

UNDERSTANDING CANADA

THE SENATE OF CANADA

Gary William O'Brien



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THE SENATE OF CANADA

Gary William O'Brien



INSTITUTE OF PARLIAMENTARY AND POLITICAL LAW
INSTITUT DE DROIT PARLEMENTAIRE ET POLITIQUE

The Senate of Canada
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To the former Speakers
Dan Hays, Noël Kinsella, and the late Gildas Molgat:
Three giants of the Senate

Contents

	Foreword	<i>ix</i>
<i>chapter one</i>	What Is the Senate?	<i>1</i>
<i>chapter two</i>	Second Chambers — Theories and Structures	<i>7</i>
<i>chapter three</i>	The Vision of the Fathers	<i>17</i>
<i>chapter four</i>	The Roles of the Senate in Historical Perspective	<i>29</i>
<i>chapter five</i>	The Structure of the Senate	<i>39</i>
<i>chapter six</i>	The Senate at Work: Four Case Studies	<i>51</i>
<i>chapter seven</i>	Reviving Canadian Bicameralism: The Non-partisan, Complementary Senate	<i>65</i>
<i>chapter eight</i>	Prospects for Structural Reform	<i>75</i>
<i>appendix</i>	Selected Extracts Relating to the Senate in the Constitution Act, 1867	<i>91</i>
	Notes	<i>97</i>
	Bibliography	<i>115</i>
	Index	<i>119</i>
	About the Author	<i>127</i>
	About the Editor	<i>128</i>

Foreword

The term “senate” was first applied to an assembly of elders who had tasks of advising the ultimate holder of power in ancient Rome. After a long hiatus, the notion of senate resurfaced in European states such as the United Kingdom during the Age of Enlightenment. In its more modern interpretation, the designation has come to mean a parliamentary body based, in principle, on the nobility or “first estate,” or a chamber of wise thought aiming to rectify the political interests and excesses of the lower house of Parliament. In countries with extensive and difficult geography, like Canada, a senate was also thought of as having a role in providing a voice for distant and less densely populated areas. It was into this historical soil that, in 1867, the *British North America Act*, now called the *Constitution Act, 1867*, planted a living tree in Canada capable of growth and expansion within its natural limits. The Senate of Canada was, and continues to be, a major branch of that living tree.

The specific model for the Senate of Canada was the United Kingdom’s House of Lords, as far as circumstances would permit. Since Confederation, the two institutions have developed in different directions. While the Senate of this country may today still appear somewhat similar in principle to its British forebear, over the 155 years of Confederation it has developed into a unique

parliamentary institution. Today, the Senate of Canada is enshrined both in the text of the Constitution and in statute law. Further, it is deeply embedded in constitutional custom and convention, partly through law as well as in policy. Various aspects of the structure and functioning of the Senate are also examined and explained in decisions of the Supreme Court. Most significantly, that Court affirmed a few years ago that as part of the core fabric of Canada's architecture, the Senate could not be dispensed with, or significantly altered, without the unanimous agreement of both Canada and the jurisdictions that form part of it.

Beyond the Constitution, the law, and the policies that are encrusted around it, the upper house of the Parliament of Canada plays a vital role in the political life of the country. The Senate reads, indeed on occasion amends, legislation enacted by the House of Commons. It originates studies into topics of currency in government and society. Through its focus on the regions of Canada, it balances the "representation by population" characteristic of the lower house. For all these reasons, the study of Canada that omits the Senate is necessarily incomplete.

Gary O'Brien is uniquely placed to offer this study. He holds a PhD in political science from Carleton University, where his dissertation focused on the legislative and parliamentary practices of pre-Confederation Canada. As the twelfth clerk of the Senate, for the years 2009–2015, and as a continuing Senate scholar, he is familiar with the history of the institution, with its function in Canadian parliamentary and political life, as well as with its functioning. This book is a reflection of his experience and expertise.

Gregory Tardi, DJur
Editor, Understanding Canada Collection
January 2022

What Is the Senate?

The Senate of Canada is the upper house of the Parliament of Canada. As one scholar has observed, it is “a uniquely Canadian institution to serve uniquely Canadian needs.”¹ It is composed of 105 appointed members who represent the various provinces and territories of the country. The distribution of seats is made on a regional basis, with twenty-four senators from the Maritimes Division, twenty-four from the Quebec Division, twenty-four from the Ontario Division, and twenty-four from the Western Division. The Province of Newfoundland and Labrador has six senators, and the three territories (Yukon, the Northwest Territories, and Nunavut) have one senator each.

