Mike Duffy, the buck stops at the Prime Minister'.^{††}

Last November, desperately trying to put the issue to rest, the Conservative government orchestrated a vote in the Senate to suspend the senators without pay for the remainder of the parliamentary session. The resolution passed, and three senators were suspended,^{‡‡} but the media kept the scandal in the public eye, as more and more damning revelations emerged. In sum, it all looked very, very bad for the governing party, and not just because of the misuse of public funds by Conservative senators and the involvement of the Prime Minister's Office. The Conservatives first came to power by crusading against government corruption, and the party campaigned on a promise to reform the Senate. In fact, because he was so keen on reform, the prime minister was initially reluctant, and slow, to make appointments to fill Senate vacancies. As Mr Harper stated when first elected in 2006: 'If a legislative body is going to be serious, it has to be elected'.^{§§}

Not elected, equal or effective

The prime minister's assertion that the Senate can't be taken seriously in its present form brings me to the three other problems with the institution: the Senate is not elected, it is not equal in its representation of the provinces, and, according to many critics, it is not effective in its exercise of legislative duties. Canada's Senate is one of only two appointed upper houses in the western world, so it is a relic of a much less democratic age. Even a sitting senator is on record as saying the upper house 'has no democratic validation'.^{***} One of the reasons the Senate is in such disrepute is that the appointments are all about patronage.

^{††} Lori Turnbull, 'On cheque to Mike Duffy, the buck stops at the Prime Minister', *Globe and Mail*, 23 October 2013.

^{‡‡} The fourth senator at the heart of the scandal, a Liberal appointee, had retired from the Senate a few months prior to the suspension vote.

^{§§} For example, see: <http://www.youtube.com/watch?v=yYgIJTSt7No&feature=related>.

^{***} Ian Austen, 'Dispute over Canadian senators' expenses balloons into larger political scandal', *New York Times*, 24 October 2013.

Senate seats are rewards for long party service and there is no tradition of prime ministers making appointments to the Senate from outside their own parties.

Another issue is representation. The distribution of Senate seats is bizarre, and to do it justice requires a lengthier explanation than I have time for today. The short version is that Senate seats are assigned based on a principle of regional representation derived at Confederation. Based on this formula, seats were allocated to the original provinces, which were seen to constitute three distinct regions. Senate seats were added or redistributed as provinces and territories were created or joined the federation.^{†††} As a result, representation is based *neither* on population *nor* on the principle of equality of the provinces. For example, 10 senators represent the three quarters of a million people living in the province of New Brunswick. My home province of Alberta has over 4 million residents, but only six senators. Another way of making this point is to say that New Brunswick has 75,000 people per senator, while Alberta has 660,000 people per senator. The distribution of Senate seats is a significant issue in Western Canada, especially the provinces of British Columbia and Alberta which have rapidly growing populations.

Finally, effectiveness is a concern, especially for those, like Prime Minister Harper, who believe that an appointed body cannot perform a valuable role. Because the Senate is not elected, it lacks democratic legitimacy and very rarely exercises its power to defeat bills passed by the House of Commons. Constitutionally, the Senate has almost identical powers to the lower house. The only difference is that the Senate cannot introduce money bills. So, while in principle the Senate has a veto over all legislation, in practice the veto has rarely been used. Although this fact is often cited as evidence of the Senate's uselessness as a legislative body, most critics would be outraged if the Senate actually used its powers in this manner. An effective bicameral parliamentary system should regularly see issues resolved before they result in a legislative impasse.

So what *does* the Canadian Senate actually do? Its key function is one of legislative oversight; so-called sober second thought. This is a task which, by many accounts, Canada's Senate performs very well because of the impressive legislative skills of senators who are experienced legislators, having held office in the House of Commons or a provincial assembly.^{†††} Others have served as lawyers, judges, chiefs of police, and any number of public roles, and they bring a wealth of experience to bear. Moreover, they have the time to inspect legislation, line by line, and correct errors. As a former leader of the Liberal Party of Canada observed, 'This Senate, this imperfect institution we've got, does a very important

^{†††} There are 105 senators in the Canadian Senate: 24 from each of the four regions (Ontario, Quebec, Western Canada and Atlantic Canada), six from Newfoundland and Labrador, and one from each of the three Territories.

