The Ethics of Senate Reform

Ian Greene
School of Public Policy and Administration
York University

and

Garrett MacSweeney
Department of Philosophy
York University

York Collegium for Practical Ethics
York University

Paper presented to the Canadian Poltitical Science Association Annual Meeting
June 4, 2015
University of Ottawa

The Ethics of Senate Reform[1]

Ian Greene and Garrett MacSweeney
York Collegium for Practical Ethics
York University

All proposals to reform the Canadian Senate that have been proposed during the past century and a half have failed. There are two main reasons for this in addition to the hurdles erected by constitutional amendment procedures. First, the topic of Senate reform has generally been a highly partisan issue, thus preventing the development of a consensus that would be needed to move any proposal forward. Second, and related to the first, not enough attention has been paid to develop a proposal for Senate reform that is built on an ethical foundation.

An ethical foundation for a Senate reform process would need to encompass the same principles for ethical conduct in our political system that have become standard as Canadian jurisdictions have moved toward clearer ethical standards in the political process through, for example, the development of conflict of interest rules, standards for lobbying and the prevention of wrongdoing, the promotion of fairness and impartiality, and the protection of minority rights. Canadians have come to expect higher ethical standards in the political process during the past three decades of ethics reforms, although these expectations clearly have not always been met.[2] We argue that no proposal for Senate reform is likely to move forward to implementation unless Canadians perceive the process to be an ethical one, in part because of these new and higher expectations. In addition, because of the Senate/PMO expenses scandal involving Mike Duffy and others, many Canadians currently view the Senate as a hotbed of corruption, and so a reformed Senate must show real promise that the result will be an upper house with much higher ethical standards.

The Supreme Court of Canada's decision in the Senate Reference of 2014[3] has not only clarified how Senate reform can take place in a constitutional manner, but it has also set out the purpose and role of the Senate in the Canadian constitutional structure. We begin this paper with a review of the parts of the Supreme Court Senate reference that are relevant to this paper. The second part of this paper will catalogue the ethical lapses that set the stage for the Senate/PMO expenses scandal, most particularly the loose way in which the PMO defined "residency" for the purposes of Senate appointments, and the lack of oversight monitoring the expenses claims of Senators. The third section of the paper will review the Justin Trudeau proposal for changes to the procedure for Senate appointments, and will examine how this proposal, or something similar to that, could be pursued in an ethical fashion after the October 2015 election, regardless of the election outcome.

The Supreme Court Senate reference (2014)

---

[1] The idea to submit a paper proposal to the CPSA on this topic was developed at an executive meeting of the York Collegium for Practical Ethics in October, 2014.

[2] Maureen Mancuso, Michael Atkinson, André Blais, Ian Greene and Neil Nevitte. *A Question of Ethics: Canadians Speak Out About Their Politicians*. Oxford University Press Canada, 1998; Second Edition, 2006.

[3] *Reference re Senate Reform*, 2014 SCC 32.

The 2014 Senate reference was initiated by the federal Cabinet primarily to clarify whether the Conservative government's draft legislation to facilitate provincial consultative elections for prospective Senate appointees, and for Senate term limits, can be accomplished under s. 44 of the Constitution Act, 1982 – the section that allows Parliament to amend its own internal constitution. This is a question that the cabinet should have put to the Court in 2006 when this approach to Senate reform was first proposed by the minority Conservative government, but it is probable that the government knew what the answer would likely be and did not want the answer publicized. The government preferred to attempt to try informally to amend the constitution "by stealth"[4] between 2006 and 2014 by inviting provinces to hold Senate consultative elections, as in the Alberta example, appoint those so "elected" to the Senate, and then see the whole process become a *fait acompli*. The Supreme Court found that Senate consultative elections, and the introduction of term limits would be constitutional only after a constitutional amendment under s. 42 using the "seven-fifty" general formula that dissenting provinces cannot opt out of.