The Canadian Senate is the only non-elected legislature in Canada and its only upper house.² Senators are summoned by the Governor General on the advice of the prime minister and can serve until the age of seventy-five. Despite its non-elective basis, the Senate’s legislative powers are identical to those of the House of Commons with two exceptions: money bills must originate in the House of Commons; and amendments to the Canadian Constitution can be made without the agreement of the Senate.³

There have been only a few constitutional amendments affecting the Senate. A mandatory retirement age of seventy-five was adopted in 1965, and a 180-day suspensive veto on constitutional

amendments was made statutory in 1982. Also in 1982, it was agreed that the powers of the Senate, the method of selecting senators, and the number of senators per province would be subject to the general amending provision requiring support in seven provinces that have at least 50 percent of the population. The Constitution has also been amended to add new senators as the number of provinces and territories increase.

Despite its unelected foundation, the Senate is an intrinsic part of the parliamentary process. The Supreme Court has stated that “the Senate is one of Canada’s foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation.”⁴ George Brown, one of the Fathers of Confederation, told the members of his party at the time of Confederation:

that no opposition on their part ought to be offered to the creation of a Senate as an integral part of the Constitution of this country; that it was the price of representation by population, that it was part of the bargain, and that it ought to be accepted.⁵

Its original purpose was to bring the very large and dispersed colonial provinces of British North America together and be a unifying force within the new Dominion. As Brown said, “on no other condition” — agreement on the Senate — “could we have advanced a step.”⁶

Among contemporary upper chambers, the Senate is one of the most powerful. In a paper presented to the British House of Commons in 2007, Jack Straw, the Government Leader of the House and Lord Privy Seal, described Canada’s upper house as follows:

On the face of it, one of the most powerful second chambers in the world is the wholly appointed Canadian Senate. When the Canadian Parliament was established, the Senate’s powers were based on those of the pre-1911 House of Lords. Even today, Canada has no equivalent of the Parliament Acts. There are only two restrictions on the Senate’s nominal powers: financial legislation must be introduced in the first chamber; and, although the Senate may amend financial legislation, it cannot increase taxation.⁷

Prime Minister Wilfrid Laurier grasped the enormity of the Senate's legislative powers when he told the House of Commons in 1908:

But if under our constitution in Canada there was a deadlock between the House of Commons and the Senate, nothing short of revolution could solve the difficulty . . . no constitutional remedy within our grasp could bring the Senate to a different view.⁸

Historically, the membership of the Senate has included Canadians with distinguished achievements and varied backgrounds.⁹ Two prime ministers have sat in the Senate: Sir John Abbott (1891–1892) and Sir Mackenzie Bowell (1894–1896). Appointments often represented Canada's social diversity. The first woman to be appointed was Cairine Reay Mackay Wilson in 1930.¹⁰ The first senator of Indigenous birth was James Gladstone in 1958, two years before the federal franchise was extended to Indigenous peoples living on reserves.

The investigative work undertaken by its committees is considered of great quality, and indeed of a higher standard than that of the House of Commons.¹¹ Its reports have received international recognition. For example, in 1971, an American congressman, Charles Mosher, claimed the four-volume report on science policy produced by a special committee chaired by Senator Maurice Lamontagne was "the most thorough study of any in the world."¹²

Yet it is an institution that has never been fully accepted into the Canadian political system. Few observers ever recommend its design to other countries. Writing in 2002, David C Docherty observed that the Canadian Senate "represents and embodies some of the most anti-democratic features of representative assemblies . . . [I]t ranks as one of the last reformed chambers in Westminster-based parliamentary democracies."¹³ CES Franks saw the Senate's chief characteristic as not what it does but that it has survived. He declared the Senate to be a "frustrating puzzle."¹⁴ Others have described the Senate as being "simply a fifth wheel on the governmental coach"¹⁵ and a "political conundrum,"¹⁶ which poses for Canadians "a democratic dilemma."¹⁷

In the first major academic study of the Senate, Robert A Mackay entitled his opening chapter “The Problem” and his last chapter “To End or Mend the Senate?”¹⁸ The Co-operative Commonwealth Federation’s (CCF) *Regina Manifesto* of 1933 called for the abolition of the Senate, a position Canada’s New Democratic Party has repeatedly taken. Its improvement is the subject of numerous books and articles. David E Smith has written: “Few studies of the Senate do not talk about, if they are not devoted to, its reform. Indeed, ‘Reform of the Senate’ must be one of the hoariest topics in Canadian politics.”¹⁹