^{†††} David Docherty, 'The Canadian Senate: chamber of sober reflection or loony cousin best not talked about', *Journal of Legislative Studies*, vol. 8, no. 3, 2002, p. 28.

job of catching our mistakes—this is said to you as an MP ... sometimes stuff slips through, and the Senate catches it'.^{§§§}

Also, Senate committees make valuable contributions to policy development. They conduct investigations, studying issues the House doesn't have time to delve into, listen to testimony from witnesses whose voices are not often heard, and produce reports which sometimes prompt the government to change the laws. For example, the Carstairs Report, which investigated the issue of government support for end-of-life care, recommended the extension of income security and job protection to family members who take time out of the workforce to care for dying relatives. Despite being authored by a Liberal senator this very sensible recommendation was implemented by a Conservative government.

While some senators arguably do not earn their pay packets, others are incredibly dedicated and hardworking, and steer important legislative initiatives. But this work is typically ignored by the media, thus is largely unseen and unsung. Indeed, a public opinion survey found that very few Canadians can explain what senators do on a daily basis, nor can they identify the role of the Senate in the Canadian parliamentary system.^{****} This is not surprising, because what Canadians *do* hear about is senators who don't show up for work, for example the so-called 'siesta senator' who actually lived in Mexico and only appeared in the Senate once or twice a year, just often enough to keep his job according to the very lax rules in force at the time. And, of course, Canadians have heard a lot about the four senators at the heart of the recent scandal, thus it is not surprising people think senators do very little to earn their salaries of \$135,000 per year, not including per diems and other expenses.

Why not reform the Senate?

Demands for Senate reform are practically as old as Canada. In fact, calls for reform began a few years after Canada was created in 1867. The most recent proposals centre around variants of a 'Triple E' model: elected, equal and effective. This model champions an upper house that is elected by the people, has an equal number of senators from each province, and features mechanisms to address legislative gridlock (because of course an elected Senate is a democratically empowered Senate). One of the biggest proponents of the Triple E Senate model was the Reform Party of Canada, which eventually morphed into the Conservative Party of Canada. Thus our current governing party strongly endorses the Triple E approach. In fact, the Conservatives campaigned on Senate reform, emphasising the need to democratise the Senate. Immediately upon being elected, the Harper Government tabled legislation designed to do just that. But because the Conservatives held a minority of the seats in both the House of Commons and the Senate, the legislation had insufficient support.

^{§§§} http://www.youtube.com/watch?v=_bAgLQsQWQU&feature=related.

^{****} Beeby, op. cit.

Fast-forward five years, to the 2011 election, when the Conservative Party won a majority. The Harper Government quickly reintroduced the Senate reform bills as one piece of legislation, called the Senate Reform Act, which had two provisions.^{††††} The first was to set term limits for senators. Instead of holding the position until age 75, as is currently the case, senators would sit for a single nine-year term. Second, the legislation empowered provinces to implement a democratic mechanism for the selection of Senate nominees. However the prime minister would have retained the power, and duty, to make the appointments. As a result, instead of creating a Triple E Senate the Senate Reform Act provided, at best, half an E, as the so-called ‘democratic consultation processes’ were entirely voluntary. Some provinces, like mine, which already has a mechanism for electing senators, would have opted in but others would have declined. Had the Act been passed and implemented we would now have a quasi-elected Senate, one with no equal representation for the provinces, and no system for addressing legislative deadlock.

The reason why a government so keen on a Triple E Senate took such a limited approach to reforming the institution is that it was trying to avoid negotiating a constitutional amendment. The Constitution Act clearly requires any changes affecting the fundamental nature of the Senate—such as electing senators, redistributing Senate seats and reducing the powers of the institution—to be implemented in collaboration with provincial governments. The Harper Government argued that its Senate Reform Act represented mere tinkering with the existing design, thus did not require consultation with the provinces. This of course was patently untrue; electing senators, even if the prime minister formally appoints them, is contrary to the Senate’s original design. So why didn’t the federal government try to get the provinces on side and negotiate a constitutional amendment to provide for an elected Senate, and take care of the other two E’s—equal and effective—at the same time? That a government so intent on democratising the Senate would take a half measure, one that was clearly unconstitutional, may seem deeply puzzling to non-Canadians.