The Supreme Court's reasoning was that an appointed Senate, in which Senators are appointed until retirement, is part of the "constitutional architecture" of Canada.[5] In the negotiations leading up to Confederation in 1867, the nature of the upper house in the new Parliament was of paramount importance, and the union would never have come about without agreement about the nature of the Senate. The Senate was to be appointed rather than elected so that it could act as a non-partisan chamber of sober second thought, and Senators were appointed for life (later until retirement) to encourage independent legislative review based on years of experience:

> [56] The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of "sober second thought".
>
> [57]As this Court wrote in the *Upper House Reference*, "[i]n creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons": p. 77 (emphasis added). The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.[6]

The Conservative government's attempt to reform the Senate by stealth was not only unconstitutional, from our perspective it was also unethical. In the second edition of *The Responsible Public Servant* (2014), Kernaghan and Langford underline the importance of "the demand for more deliberative democracy, legitimizing governing processes through more open, informed and equal engagement of

---

[4] Richard Albert, "Democratic Deliberation and the Rule of Law," presentation to the McGill Law Journal conference on "Democracy, Federalism and the Rule of Law: The Implications of the Senate Reference," Montreal, January 30, 2015.

[5] Senate Reference, 2014, para 54 ff.

[6] Ibid., para. 56 and 57.

citizens and affected stakeholders in decision making at all levels."[7] An attempt to amend the constitution by stealth without public consultation and without engaging citizens is clearly unethical.

The other two major proposals for Senate reform currently on the table are the NDP plan to abolish the Senate, and the Liberal plan to appoint future Senators in a non-partisan way. The 2014 Senate Reference confirmed that abolition of the Senate would require a constitutional amendment approved by Parliament and all provincial legislatures – the s. 41 procedure. This avenue would by necessity require a good deal of public consultation, and so the process is likely to be an ethical one. However, because Canadian public opinion is seriously divided on the question of Senate abolition,[8] and the majority of provincial governments seem to be opposed to the idea at this time, Senate reform through abolition is not likely to come about in the foreseeable future. Because of the serious ethical issues faced by the Senate that make meaningful change of the institution in the short term imperative, we think that it is more useful to delve into the ethical issues surrounding the Liberal proposal, because it is our view that it is a more realistic approach in the short run regardless of which party wins the 2016 federal election.

Justin Trudeau summarized his proposal for Senate reform as follows: "I'm committing today that, if I earn the privilege of serving Canadians as their Prime Minister, I will put in place an open, transparent, non-partisan public process for appointing and confirming Senators."[9]

From the perspective of the Supreme Court Senate Reference, is a constitutional amendment required to implement the Liberal proposal? It all depends on how the Trudeau commitment is carried out should he become Prime Minister in October, or should the party that wins the election adopt a similar approach. Under the current system, the Prime Minister can ask the Governor General to summon any person to the Senate who meets the qualifications set out in s. 23 of the Constitution Act, 1867. No constitutional amendment would be required should the Prime Minister request the Privy Council Office to draw up a list of non-partisan Canadians that the Prime Minister could refer to when choosing whom to ask the Governor General to summon. Should a more formal process be developed, such as the creation of an independent Senate Appointments Commission along the lines of the independent House of Lords Appointments Commission that has recommended more than sixty of the appointments to the House of Lords since 2001,[10] a constitutional amendment would likely be required. However, the Prime Minister should first send a reference question to the Supreme Court to settle two issues. First what degree of "residency" must a potential Senate appointee possess in his or her province of appointment prior to, and after the appointment?[11] Second , is a constitutional amendment required to set up

---

[7] Kenneth Kernaghan and John Langford, The Responsible Public Servant, Second Edition (Toronto: The Institute of Public Administratin of Canada, 2014), p. 236.

[8] In the context of the current Senate scandals, in April 2015 about two-fifths of Canadians wanted abolition of the Senate, while slightly more than two-fifths wanted reform. Joseph Brean, "Most Canadians support either abolished or reformed Senate: poll," Canadian Press and The Ottawa Citizen, April 7, 2015, accessed on May 20, 2015 at: http://ottawacitizen.com/news/politics/most-canadians-support-either-abolished-or-reformed-senate-poll.

[9] Justin Trudeau statement: 'Senate is broken, and needs to be fixed' CBC News, posted January 29, 2014.

[10] See House of Lords Appointments Commission, accessed on May 20, 2015 at: http://lordsappointments.independent.gov.uk/.

