

Canadian Study of Parliament Group: The New Senate

On September 15, 2017, the Canadian Study of Parliament Group convened a one-day conference where academics, journalists, parliamentary staff and parliamentarians were asked to share their thoughts on some of the changes that have occurred in the Senate over the past few years. Diverse perspectives prompted some animated discussions among presenters and audience members, but there was general agreement that we are experiencing a unique moment in parliamentary history.

Will Stos

Evolution of the Senate – Historical Perspective

Members of this first panel, including David Smith, a distinguished visiting professor at Ryerson University, Jean-François Godbout, associate professor of political science at the University of Montreal and Jack Stilborn, formerly of the Library of Parliament, examined the original intent behind the formal structure of the Senate in 1867 and some past reform proposals.

Smith, who remarked on the considerable interest in the second chamber today due to the new independent selection process and the Supreme Court ruling on reform rendered in 2014, explained that, constitutionally, the three parts of Parliament are inextricably bound – change in one affects the others. Indeed, he reminded the audience that the Supreme Court called the Senate a key part of the architecture of Confederation. Smith suggested that, to many Canadians outside of Ontario, the Senate was, and remains, an important balance to that province's power. He said it is not “a vestigial institution” to be dismissed merely as a bargaining chip in helping Confederation happen, as some scholars have argued. Smith wondered if Canada will move in the direction of a suspensive veto similar to the UK's 1911 *Parliament Act*. Although a *Globe and Mail* editorial supports this idea, Smith suspects the Court may have something to say about such a policy. In closing, he highlighted a link between a rejuvenated independent Senate and the party-constrained MPs in the House. The Senate becomes a protector of the public interest if, as the *St. John's Telegram* notes, a minority of Canadians can elect a majority government.

Godbout's presentation delved into his research on all recorded divisions in both the House (12,106) and the Senate (1,285). He is using these votes to examine party loyalty and discipline and hopes his analysis may help to explain why there appears to be much more cohesion in parties since the 1930s. Is this cohesion related to electoral pressure and partisan sorting? Franchise expansion? Career or replacement effects? Legislative agenda and Parliamentary rules? Member ideology? Godbout noted that in the Senate there is no electoral pressure or franchise expansion to account for party cohesion as there is in the House, yet he identified an increase in partisanship in the Senate. Why is partisanship in the Senate a problem? Godbout contends the chamber was supposed to be one of sober second thought and to represent regional interests. Partisanship didn't occur as quickly in the Senate as it did in the House, but since the 1960s his research suggests it has become quite partisan. Godbout states that only 133 bills have been vetoed by the Senate. When the same party controls both chambers, only one per cent of bills are vetoed. When the houses are divided, it increases to two per cent. He concluded by noting that social choice theory suggests the new independent selection process predicts little impact on the extent of partisanship.

Stilborn provided a brief history of Senate reform initiatives. Early attempts looked to enhance regional representation, while a second round examined the German Bundesrat model in which provinces would appoint Senators. More recently, a proposal for an elected Triple E Senate emerged out of Alberta. Stilborn joked that Senate reform sounds like it comes out of a fashion runway, not a serious political discussion of institutions: every five years some hot new proposal comes strutting down the runway. He contended Canada's Senate continues to act better in practise

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than in theory (to borrow a phrase in one of Smith's books), and lamented that when speaking about reform we haven't articulated what problems we're trying to solve and whether they call for institutional reform, and specifically upper chamber reform. "Until we work out that framework we're doomed to walk in a no-man's land of incoherence," he said.

Machinery of the New Senate

A second panel, featuring Heather Lank, principal clerk of chamber operations and procedure, Blair Armitage, principal clerk of committees, and Michel Bedard, parliamentary counsel in the Office of the Law Clerk and Parliamentary Counsel, brought together Senate administrators to discuss rule changes in the chamber and to recount how specific practices came to be.