The best way to explain this seemingly bizarre approach is to observe that members of the political class now characterise the Constitution as a no-fly zone. Since 1995, Canadian governments have been fearful of re-opening deep and still painful wounds rendered by three rounds of constitutional deliberations held in the 1980s and early 1990s. The first round succeeded in patriating^{††††} the Constitution, adding a Charter of Rights and Freedoms, and entrenching a series of constitutional amending formulas. But it also sparked an intense national unity crisis because the province of Quebec was excluded from the final deal-making process, and its interests were not reflected in the agreement. Two subsequent attempts to address Quebec’s constitutional demands and other unresolved issues, including Senate

^{††††} Government of Canada, ‘Backgrounder: Senate Reform Act’, <http://www.democraticreform.gc.ca/eng/content/backgrounder-senate-reform-act>.

^{††††} ‘Patriation’ is a peculiarly Canadian colloquialism referring to the process that passed *The Constitution Act, 1867* into law as a Canadian statute, thus ‘bringing the constitution home’ to Canada. Before 1982, it was a British statute called *The British North America Act*, and it could only be amended by Act of the British Parliament.

reform, failed, decisively and dramatically, prompting a referendum on Quebec sovereignty in 1995. When the 'yes' vote came perilously close to succeeding, Canadians saw their country on the brink of being ripped apart. These lengthy, turbulent constitutional deliberations have been likened to a national psychodrama. As a result, for the past 20 years, governments of various political stripes have made it clear that they will not perform what they see as the Canadian equivalent of opening Pandora's box.

In summary, because Mr Harper did not want to engage in a lengthy and possibly futile process of constitutional deliberations on the structure of the Senate, the Senate Reform Act was represented as plausibly within the boundaries of the constitutional law, and within the jurisdiction of the federal government. To no one's surprise, it was immediately challenged in the courts and vehemently opposed by several provincial premiers. Western Canadian provinces were concerned that they would be severely under-represented in a democratically empowered, and thus legislatively powerful, Senate, and the province of Quebec objected to any attempt at institutional redesign without consultation. Recognising that the courts would eventually settle the matter, the federal government asked the Supreme Court of Canada to rule on the constitutionality of its legislation. It also asked the Supreme Court to answer a number of hypothetical questions about Senate reform. For instance, would abolishing the Senate require the unanimous agreement of the provinces and the federal government?

On 25 April, the Supreme Court rendered its decision.^{§§§§} The ruling was unanimous—and said what everyone already knew—the federal government's Supreme Court Act did indeed violate the constitutional law. According to the court's decision, the federal government cannot try to transform the Senate into an elected body without the consent of at least seven provinces representing at least fifty per cent of the population. Also, the court ruled that it is not within the jurisdiction of the federal government to unilaterally impose term limits on senators. Finally, in the opinion of the court, abolition of the Senate does indeed require *unanimous* agreement of the federal government and all 10 provinces, rendering abolition next to impossible.

Abolition irresponsible, meaningful reform possible

Yet calls for abolition are growing stronger. The website of an organisation called Democracy Watch urges Canadians to 'send a strong message to key politicians that you want them to stop playing games and immediately take action to shut down the Senate'.^{*****} To give you a sense of the strength of public antipathy toward the Senate, here's why Democracy Watch wants the Senate obliterated:

The Senate is unelected, unaccountable, unrepresentative, secretive, unethical and undemocratic—and a waste of your money. Many senators have their jobs only

^{§§§§} Reference re: Senate Reform, 2014 SCC32.

^{*****} Democracy Watch, 'Shut down the Senate campaign', <http://democracywatch.ca/campaigns/shutdownsenate/>.

because they are a friend of, or did favours for, a Prime Minister, and they have their job (with you paying their salary) until age 75 even if they do little or nothing. ††††

Abolition is now being bandied about as a sensible option. The current official opposition party, the New Democratic Party, has long been a champion of scrapping the Senate, and there is growing support for this approach from some provincial governments. As I mentioned earlier, Saskatchewan passed a resolution calling for the Senate to be abolished, and some pundits are suggesting we press the delete button on the current Senate and start over, building an entirely new upper house. In his hot-off-the-press book, provocatively titled *Our Scandalous Senate*††††, former Member of Parliament Patrick Boyer advocates holding a national referendum on abolition. If a majority of Canadians support demolishing the upper house, he says, then the federal and provincial governments would be obliged to honour the public's wishes. But, quite frankly, it is not going to happen because of the constitutional requirement of unanimity. Some provinces will never agree to abolish the Senate.