Notwithstanding the Senate’s vast bibliography, it is an institution often misunderstood,²⁰ and since, as the saying goes, “misunderstanding breeds distrust,” the concept of good governance demands this mistrust be addressed. The purpose of this book is to help us better understand the Senate as a national institution in hopes that a more informed debate on Canada’s system of parliamentary government can take place. We will examine how the Senate came to be, what it does, how it compares with other second chambers, how it functions, and what the prospects for structural reform are.

In two judicial opinions, the Supreme Court of Canada has described the Senate as having a “fundamental nature and role.”²¹ We need therefore to explore what that “fundamental nature and role” is, since “nature” is not a term that can be simply defined by positive law. As the ancient philosophers taught us, “Nature, however understood, is not known by nature. Nature had to be discovered.”²²

Two of the problems in studying the Senate are a tendency to read the present into the past in the hope of justifying the Senate’s current actions, and being selective in the evidence about how the Fathers of Confederation saw the Senate’s purpose. For example, we cannot discern the totality of the views of Canada’s first prime minister, Sir John A Macdonald, by simply examining the minutes of the 1864 Quebec Conference. We must also look at his differing remarks during the *Confederation Debates* when the seventy-two resolutions were ratified by the legislature of the Province of Canada.

Another problem is the temptation to examine the Senate from an *a priori* perspective. Some dislike the fact that the Senate is not elected, while others resent it may not be representative of the average Canadian. Such inquiries can lead to bias.

This study will approach the Senate more conceptually, namely through the prism of bicameralism. Bicameral institutions are legislative bodies whose deliberations involve two distinct assemblies. The essence of the Parliament of Canada is that it is bicameral, consisting of the Senate and the House of Commons. The British essayist Walter Bagehot once remarked with respect to the British parliamentary system, “if we had an ideal House of Commons . . . it is certain we should not need a higher Chamber.”²³ The Senate’s composition, its powers, and its functions are always linked to the bicameral process, which, as we will later discuss, poses problems for its reform.

Chapter 2 will review the various theories and structures of bicameralism, while Chapter 3 will attempt to show how those models were adapted to Canadian realities. Janet Ajzenstat writes that the Fathers were no strangers to political theory. They were, above all, thinkers about their country and about politics:

The Fathers of Confederation and Canada’s founding legislators exhibited an impressive knowledge of constitutional history and theoretical texts. They cited British, American, and French authorities, studied European constitutions, and compared federal systems . . . some at least knew Thomas Hobbes, John Locke, Montesquieu and Rousseau. Mill’s *Representative Government*, published in 1861, is the most often-cited book. Many had read the famous documents of US constitutional history, especially the *Federalist Papers*. They referred to sections of the American Constitution and to constitutions of the individual states.²⁴

In Chapter 4, we will look at the roles the Senate has historically played regarding federalism, parliamentary government, and the review of legislation. Applying the various models of bicameralism that compose the Senate’s design will help us better evaluate how well the Senate has fulfilled its constitutional duties.

Chapter 5 will provide a snapshot of the Senate as a parliamentary institution, specifically its most salient features and procedures. Chapter 6 will focus on examples of the Senate at work. Four case studies will be reviewed: (1) its examination of *An Act to amend the Patent Act* in 1987; (2) the Pearson Airport inquiry of 1992; (3) the Special Senate Committee on Poverty (the Croll inquiry, 1969 to 1971); and (4) the Special Committee on the Cape Breton Development Corporation of 1996.

In 2015, with the election of the Liberal government of Justin Trudeau, an effort was made to revive Canadian bicameralism by creating a Senate composed of non-partisan legislators who would use influence as opposed to political power when they engaged with the House of Commons. Chapter 7 will focus on this new non-partisan, complementary Senate and its workways. The final chapter will review past proposals for reform and the impediments they faced, as well as the prospects of achieving structural change to the Senate's design.

As Canada moves more deeply into the twenty-first century, the challenges of parliamentary government will not lessen. The capacity of Parliament to effectively deal with those challenges will be stronger if Canadians accept and value the contribution of their bicameral system. It is therefore essential that there be a better understanding of Parliament's upper house, the role it plays in governance, and how that role can be improved.