



A New Senate for Canada

**A Two-Step Process for Moving
Forward on Senate Reform**

The Honourable Daniel P. Hays, P.C.

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Canada*West*
F O U N D A T I O N

ABOUT THE AUTHOR

Dan Hays was appointed to the Senate of Canada by Prime Minister Trudeau in 1984 to represent Albertans. Following his retirement from the Senate on June 30, 2007 he was appointed Chairman of Macleod Dixon LLP. During his years of service in the Senate, Mr. Hays held a number of leadership positions and at different times served as Chair of the Standing Committee on Agriculture and Forestry, the Standing Committee on Energy, the Environment and Natural Resources, and the Special Committee on Senate Reform 2006. In 1999, he was appointed Deputy Leader of the Government in the Senate, and in 2001, Prime Minister Chrétien appointed him Speaker of the Senate, a position he continued to hold under Prime Minister Martin. Following the 2006 federal general election, he was appointed Leader of the Opposition in the Senate. On January 22, 2006, he was made a Privy Councillor by Prime Minister Harper. Mr. Hays has been involved in the cattle industry since 1957 and continues to maintain a herd of Hays Converter cattle.

Additional Canada West Foundation Senate Reform Publications:

Dialogues, Summer 2006 - Senate Reform <http://www.cwf.ca/V2/cnt/03b718574b6f9326872571a9004e967c.php>

Presentation by Roger Gibbins to the Legislative Committee on Bill C-20 http://www.cwf.ca/V2/cnt/generic_page_200805161406.php

Expanding the Blueprint - Beyond Regionalism: The Rest of the Senate Reform Story.

<http://www.cwf.ca/V2/cnt/8106ff86b0bd07b587256bd5005cc09b.php>

For the Record: Alberta's 1998 Senate Election <http://www.cwf.ca/V2/cnt/ebfc9f4aca0a9ae087256bd5000258e4.php>

Electing Alberta Senators - Senate Reform Step 2: Moving from Precedent to Practice

<http://www.cwf.ca/V2/cnt/0ea54a03ec04557587256bd300040250.php>

Why a Senate, Why Senate Reform, and Why a Senate Election? <http://www.cwf.ca/V2/cnt/9e16c97e02e17d7887256bd300050950.php>

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Preface

Dr. Roger Gibbins, President and CEO, Canada West Foundation

The Canada West Foundation has a longstanding interest in Senate reform, one that began in the early 1980s with the search for more effective regional representation and broadened into a general engagement with democratic reform. As an organization, we have nailed our colours to the mast on this particular issue: we believe that a reformed Senate will better serve all Canadians as we confront the governance challenges of the 21st Century. The issue is not one for the West alone; it is, or at least should be, a national issue.

Senate reform has nonetheless been a lonely crusade, and an extremely difficult one at that. Although public opinion polls make it very clear that very few Canadians support the Senate status quo, progress on reform has been difficult for two reasons. First, there have been genuine differences of opinion about the destination; we have not agreed on a reform design that would best serve the interests of our wonderfully diverse country. We need a design that accommodates not only regional interests, but also those of an increasingly diverse demography. Second, and most importantly, there has been no agreement on the appropriate process of reform and a fair bit of reluctance on the part of provincial and federal leaders to commit to the hard and messy work of constitutional change.

We have been caught between two extremes: between those who believe that any departure from the status quo is too difficult to entertain and those who favour abolition. Moreover, the strongest opponents of Senate reform often dress themselves up in reformist garb, arguing passionately that “yes, reform is needed, but just not now and not if it opens up the possibility of constitutional reform.”

The bottom line is that we have not been able to find a viable way forward, and the efforts that have been made, including Senate elections in Alberta and recent legislative initiatives by the Government of Canada, have made little progress.¹ We seem stuck; big, comprehensive reform seems impossibly difficult, and yet more modest reforms to the status quo strike many as counterproductive as there is fear that making the existing Senate more functional could undercut the need for comprehensive reform. So we sit, spinning our wheels, stuck

with an institution that has scarcely changed at all since 1867, even though the country it serves has changed almost beyond recognition.