In my view, getting rid of the Senate is politically irresponsible. Canada needs an upper house, not least because of the extreme concentration of power in the executive branch of the national government. The type of careful legislative oversight that the Senate provides is crucial given the fusion of powers, and the Senate does play a significant role by scrutinising and improving the quality of legislation, even if it rarely exercises its legislative veto. In any case, abolition should not be championed as a knee-jerk, ill-informed reaction to the unethical behaviour of a few senators.

If not abolition, what about reform? There was a bit of hysteria about prospects for reform after the Supreme Court rendered its decision. 'Did the Supreme Court just kill Senate reform?' asked a columnist for a national newsmagazine§§§§§ and his answer was 'yes'. 'That terrible screeching noise you heard this morning was the wheels of Senate reform in Canada grinding to a halt', he declared. 'Supreme Court ensures our widely reviled patronage house (the Senate) will stay forever', announced the headline for a newspaper article, whose author believes the practical effect of the court's decision 'is to make Senate reform impossible'. ***** The federal government agrees. Immediately following the court's opinion, the prime minister announced that the government of Canada would not continue its work on Senate reform. This stance may be politically expedient for the Conservative Party, as it can throw up its hands in defeat, blaming the Supreme Court for the lack of government action on

††††† *ibid.*

††††† Patrick Boyer, *Our Scandalous Senate*, Dundurn Press, Toronto, 2014.

§§§§§ Emmett Macfarlane, 'Did the Supreme Court just kill Senate reform?', *Macleans Magazine*, 25 April 2014.

***** Andrew Coyne, 'Supreme Court ensures our widely reviled patronage house (the Senate) will stay forever', *National Post*, 25 April 2014.

parliamentary reform. Also, the decision fuels Conservative Party supporters' deeply held antipathy towards the Supreme Court.

One could not fault Canadians for thinking the sky had suddenly fallen on Senate reform. But giving up on reform ignores a couple of obvious modifications that could be enacted quickly, and quite easily. The first is removing the property requirement for Senate appointees, and the second is changing the mechanism for selecting senators. In my view, these two initiatives could dramatically alter the make-up of the Senate.

In the Senate reference case, the Supreme Court was asked whether or not the federal government could unilaterally remove the property requirement set out in the *Constitution Act, 1867*. That the court said yes was read as throwing the Harper Government a bone, but I think it is much more significant than that. The property requirement was designed to foster an upper house that represented the propertied elite. The Constitution Act requires every senator to own land worth least \$4,000, plus real and personal property worth at least \$4,000, above debts and liabilities (which rules me out, frankly). As David Docherty writes, 'it is clear that the intention of the framers of the Senate was to use the property qualification as part of the method of making the upper chamber a more elitist and conservative body than the lower house'.⁺⁺⁺⁺⁺ The Senate continues to reflect this outdated perspective as senators overwhelmingly represent the interests of the corporate class. Indeed, some own and run businesses. For instance, we have a senator who owns two major sports teams, the Toronto Argonauts and the BC Lions.⁺⁺⁺⁺⁺ Others serve as directors or board members of major corporations. In fact, one of the senators at the heart of the scandal claimed travel costs for performing exactly these sorts of corporate duties, so taxpayers were funding her travel to sit on the board of a publicly traded corporation.

Arguably the interests of the middle or working classes and the economically marginalised could be much more effectively voiced in the Senate if the property requirement was lifted. It is a simple matter of passing a piece of legislation. The province of Quebec would have to agree to agree to this change for its Senate appointees, who are required by the Constitution Act to hold property in Quebec, but there is no evidence that the Quebec Government would oppose such a move, and the province might in fact welcome the chance to update an arcane provision of the Constitution.^{§§§§§§} After all, no one would lose, and arguably Canadians would gain a great deal if a much wider range of people were qualified for appointment to the Senate. This initiative might well boost representation from groups that tend to have fewer economic resources, such as women, racialised minorities and indigenous Canadians.

⁺⁺⁺⁺⁺ Docherty, op. cit., p. 30.

⁺⁺⁺⁺⁺ Joanna Smith, 'Many Canadian Senators make money outside the Senate', *National Newswatch*, 4 July 2013.

^{§§§§§§} See Hon. Dan Hays, 'Updating some antiquated constitutional provisions relating to the Senate', *Canadian Parliamentary Review*, Spring 2009, pp. 21–5.