[11] Prime Minister Harper has maintained that he was following a 150-year-old tradition in appointing Senators to represent provinces when the appointees owned property there, but their permanent residence was elsewhere.

informal and/or formal mechanisms to make non-partisan appointments to the Senate, and if so should the amendment be made according to s. 44 of the C.A., 1982 (Parliament can amend its own internal constitution), or s. 42 (the general amending formula). However, regardless of the constitutional requirements, we argue that there are additional ethical requirements, which we will discuss in the third section of this paper.

The Senate Expense Claims Scandal

The Canadian public has become aware of serious ethical lapses in the Canadian Senate thanks to the expense claims controversies surrounding Conservative Senators Mike Duffy, Pamela Wallin and Patrick Brazeau, and former Liberal Senator Mac Harb. Harb resigned from the Senate in August, 2013 after paying back $231,000 in expenses that he had collected, but which the Senate administration later declared that he was not allowed to have claimed.[12] The three Conservative Senators were suspended in November, 2013 after the Conservative-controlled Senate Internal Economy Committee reported that they had received reimbursement for expenses for which they were not entitled.[13]

The only Conservative Senator to vote against the suspensions was Hugh Segal, who thought that the three Senators should have the opportunity to respond fully to the expenses allegations before a decision was made about suspension. There is no doubt that from an ethical perspective, Segal was right. While the allegations are serious, the punishment is equally serious: suspension of the Senators without pay for two years. To deny the Senators an opportunity to respond fully speaks, in part, to the procedural concerns of the institutional ethics regime within the Senate. The Senate is, after all, a seat of government, and ought to be held to the expectations of a procedure founded on fairness and transparency. While there is little doubt that allowing a full response would have exposed the Government to some politically sensitive material, transparency, fairness, and due process in meting out the suspension would have been prudent. Following due process would have been the right course of action not only to avoid the appearance of contempt in its attempt to silence the accused by punishing the Senators quickly and sweeping the issue under the rug, but more importantly because of the right that these three Senators were due in accordance with our democratic principles: a right to mount a full defense against the accusations. Segal has since resigned his Senate seat and is currently one of our colleagues in the academic world as Master of Massey College.

On May 19, 2015, the NDP sent a letter to Governor-General David Johnston asking him to explain how this 150-year-old tradition was applied by his office. On May 22, the Governor General's office replied that "the Governor General has no role in the Senate selection process." Jordan Press, "The Gargoyle: Governor General turns aside NDP in quest for constitutional clarity on Senate residency rules," Ottawa Citizen, May 22, 2015, retrieved May 22, 2015 at: http://ottawacitizen.com/news/politics/the-gargoyle-governor-general-turns-aside-ndp-in-quest-for-constitutional-clarity-on-senate-residency-rules.

[12] CBC News, "Senator Mac Harb pays back $231,000 in expenses, retires," August 26, 2013, retrieved May 20, 2015 at: http://www.cbc.ca/news/politics/senator-mac-harb-pays-back-231-000-in-expenses-retires-1.1308485.

[13] Leslie MacKinnon, "Senate votes to suspend Brazeau, Duffy, Wallin," CBC News, Nov. 6, 2013, retrieved May 20, 2015 at: http://www.cbc.ca/news/politics/senate-votes-to-suspend-brazeau-duffy-wallin-1.2415815.

Duffy was charged by the RCMP with 31 criminal code offences involving fraud, breach of trust and bribery, and his trial began in April, 2015.[14] The trial was originally expected to last 41 days, but it is clear that the trial will last longer. Because a great deal has been learned about ethics lapses in the Senate through the Duffy trial to date, we will focus on the major ethics issues involving the Senate that have been revealed by the Duffy trial.