Here’s where the Honourable Dan Hays comes in to offer a way to address immediate weaknesses in the status quo while also providing a path toward more comprehensive democratic reform. His proposal provides breathing room while opening the door to a more fundamental reform agenda. We need both, and Hays delivers both with the inspiration of a reformer and the pragmatism of an experienced politician.

It is important to stress both the message—that incremental and fundamental reform are compatible, and the attributes of the messenger. From his long service as a Liberal Senator, including serving as the Speaker of the Senate, he understands the institution firsthand. He knows its warts, but also its strengths, and its potential. He is an insider in the best sense of the word. At the same time, he has represented Alberta, the cauldron of Senate reform, and thus knows, understands and appreciates the Senate reform constituency. And, perhaps above all else, he is a passionate Canadian with unrelenting faith in the ability of political institutions to serve Canadians and their increasingly diverse country.

None of this is to say that the proposal put forward by Dan Hays is aligned with past and current work by the Canada West Foundation on Senate reform. It is not. However, he offers an interesting and practical path forward, and in this way makes an important contribution to Senate reform, and to democratic reform in Canada. His proposals provide the opportunity to push the debate forward, and this is precisely what the country needs.

If we can find a way to open up a constructive national conversation, then we can turn to how best to design a democratic Senate for the 21st Century. To this end, the Canada West Foundation will play a direct role by bringing forward a variety of reform proposals for consideration by Canadians. Once we can figure out how to get from here to there, we can begin to articulate what “there” should look like. For now, the first need is to convince Canadians that there is a way out of the current impasse. To this end, I applaud the contribution made by Dan Hays. He puts us on a road we need to travel if Canada’s democratic potential is to be fully realized.



Roger Gibbins

¹ There have been two elected Senators appointed to the Senate: Stan Waters and Bert Brown. Stan Waters was elected in a provincial election in Alberta in 1989 and appointed to the Senate by the Governor General in 1990 on the advice of Prime Minister Mulroney. Bert Brown was also elected in an Alberta election in 2004 and appointed by the Governor General in 2007 on the advice of Prime Minister Harper.

These comments were prepared for a presentation to the Legislative Committee of the House of Commons on Bill C-20, an Act to provide for consultations with electors on their preferences for appointments to the Senate.

By any measure, Canada is one of the world's most successful countries. Our bicameral governance model—adapted to a federal structure and shaped by the political values, views and imperatives culminating in the *British North American Act, 1867* (renamed *Constitution Act, 1867*)—has served us well. But if asked for advice on developing a new model, or revising an existing model, of parliamentary governance, I would not, nor do I know of anyone who would, recommend a duplicate of the Canadian Senate as a second chamber.

Our values, views and imperatives have undergone profound changes since Confederation. In particular, we now have a much greater sensitivity to democratic values. It follows then, that modernization and reform of our Upper House deserve urgent attention and should be given high priority. In this respect, I agree with Prime Minister Harper and note that at different times his predecessors, the Right Honourable Pierre Trudeau and the Right Honourable Brian Mulroney, themselves brought forward parliamentary initiatives in recognition of this fact. I acknowledge that our federal structure, in particular our constitutional amending formula, make this one of our country's most difficult challenges. The words of Machiavelli come to mind: "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success than to take the lead in the introduction of a new order of things." Even so, it is still timely and of the highest importance.

With its formidable constitutional powers, the Canadian Senate stands unique among legislatures in parliamentary systems throughout the world. Yet remarkably, none of its members are elected; instead, they are appointed on the advice of the Prime Minister to the age of 75 and no criteria for their appointment has evolved other than that they are almost always from the Prime Minister's party. As well, it is the only second chamber to my knowledge whose legal basis has remained virtually unchanged since it was created.