Lank stressed the importance of understanding the unique context and circumstances from which this new Senate has developed. The Supreme Court noted there was a constitutional impediment to reform and former Prime Minister Stephen Harper did not fill many vacancies during parts of his mandate. The rules of the Senate were designed with a two-party model in mind, but the current composition of the Senate is dramatically different from the historical tradition of government/opposition caucuses. Now there is an Independent Senator Group (ISG) and this new reality has required that rules be adapted. Some of these developments show flexibility of the institution. Historically, government bills are sponsored by senators aligned with the government. In the current case, only three senators are aligned with the government, so Independent senators, and in one case, a Conservative senator (at the time) sponsored government bills. Lank noted that many amendments are now occurring at third-reading, not just at committee. Moreover, many messages between the Senate and the Commons are being sent. Also respecting Bill C-14 – the Senate agreed to a modified third reading process. Another change has occurred with the scroll meeting – in the past government and opposition leaders were central; now, the meetings are held in neutral spaces and consist of more caucus leaders. The Senate now invites ministers from the House of Commons to answer questions about their portfolio. Different groups in the Senate meet to discuss a rotation of the questions. Lank concluded by stating the most significant change concerns the way parties or groups are formed and recognized. Facilitator of the ISG has most of the same privileges of the party leaders in the Senate. All of these changes

have created an air of unpredictability and the Speaker must be ready at all times to respond to changes in circumstances.

Armitage reported on changes in Senate committees, which have long been lauded for the quality of their work. He doesn't see this reputation changing, explaining that Senators can develop specialities, long-term knowledge and have less need to consider job prospects, etc. Armitage noted that allocation of committee seats had never been explicitly outlined. Senators were named not to act as their party delegate, but individually. Once named to a committee, only a decision of the Senate could change their membership. Independent Senators began asking for proportional access to committees. With growth of Independents and former partisans opting to become Independents, individual Senators were not bound by a whip. This change was a concern for the parties. Senators could be replaced by members of their own party if they had other business to attend to, but the Independents didn't have the same ability and this became an irritant. For the first time, committee appointments are now made proportionally.

Bedard explained how there are certain procedural advantages to being a member of a recognized group in the Senate. Senate rules did recognize the possibility of the third caucus in the chamber, but not that the government would not have a caucus in the Senate. For the first time we are in a situation where this is the case. Bedard noted that the ISG started informally. These Senators were not recognized as a group under the old rules because they were not a registered party under the Elections Act. Eventually the ISG was recognized by a special order and the Senate Committee of Internal Economy, Budgets and Administration has allocated funding to the ISG since that time. Bedard also reported on changes to the system of amendments. Previously, most amendments came from the opposition and usually there was one lead Senator making these amendments. Very rarely were these amendments passed. Now, there isn't the same kind of coordination. Some Senators may propose similar amendments and then discuss them amongst themselves in order to make changes. Bedard also highlighted that in committee, sponsors of bills are proposing amendments to their own bills. This scenario can't happen at Third Reading, but can happen in the committee.

The New Senate in the News

Carleton University political science professor



Peter Harder

Philippe Lagassé, opted to chair this panel, featuring journalists Kady O'Malley and Dale Smith, as a conversation and encouraged questions from the floor throughout.

When asked of their overall impression of the upper chamber, O'Malley said she always found the Senate quirky. It was independent, though not nearly as much as it is now, but there was unpredictability... at least up to four to five years ago. Within the media at large, O'Malley said the Senate would usually be ignored until a Senator did something scandalous. Then, the entire institution would be maligned. Smith said he most vividly recalls a Canada Post bill in which the Senate questions caused the minister and staff to scramble as they attempted to answer. He said he finds less childishness in the Senate than what he saw from the House galleries. Lagassé asked why the press gallery, as a whole, is less enamoured with the Senate? Smith suggested it is partially due to the state of journalism – there are sparse resources to cover activities and a need to focus on the House. Much political writing is also personality-based – journalists cover the antics, not so much the policy – and these



Paul Massicotte

types of stories are more common in the House. O'Malley mentioned the lack of regularity in terms of what may be discussed in the Senate compared to the House. She said it can be difficult to convince editors to send reporters there if they aren't certain about what votes or debates will occur in a given day. When asked about their thoughts on recent trends in the Senate, O'Malley said she sees the Senate as one big opposition versus the government representative, Peter Harder. The government now has to convince individual Senators to support its legislative agenda. She added that she's been seriously impressed by the quality of new Senators in terms of their ability to hit the ground running. Smith cautioned that recent changes may have swung the pendulum too far and could cause unintended consequences. Noting the decline of partisanship as more Independent Senators enter the chamber, he contended there is, and should be a role for partisan caucuses. These caucuses should be able to renew their numbers while keeping 'crossbenchers.' Smith asked if 100 or so independent fish are swimming against a government, can they really push back effectively? O'Malley responded that the absence of partisan caucuses does not mean that



Renee Dupuis

ad hoc caucuses won't form around different issues. The panel closed with both journalists complimenting the Senate's Twitter feed model, and suggesting other institutions follow its example. O'Malley also added that it's time to consider ethics rules about what senators can do in terms of sitting on boards. Lagassé concurred, saying this is especially important when Senators can self-select what committees they sit on.