First and foremost is the issue of residency. Section 23 of the Constitution Act, 1867 states very clearly, with regard to the qualifications of a Senator, that "He shall be resident in the Province for which he is appointed."[15] Mark Audcent, the former Senate law clerk, noted in his testimony on the second day of the Duffy trial that while "residency" is not precisely defined in the constitution, interpretation of residency through the Senate administration rules includes "'indicators of residence." Those include physical presence at the residency, the place where his or her home is and where family lives, and where that individual votes, pays taxes, and receives government and health service and has social connections."[16] While these administrative rules may apply within the Senate's internal administration, their constitutional status as a definition of resident is what is central to Duffy's defense. As Donald Bayne, Duffy's defense attorney, argues, the notion of principle residency is determined by importance. For Bayne, in the context of the residency rules for Senatorial qualification, Duffy's home in P.E.I. is more important and so should be considered primary.[17] With such wide interpretations of residency, the question will no doubt play a central role for both sides in the anticipated appeals process. Given the focus of the Supreme Court Senate Reference (2014) on Canada's constitutional architecture, and the constitutional purpose of the Senate, we predict that when the Duffy case reaches the Supreme Court – which we think is bound to happen – the Court will affirm that residency refers to potential Senators who actually reside, in the full meaning of the term, in the province for which they are appointed prior to appointment, rather than simply owning property there but living somewhere else.

Audcent's testimony, however, illuminates a deeper ethical concern stemming from the appointments and administration of the Senate, namely the fact that the Senate has no formal or internal vetting process for determining the eligibility requirements of a potential or sitting Senator. While the members of the Senate have final say on eligibility and who gets to sit in the Senate, the vetting process rests with the Prime Minister's Office (PMO) and is presumably carried out before the Prime Minster makes the appointment.[18] Thus, by appealing to the PMO on eligibility the Senate shirks its ethical responsibility to insure and maintain the constitutional eligibility requirements of its members by failing to have any internal due diligence process or residency oversight.

---

[14] Janyce McGregor, "Mike Duffy Senate expenses trial set for 41 days starting in April," CBC News, September 23, 2014, retrieved May 20, 2015 at: http://www.cbc.ca/news/politics/mike-duffy-senate-expenses-trial-set-for-41-days-starting-in-april-1.2774968.

[15] Constitution Act, 1867m, s. 23(5).

[16] Mark Gollom, "Mike Duffy trial: Senate's ex-law clerk says residence rules undefined," CBC News, April 08, 2015, retrived May 21, 2015 at: http://www.cbc.ca/news/politics/mike-duffy-trial-senate-s-ex-law-clerk-says-senator-residence-rules-undefined-1.3024037

[17] Ibid.

[18] ibid.

For an institution that is central to our bicameral parliamentary make-up not to have its own due diligence process for the vetting the eligibility of its members is an ethical failure of its administration. While it is the case that the Prime Minster appoints Senators, by Audcent's testimony the responsibility on the question of eligibility rests with the Senate as a whole. The nature of this failure is thus rooted in the bicameral nature of our Parliament, the particular constitutional role of the Senate as an independent house, and the dependency the Senate shows to the House of Commons, and the PMO in particular, on this question. The ethics issue with the Duffy appointment is thus as much a Senate issue, as it is an issue regarding the Prime Minister's appointment procedures, and the relationship between the PMO and the Senate administration. The Senate itself should have addressed the residency issue, had the infrastructure in place to do its own investigation, and taken steps to demand its constitutional clarification. The Senate should have had greater oversight on an issue central to its makeup, and its purview of responsibility.

If Duffy was appointed constitutionally, then he likely has the right to claim Ottawa as his second residence, and so many of the expense claims that the Senate Internal Economy Committee claimed that Duffy had to repay would, in fact, be legitimate expenses. From a common sense perspective, however, Duffy is a resident of Ottawa, not P.E.I., and therefore his expense claims relating to Ottawa as his secondary residence are not legitimate. Subsequently, if this is the case then the constitutionality of Duffy's appointment to the Senate as a representative of P.E.I. is questionable.

As much as there are ethical questions about the process by which appointments to the Senate occur, the Senate expense scandal has served to highlight the troublesome nature of the relationship between the PMO and the Senate, and Senator Duffy in particular. These concerns stem from the actions of Senator Duffy with respect to his expenses, his dealings with the Prime Minster's former Chief of Staff, Nigel Wright, his dealings with his friend Gerald Donahue, and the overall weakness of expense claims oversight by the Senate administration.