The second interim reform is even easier to accomplish because the decision can be simply and straightforwardly taken at the prime minister's discretion. Canada's first minister can immediately change the appointment process. Even some Conservatives think this is a good idea. For instance, the Conservative Party's former campaign manager, Tom Flanagan, urged the government to develop a Plan B for Senate reform in the likely eventuality that the Supreme Court decision did not go the government's way.***** Professor Flanagan proposes that provincial governments set up advisory committees to recommend names for the consideration of the prime minister. Peter Russell, Canada's pre-eminent constitutional and parliamentary scholar, has an even bolder suggestion: 'What if the prime minister was brave and principled enough to publicly commit himself to ending patronage to the Senate and agree to be advised on Senate appointments by a non-partisan council of Canadians representing all fields of endeavor?'++++++

In January, the leader of the Liberal Party, Justin Trudeau, announced that this is exactly the action he would take if his party formed the government. Trudeau recommends a non-partisan appointment process that would fill the Senate with independents. As he stated: 'The Senate must be non-partisan, composed of thoughtful individuals—independent from any particular political brand'.+***** To show the strength of his intentions, Mr Trudeau announced that, from that moment forward, Liberal senators were ejected from the Liberal Party's parliamentary caucus, exempted from the strictures of party discipline, and free to vote as they choose. The reaction from pundits was mixed. One columnist called 'Trudeau's Senate idea fresh, brave—and worth considering'.+***** Another judged the proposal 'a breathtaking confusion of stupidities' because, of course, the Liberal senators continue to maintain their partisan allegiances.***** Will Mr Trudeau actually implement this policy if elected? We will see. If he is electorally successful in 2015, he will confront a Senate full of Conservative appointees and the temptation to restack the deck with Liberals may prove irresistible.

Trudeau's announcement was clearly designed to provoke the government and keep the Senate story alive in the media, and was successful on both fronts. In response to the Liberal Party's position, the prime minister said changing the appointments process is merely cosmetic and will do nothing to make the Senate more democratic and accountable. To quote Mr Harper directly: 'What the Liberal party doesn't understand is that Canadians are *not* looking for a better unelected Senate. Canadians believe that for the Senate to be meaningful

***** Tom Flanagan, 'House of Lords offers a Plan B for Senate reform', *Globe and Mail*, 27 May 2013.

+***** Peter Russell, 'The Senate again? Let's figure it out', *Ontario News Watch*, 12 February 2013, <http://ontarionewswatch.com/onw-news.html?id=532>.

+***** Gloria Galloway and Josh Wingrove, 'Trudeau cuts Liberal senators loose in push for a non-partisan Red Chamber', *Globe and Mail*, 29 January 2014.

+***** Jeffrey Simpson, 'Trudeau's Senate idea fresh, brave—and worth considering', *Globe and Mail*, 30 January 2014.

***** John Pepall, 'Trudeau's Senate plan: "a breathtaking confusion of stupidities"', *Globe and Mail*, 30 January 2014.

in the 21st Century, it must be elected'.^{††††††††} But without any immediate prospects for an elected Senate, maybe Canadians would in fact prefer a better, unelected Senate. And if the prime minister is so determined that the Senate be elected, why didn't his government initiate discussions with the provinces about constitutional reform? As the Supreme Court's ruling demonstrates, a constitutional amendment is necessary to achieve an elected Senate, and this requires federal-provincial negotiations. Here is the prime minister's explanation for refusing to even try:

We know that there is no consensus among the provinces on reform, no consensus on abolition, and no desire of anyone to reopen the Constitution and have a bunch of constitutional negotiations.^{††††††††}

He is right about the fact that there is no agreement on how to fix the Senate; there never has been. But does this mean we should simply give up on trying to reform the upper house? I don't think so.

We desperately need a national conversation about the role of the Senate. As political scientist Emmett Macfarlane argues, 'It is one thing to make the case that the current situation is unpalatable, it is another to answer the question, "what should the Senate be for?"'^{§§§§§§§§} Of course Canadians will disagree about the answer to this question, and about whether or not we even need an upper house. But saying we cannot start the conversation because provincial governments will not be able to reach a consensus suggests Canadians should not have a say in the design of their national institutions. Maybe politicians find consolation in this self-imposed constitutional straightjacket, as it allows them to avoid risk and uncomfortable levels of scrutiny.