When their opinion has been sought, Canadians have consistently expressed dissatisfaction with the Senate. From this we must draw certain conclusions; the first is the necessity to change the outdated practice whereby appointments to the Senate are made at the sole discretion of the Prime Minister; the second is the need to reform the distribution of Senate seats. For example, BC and Alberta are home to almost 24% of the national population and are responsible for almost 30% of Canada's GDP, but hold only 11% of the

Senate seats (12 of 105).² A better reflection of provincial interests in the composition of the Senate is becoming a compelling necessity in recognition of important economic and demographic changes that have occurred since the last major seat adjustment over 90 years ago (*Constitution Act, 1915*).

I believe from personal experience that the Senate is worth reforming because of its strengths and, in particular, its essential role in the legislative process. Hence, we must try to minimize unintended consequences of changing one of our country's essential institutions and keep in mind the maxim "first, do no harm." I reject the strategy of creative destruction recommended by some as it is more likely to result in abolition than reform. As well, a *reformed* Senate that Canadians accept and value can address long-standing sore points in our national politics.

While I believe that incremental change is the approach most likely to succeed in the end, my principal criticisms of the Senate reform proposals currently before Parliament continues to be that they are not accompanied by a policy paper or study to provide context as to how, or for that matter whether, they fit into a general strategy of comprehensive Upper House reform. Nor has enough been done to seek public input or encourage all-party discussions on the possibilities for achieving a fully reformed Senate. In the United Kingdom, the Blair government used initiatives of this sort to achieve considerable success on House of Lords reform; the potential is there to do the same in Canada.

When the Senate term limits bill was introduced on May 30, 2006 (Bill S-4, An Act to amend the *Constitution Act, 1867* - Senate tenure), I took it as an important step forward in the difficult process of reform. This in turn prompted me to suggest a **two phase approach to Senate reform**.

PHASE I

The first step would be to modernize the Senate and its relationship with the House of Commons. This would involve change that is within the power of Parliament to enact and realistic in terms of an achievable agreement between the two Houses. This would include, in addition to term limits for new Senators, amendments to the antiquated section of the *Constitution Act, 1867* dealing with the age, citizenship, property ownership, attendance and residency

² See *State of the West 2008: Western Canadian Demographic and Economic Trends* by Brett Gartner. Canada West Foundation. www.cwf.ca.

requirements. As to term limits, 15 years was in effect agreed to by the Senate in response to Bill S-4. Pending more comprehensive reform, I accept this as reasonable, although 12 years is preferable (8 years is too short of a mandate for an appointed Senate).

More difficult, but still within Parliament's power, is a new approach to deal with deadlock between the Senate and the House of Commons, the use of a Senate Appointments Commission modeled after the Lords Appointments Commission in the UK, and a new procedure to involve all Senators in the choice of their Speaker.

While still in the Senate, I put forward a *Senate Modernization Bill* which could have been passed by Parliament under Section 44 of the Constitution without provincial approval. Among other things, the bill would have reformed the traditional way that Senators are appointed. Pending more comprehensive reform, new procedures could be established drawing on the precedent of the House of Lords. This process would require a Prime Minister whose party has a secure majority of seats in the Senate to involve at least the Leader of the Opposition in the House of Commons before putting forward names of nominees to the Governor General. As long as the Senate remains an appointed chamber, it is appropriate for the Prime Minister to share the nominations.

I also proposed that a Senate Appointments Commission should be created to establish guidelines for choosing Senators and be authorized to recommend the appointment of a certain number of independent Senators. This would ensure the presence of a significant number of Senators who are not aligned with any particular political party. For example, the Prime Minister and the Leader of the Opposition could be allocated 80% of the nominations with the remaining 20% chosen by the Senate Appointments Commission.

PHASE II

The second phase of reform would involve 1) electing Senators; 2) rebalancing the number of seats among the provinces and territories; and 3) ensuring that the powers of the Senate are appropriate to a democratically empowered second chamber and in tune with all that has evolved between the two federal houses and the provinces since 1867. Phase II is the more difficult phase!