From the moment Duffy was announced as a Senator for P.E.I. on December 23, 2008, he began to expense the house he had been living in in Ottawa for five years, even though he was not officially made a member of the Senate until January 2, 2009. At $81.55 a day, documents show that by early 2010 his $76,996.63 Ottawa mortgage had been paid off, and in addition to these claims, Duffy also expensed per diem meals while in Ottawa. In total, external auditors identified questionable claims in excess of $90,000 by the winter of 2013.[19] Questions surrounding Duffy's residence expenses, however, surfaced as early as December 4, 2012 when Duffy claimed he received an email from Nigel Wright stating that Duffy's residence expenses were in compliance with the rules.[20] Regardless of the PMO's initial and repeated position of support for the legitimacy of Duffy's expense claims, however, in a February 13, 2013 meeting between Duffy, Wright, and Prime Minister Stephen Harper, Senator Duffy claims to have

[19] Laura Payton, "Mike Duffy claimed Senate expenses before starting job", CBC News, April 7, 2015, retrieved April 21, 2015 at: http://www.cbc.ca/news/politics/mike-duffy-claimed-senate-expenses-before-starting-job-1.3023906
[20] The Canadian Press, "Mike Duffy trial: Chronology of the Senate expense scandal saga," CBC News, April 10, 2015, retrieved on April 21, 2015 at: http://www.cbc.ca/news/politics/mike-duffy-trial-chronology-of-the-senate-expense-scandal-saga-1.3022241

been instructed to pay back the $90,000 “because the Senate rules are, in (Harper’s) words, "inexplicable to our base.”[21] By February 21, 2015 an agreement had been struck to have Wright cover the $90,000 personally, but to cover this up by having Duffy claim the money was repaid personally through a loan from RBC, a claim he made on February 22, 2015.[22] By April 19, 2015 the $90,000 had been transferred to Duffy from Wright, and from Duffy to the Senate when Duffy made the claim that “I have always said that I am a man of my word. In keeping with the commitment I made to Canadians, I can confirm that I repaid these expenses in March 2013.”[23] All of this then led to the re-drafting of the Senate committee report on Duffy by members of the PMO and senior Conservative Senators Carolyn Stewart Olsen, and David Tkachuk on May 8, 2013, according to evidence of which appeared in the Duffy trial[24]

It would be beneficial to pause here for a moment to take stock of the ethical issues thus far present in the Duffy affair. To start, there is the question of the propriety of Duffy submitting expense claims to the Senate before he became an official member of the Senate. Does this approach comply with the maxim that public office is not to be used for personal gain? If Duffy’s subsequent expense claims relating to residency were not legitimate, what about paying off the mortgage of a house he lived in for five years prior to his appointment, using the proceeds of the residency expense claims? What about the claiming of per diem meals while in Ottawa? Regardless of the outcome of the Duffy trial regarding the criminal code issues, we argue that the majority of Canadians are not likely to view these expense claims as ethical. The fact that the Senate lacked sufficient oversight to deal effectively with this matter is also unacceptable.

In addition to this there are the issues surrounding Duffy’s dealings with the Prime Minister and Nigel Wright. It is clear that the December 4, 2012 email from Wright to Duffy, noted above, constituted an apparent interference with what Audcent testified was the purview of the Senate with regard to residency and expenses. More importantly, however, is the alleged direct interference of the PMO in altering the committee report on Duffy with the help of senior Conservative Senators. While the evidence indicates that the interested parties supposedly agreed that the expenses related to residency claimed by Duffy were permitted, they apparently concluded that it would be easier to sweep this conclusion under the rug to avoid political heat. The level of dishonesty by which to cover up the $90,000 payment from Wright is a good example of the ethical trap of “dirty hands” – lying but justifying this action as being “in the public interest” when the action is really in the interest of the political party

[21] ibid
[22] ibid.
[23] ibid.
[24] ibid.; and Daniel LeBlanc, “PMO urged changes to Duffy audit, RCMP officers say,” The Globe and Mail, May 06, 2015, retrieved on May 22, 2015 at: http://www.theglobeandmail.com/news/politics/pmo-urged-changes-to-duffy-audit-rcmp-officers-say/article24296238/

or individuals involved.[25] This story, of course, was used by multiple Government spokespeople and Ministers to try to vindicate Duffy's character.