In my view, Mr Harper's assertion that there is no desire to reopen the constitutional dialogue is short-sighted. Maybe now, in the wake of the Senate scandal, is the perfect time for a single-issue round of constitutional reform, focused exclusively on the Senate. Everyone is talking about it anyway, but the fact that Canadians know so little about the functions of the Senate indicates that a conversation would play a highly useful educative role. Even if nothing came of the deliberations people would learn about the Senate's past, and be encouraged to thoughtfully consider its possible futures. That said, I would not bet a great deal of money on the likelihood of a federal government starting constitutional talks in the near future, because Mr Harper's belief that 'there's no desire of anyone to reopen the constitution' is a mantra among federal politicians. For instance, former Liberal leader Stephane Dion similarly declared, in the wake of the Supreme Court decision, 'There is no

^{††††††††} Steven Chase, 'Canadians want an elected Senate, Harper says after Trudeau boots senators', *Globe and Mail*, 29 January 2014.

^{††††††††} Quoted in Rana, op. cit.

^{§§§§§§§§} Emmett Macfarlane, 'What do we really want to do with the Senate?', *Maclean's Magazine*, 22 July 2013.

appetite among Canadians to reopen the Constitution'.***** Political leaders utter this assertion with such synchronistic finality it is now accepted as capital-T truth, but public opinion polls reveal increasing support for constitutional reform, in the province of Quebec and indeed across the country.†††††††† For instance, a survey conducted a couple of years ago, well before the Senate scandal erupted, found 61 per cent of Canadians are prepared to reopen the Constitution in an effort to reform or abolish the Senate.†††††††† As well, talking about the Constitution is not so risky anymore. The Quebec sovereignty movement is currently in abeyance, so there is less of a risk of sparking a national unity crisis by engaging in constitutional deliberations on Senate reform.

Another reason to hope for transformation via constitutional amendment is because younger people are much more likely than older citizens to prefer reforming the Senate to abolishing it. As a public opinion survey conducted last November found, 18 to 34-year-old Canadians are significantly more likely than those aged 35 and above to support reform, or to say the Senate should be left the way it is. While 66 per cent of Canadians aged 55 and over feel the best outcome for the Senate is to scrap it, only 36 per cent of those under 35 advocate abolition.§§§§§§§§ So the students I teach, the future generations of policy-makers, are more positive about the prospects for fixing the Senate, and more likely to see constitutional reform as an enticing possibility. Because the post-traumatic stress disorder produced by previous rounds of constitutional negotiations affects mainly affects people my age and older, it is not surprising a younger generation is more willing to give constitutional reform another try.

Conclusion

To sum up, the status quo is unacceptable. At the very least, the prime minister has a duty to address the problems that generated the expenses scandal, and to clean up the appointments process. Moreover, it is disingenuous and irresponsible of the current government to throw up its hands in the wake of the Supreme Court decision and refuse to pursue any form of dialogue or action on Senate reform. Substantial reforms are possible, even without a constitutional amendment. The federal government can easily remove the property requirement for senators and dramatically revamp the way in which appointments are made. As Canadians wait in vain for politicians to agree on how to democratise the institution, maybe we do want an improved unelected Senate. My argument, in one sentence, is this: status quo unacceptable, abolition irresponsible, meaningful reform possible and definitely

***** Jordan Press and Mark Kennedy, '“Significant reform and abolition are off the table”: Stephen Harper “disappointed” by Supreme Court Senate reform decision', *National Post*, 24 April 2014.

†††††††† Philip Authier, 'Majority of Quebecers want constitutional reform, poll finds', *Montreal Gazette*, 26 March 2012.

†††††††† Joan Bryden, 'Most Canadians now willing to reopen Constitution, poll finds', *Globe and Mail*, 26 May 2011.

§§§§§§§§ Angus Reid Global, op. cit.

worth pursuing. I sincerely hope a future government will gather sufficient courage and fortitude to engage Canadians in a national deliberation on the future of the Senate.



Question — In your talk there was one thing I was hoping you would refer to and that is the First Nation people and how they fit in. Having been out of Canada for many years I was aware there were serious problems at the time. There has been some change and your talk has very much brought me back into line with what the immediate situation is and I appreciate that. In terms of politics, and I say the same thing for Australia, would there be a possibility of having plebiscites which in fact would lead to the government having to at least justify why they would not support such an act, in your case wanting to change the Senate. If there could be a plebiscite which is taken seriously then there could be a possibility of some reform coming in that direction.