The reason it is more difficult is that these three essential components of comprehensive Senate reform are interrelated. A cafeteria approach could work with the first phase to modernize the Senate but, as much as I would like it to be otherwise, not with the second phase. The reason for this is explained by Gordon Gibson: a fully elected and legitimate Senate with is

present powers and existing provincial representation would result in a horror show with many unintended and unacceptable consequences.³

What then can be done to achieve comprehensive reform? In a discussion paper on Senate renewal that I tabled in the Senate in May 2007, I recommended that the government of the day should be encouraged to appoint a Royal Commission with broad powers of consultation to receive input from the public, stakeholders and expert witnesses. The conclusions drawn and recommendations made by the Royal Commission would be followed by all-party discussions at both the federal and provincial levels. These discussions would deal with the method for electing Senators, the redesign of seat distribution, and probable changes to Senate powers. Such matters require the approval of the provinces as set out in section 38 of the *Constitution Act, 1982*.

As a model to help guide us through this reform, we should look at how the United Kingdom is reforming the House of Lords. From the Lord Wakeham Commission and the tabling of white papers in Parliament to joint-committee studies and all-party discussions, the United Kingdom has thoroughly aired this issue and made considerable progress in reforming their Upper House. Canada has much to learn from this example.

How we select Senators is what must ultimately change. And in my view, they should be elected through a process like Australia's single transferrable vote system from multi-member constituencies. As well, the Senate Appointments Commission should be retained from Phase I of the renewal process and be authorized to appoint some of the Senators if minority interests are not reflected in the election results. The Commission should also, as suggested above, be authorized to recommend the appointment of a limited number of independent Senators following the House of Lords example.

Seat allocation will have to be determined to the satisfaction of the provinces before we move on to an elected Senate. In my opinion, the distribution of seats should be based on provinces. The German Bundesrat model is helpful here: it uses larger, middle-sized and smaller provinces which are allocated a similar number of seats according to the size of the provincial units in their federation. I believe this to be the logical basis for determining seats in an Upper House. However, to honour the spirit of the original Confederation compact, no province should have fewer seats than necessary to respect the constitutional guarantees pertaining to the minimum number of seats it has in the House of Commons.

3 "Challenges in Senate Reform." *Public Policy Sources*, Number 83/September 2004. Fraser Institute. https://www.fraserinstitute.org/commerce/web/product_files/ChallengesInSenateReform.pdf

Finally, with respect to powers, I would propose that those of a renewed Senate remain basically as they are now in the Constitution, with one exception: if the Senate is elected, it will be even more important to build on the Phase I reforms and ensure that we design an effective deadlock-breaking mechanism with a House of Commons bias.⁴ This is key to the renewal of our appointed Senate and would become even more important in the case of an elected Senate. ■

4 For an elaboration, see the author's comments and proposals on how to resolve the deadlock issue in the forthcoming Autumn edition of *Canadian Parliamentary Review*.

About the Canada West Foundation

Our Vision

A dynamic and prosperous West in a strong Canada.

Our Mission

A leading source of strategic insight, conducting and communicating non-partisan economic and public policy research of importance to the four western provinces and all Canadians.

Canada West Foundation is a registered Canadian charitable organization incorporated under federal charter (#11882 8698 RR 0001).

In 1970, the One Prairie Province Conference was held in Lethbridge, Alberta. Sponsored by the University of Lethbridge and the Lethbridge Herald, the conference received considerable attention from concerned citizens and community leaders. The consensus at the time was that research on the West (including BC and the Canadian North) should be expanded by a new organization. To fill this need, the Canada West Foundation was created under letters patent on December 31, 1970. Since that time, the Canada West Foundation has established itself as one of Canada's premier research institutes. Non-partisan, accessible research and active citizen engagement are hallmarks of the Foundation's past, present and future endeavours. These efforts are rooted in the belief that a strong West makes for a strong Canada.

More information can be found at www.cwf.ca.

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