By May 16, 2013, however, the release of more politically damaging information outlining Duffy's expensing of 2011 partisan campaign events as Senate events proved to be too much, and Duffy resigned from the Conservative Caucus, with Wright's resignation from the PMO following on May 19, 2013. Despite almost six months of questions regarding the expenses of at least three Senators, the Senate finally agreed to invite the Auditor General in to investigate the expenses of all Senators on June 6, 2013. Following the RCMP's formal launch of an investigation into Duffy, what became clear was the lack of adequate oversight of Senators' expense claims by the Senate, teetering on the brink of negligence.

Not only was Duffy's handling of the $90,000 of expenses identified above questionable, but Duffy, through his friend Gerald Donahue, allegedly directed a further $64,000 to cover expenses of little or no apparent value that were ineligible as direct Senate expense claims.[26] While these allegations continue to be dealt with in the current criminal court case, and we have yet to hear the potentially more explosive testimonies to come, there is little doubt that regardless of the outcome of the trial, the Senate's oversight structure, and relationship between the Conservative leadership in the Senate and the PMO, raise important ethical concerns. The very fact that the alleged fraud committed by Duffy occurred within an institution that lacked the appropriate mechanisms to not only vet, but to investigate its own members, should not be underestimated. It was precisely the lackadaisical institutional structure, political interference, and negligent administrative attitude of Senate leaders that allowed these suspended Senators, and Senator Duffy in particular, to take advantage of their public office privilege and act against their fiduciary duty to the Canadian people as Senators.

Moreover, if Duffy's appointment is eventually declared unconstitutional by the Supreme Court,[27] this raises a whole host of questions about what are the implications of an unconstitutional appointment. This question, however interesting, is outside the scope this particular paper.

Ethics of moving to a non-partisan appointment procedure

Because of the recent ethical lapses in the Senate itself, it is imperative that Senate reform be pursued in an ethical fashion both to restore the legitimacy of the Senate, and of Parliament itself. We believe that serious ethical lapses in our political institutions not only reduce the level of trust that Canadians have in their political institutions, but also discourage potentially good leaders from entering politics, thus weakening our political institutions, and ultimately our quality of life.

---

[25] David Shugarman and Paul Rynard, Eds., *Cruelty and Deception: The Controversy Over Dirty Hands in Politics* (Toronto: University of Toronto Press, 2000), and Ian Greene and David Shugarman, *Honest Politics: Seeking Integrity in Canadian Public Life* (Toronto: Lorimer, 1997), Chapter 7, "Dirty Hands."

[26] James Cudmore, "Mike Duffy trial: Gerald Donohue and the $64K question," CBC News, April 27, 2015, retrieved on May 22, 2015 at: http://www.cbc.ca/news/politics/mike-duffy-trial-gerald-donohue-and-the-64k-question-1.3048140

[27] Peter Hogg, "Effect of Unconstitutional Law," Chapter 58 in *Constitutional Law of Canada*, 2010 Student Edition (Toronto: Thomson Reuters Canada, 2010).

Just as the creation of Canada's original Senate was a result of political and regional compromise and the result the skill of politicians in putting the good of the new nation ahead of their own political ambitions, Senate reform in 2015 will require the same high-minded and statesmanlike approach from a plurality of politicians in our federal parties.

Although Justin Trudeau has committed himself to an "open, transparent, non-partisan public process for appointing and confirming Senators," this commitment leaves plenty of room for fine-tuning, which is a good situation as it opens the door to good faith discussions about this approach with members of the Conservative and New Democratic parties. The Conservative party may still be committed to an elected Senate in the long term, but the party may be willing to consider a non-partisan, or perhaps a multi-partisan, Senate appointments process in the meantime.[28] Similarly, the NDP is committed to Senate abolition, but the party may be willing to consider changes to the Senate appointments process in the meantime. Or perhaps the NDP would consider a sufficiently reformed Senate, in terms of the appointment process and the Senate's internal ethical standards, as the equivalent to the abolition of the bad old Senate. Neither the abolition of the Senate, nor the creation of an elected Senate, can be realized for years or more likely decades (if at all), and in the short term serious action is desperately needed to restore public confidence in the Senate and Parliament.[29]