Linda Trimble — We do have a modest tradition of referendum on constitutional reform. The third round of constitutional negotiations was presented to Canadians in a national referendum and failed to be passed. There is no legislative foundation for a citizen initiative on Senate reform, so as for an initiative that comes from citizens and that put to them in a plebiscite. I can't see any government proceeding in that manner. There is some discussion that the present government, the Conservatives, would hold a referendum on abolition but it has said it will not do that. So, highly unlikely. I think that Canadian governments tend to be a little bit afraid of citizens and democracy.

With respect to First Nations there have been very few Indigenous senators appointed. Representation of under-represented groups in the Senate is one of the issues that is discussed when people talk about reform and many see the appointments process as a really appropriate and quite useful mechanism for addressing imbalances. Previous governments have done a fairly good job of appointing women to the Senate to the extent that women hold about 34 per cent of the Senate seats and only 25 per cent of the seats in the House of Commons. Addressing these imbalances in something that prime ministers could quite easily do but have only been modestly inclined to do.

Question — This is a very minor point and yet it is a bit of a triggering point both in Canada and in Australia and that is the matter of the representatives' expenses. I appreciate that is a detail but nevertheless a significant one. As you know we have had similar problems here in Australia recently. There was suggestion here from Clive Palmer, one of our MPs, that a

simple solution to this problem was to give representatives a flat amount—no questions asked, spend it as they will. As an old accountant that strikes me as a very sensible solution and I wonder whether you have any thoughts on that and whether it has been considered in Canada.

Linda Trimble — It hasn't been and I agree with you it sounds quite sensible. The problem is that it is significantly more expensive to be a senator from Alberta, flying to Ottawa and conducting Senate business in Ottawa, than it is to be a senator from Ontario, the province in which the capital city is located. So there would have to be scaled expenses and I am sure that would generate a lot of controversy about which senators should have access to more money.

There just simply needs to be more oversight. All these senators had to do was write 'Senate business' on their expense claims and the three senators at the heart of this controversy told the media and parliamentarians they were told this was okay. The Senate needs to clean up its act, much in the way it had to clean up its act in the wake of the siesta senator who could turn up a couple of times a year and still be considered to be performing his duty as a senator. I think there is now some inclination to put in place procedures for more oversight in the Senate because I believe other senators will be implicated as auditors start scrutinising their expense claims.

Question — You talked about the siesta senator. Did it lead to reforms and change?

Linda Trimble — Yes it did, so senators are now required to turn up more often and have to pay fines if they miss a certain number of sessions. It was highly publicised in the media and was quite a subject of controversy.

Question — Given your comments on the large power of the executive in Canada it seems to me that in practice the only way that there might be reform of the Senate might be either if there is another scandal or if there is a change of government in 2015 in the first blush of enthusiasm before any incoming government, whether liberal or new democrat, gets used to the idea of power.

Linda Trimble — I think that is true. I was thinking as I was walking over here that the title of my talk should be '*will* Canada fix its Senate?' Canada can fix its Senate; the question is do we have the political will among our federal and provincial politicians to do so? As I mentioned, the temptation to use that power to make patronage appointments is very strong amongst prime ministers. So if we have a change in government we may see some reform of the Senate. The current official opposition party, the New Democratic Party, supports abolition of the Senate and has been vociferous on this point. So if it is elected in 2015, which is unlikely, Canadians would expect the party to act on its promise by consulting with the provinces about abolition. The Liberal Party, which is more likely to unseat the current government, supports reforming the appointment process as the short-term strategy. Again, I am not going to hold my breath on that one but Mr Trudeau was very pointed and made a big

show of making this declaration of expelling the liberal senators from his caucus and saying 'we are going to change the appointments process'. I am less optimistic about the Liberal leader's willingness to initiate constitutional talks to reform the Senate.

Question — I come from Queensland and we abolished our nominated upper house in the 1920s and I think it explains quite a lot about Queensland now. I have been looking at it historically and it seems fairly inevitable when you look at that political reform to do with suffrage especially that the house would be abolished. So to contextualise it in terms of the progressive granting of rights, getting rid of property, voting and women's suffrage, does abolition seem inevitable if the pressure is kept down on reform?

Linda Trimble — I don't think it is being seen as a crisis so I don't think that there is undue pressure to abolish the Senate. Canadians will probably forget unless another scandal emerges. There have been a number of issues of corruption and bad behaviour in the federal government of late that Canadians quickly forget when an election rolls around so I don't see an impending crisis at all. It would have been wonderful for the government of the day to seize the moment and say our Senate Reform Act failed, it is time to consider other possibilities. I was quite disappointed but not at all surprised when that didn't happen.