The New Senate in Action

A final panel brought together four Senators from various caucuses/groups to reflect on how they see the institution advancing. Government representative Peter Harder, Independent Senator Paul Massicotte, Independent Senator Renee Dupuis, and Conservative Senator David Tkachuk sometimes agreed, or agreed to disagree, about the effects of recent changes in the upper chamber.

Giving a forecast of future Senate appointments in the next few years, Harder said it will basically take a generation to turn back the clock on an independent Senate (provided there are no defections). "I believe



David Tkachuk

we are working towards what political scientists will describe as robust bicameralism," he told attendees, adding that the new Senate is working better in practise than in theory. Harder recounted how a year ago some critics said this new Senate could be a dog's breakfast; but he says it's working well. Part of the change has been in the tone of debate, and Harder noted that it's not only new Senators who have had a part in this change. In terms of the increasing number of amendments to legislation from the House, Harder suggested the prime minister and Cabinet have been "serene" about accepting or rejecting amendments, but they are listening to the Senate. All of these changes have been done without constitutional change. Rather, Harder says, it's been done in a good old Canadian way of building on good policy.

Massicotte provided a brief history of Senate modernization. He explained that for years a group of Senators had felt the Senate was not working as well as it could and that it had not realized its potential as a body of sober second thought. They met and talked about this behind the scenes and in small groups at informal dinners. He and Senator Greene

organized a meeting in September 2013 and received consensus on 11 resolutions. The Senate Committee on Modernization was created in 2015. Massicotte spoke about a less partisan Senate, explaining that partisanship in the Senate showed cracks with the expulsion of the Senate Liberals, the growth of new Independent Senators, and the changes in terms of group membership. Personally, he said he prefers groupings by values rather than by party ideology though not all Senators share this idea and some think it's necessary to have partisan groups and an official opposition. Massicotte highlighted the increasing trend towards amending legislation from the House and praised the recent experimentation with thematic debates – something that will become especially important when proceedings begin to be televised. He concluded by noting the added value of the Senate is its role as a sober second thought. “We need to redouble our efforts to support this independence,” he stated.

Dupuis suggested the independence of the Senate and senators was brought up in public discussions as soon as the Liberal Senators were expelled from the parliamentary caucus. This preceded the first Trudeau appointments in 2015. Adjustments had to be made because new Senators wanted the resources and ability to fulfill their duties. She's observed there is a will and desire of the Senate Modernization Committee to work on this. Dupuis said this new reality led to a wide range of reactions from the opposition. She notes some senators were very opposed or suspicious about this change. The Independent Senators appointed in 2016 had to have discussions amongst themselves to see if they could form a group. They organized themselves under an experienced senator, Senator Elaine McCoy.

Dupuis stressed that the Senate is not an advisory body, or council of learned elders, but rather, as the Supreme Court has stated, it is a complimentary legislative body. She and other Independent Senators, regardless of when or how they were appointed, believe concrete changes must be made to ensure the Senate functions as the second legislative body in parliament. This includes tighter deadlines for passing bills with priority given to government bills.

Tkachuk noted he disagreed with some of his colleagues' interpretations about 'the new Senate.' He contended the Senate was never popular, and “the idea that we're now going to be popular and liked is not going to happen. It's too much to expect.” Tkachuk stated there is nothing inherently new about this government's appointment process. It has been used elsewhere and he suggests it is simply a formal way to do what has been done informally – consultation with people. The PM still maintains power to appoint. If anything, Tkachuk remarked, it has made the process less transparent. Quoting former Senate Clerk Gary O'Brien, Tkachuk said partisanship was not holding back independence. Moreover, he contends the way people are using 'independence' is not correct. Independence initially came from being appointed until you die. “I am as independent as any Trudeau appointee,” he added. Tkachuk also said he views the newly independent Senators as mostly activists of the left, and the attitude among many of them that partisanship is a negative is similar to what he is increasingly seeing on university campuses where there are attempts to clamp down on hurt feelings by minimizing dissenting views. “I truly believe this is a very dangerous road we're going down,” he concluded. “You get rid of the opposition in the Senate, you risk despotism.”