Should the parties come to a general agreement on a way forward for short-term Senate reform, from an ethical perspective there should be an opportunity for extensive public consultation. There are a number of vehicles that could spearhead such a public consultation, from a Royal Commission to a special committee of Parliament. The special committee of Parliament created in 1980 that held public hearings about the proposal to patriate the Canadian constitution with a particular amending formula, and to include a Charter of Rights in the constitution, may serve as an example of how a public consultation can both improve a policy proposal -- as "Charter Canadians"[30] did during the public consultation process -- but also encourage partisan politicians to compromise as a result of hearing public opinion. The 1982 constitutional compromise was, after all, received nearly unanimously support in Parliament. Whatever process is utilized, it would be important to provide opportunities for all political parties with seats in the House of Commons to be meaningfully involved, for all groups representing Canada's diversity to have meaningful input, and for all provincial legislatures to be engaged in the process.

---

[28] Stephen Harper has stated that he will not make more Senate appointments. The constitutionality of that position is being challenged in the Federal Court, as of May, 2015. A Vancouver lawyer has launched a suit in the Federal Court to require the Prime Minister to comply with the constitutional requirement that the Governor General "shall" make appointments to fill Senate vacancies. From our perspective, the refusal to make Senate appointments to fill vacancies is yet another unethical and therefore unacceptable approach to Senate reform. See Campbell Clark, "Stephen Harper's game of Senate appointment make-believe will end," The Globe and Mail, May 21, 2015, retrieved on May 23, 2015 at: http://www.theglobeandmail.com/news/politics/stephen-harpers-game-of-senate-appointment-make-believe-will-end/article24559164/.

[29] We should be clear that our own view at the moment is that the advantages of a bicameral Parliament with a non-partisan Senate far outweigh the potential benefits, if any, of a unicameral Parliament. We also think that an elected upper house is a recipe for deadlock and hyper-partisanship.

[30] See Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: Mc_Gill-Queen's University Press, 1992).

Public hearings should also consider a transition from a partisan Senate to a non-partisan Senate. How would that transition take place? Once the majority of Senators have been appointed in a non-partisan way, how could Senate business be arranged in the absence of a government and opposition in the Upper House? From an ethics perspective, these are the kinds of issues best determined through a national debate and public hearings,[31] and not through the unilateral implementation of the plans of one particular party.

A transformed Senate must put in place a regime to ensure much higher ethical standards both in terms of the behavior of individual Senators, and in terms of Senate procedure, than the current situation. In 2005, the Senate drove the process for legislation to create an independent Senate Ethics Officer, and to develop a Code of Conduct for Senators to prevent conflicts of interest. While changes need to be made to improve the Code as well as the independence of the Office, this innovation was a big step in the right direction,[32] and has been successful in preventing any serious incidences of conflicts of interest in the Senate – a chamber that was at one time notorious for conflicts of interest.[33] However, those intent on using public office for personal gain will avoid trying to get around strict rules, and will exploit remaining weaknesses. The fragility in the Senate's oversight of expense claims is a good example.[34]

Conclusion

Political scandals can have an ameliorative impact on the political system if the reaction to scandals leads to the reform of political institutions to make them more democratic, ethical, and better able to serve the public. Most of the ethics reforms that have come about with regard to the political branches of government over the past three decades have been reactions to scandals. These include the independent conflict of interest commissioners for legislatures that we now have in all provinces and territories, as well as the House of Commons and the Senate, and increasingly in Canadian municipalities, and independent lobbyist commissioners.

The current scandal involving the Senate and the PMO could lead to a transformed (if not reformed) Senate with much higher ethical standards in terms of appointment and process, but only if most of the leaders of all Canadian political parties – federal and provincial –are driven by the desire to be statesmen and stateswomen instead of by self-interestedness and partisanship. We remain optimistic

---

[31] We are optimistic that both the academic community and current Senators could make a positive contribution to such a process. See, for example, Jennifer Smith, Ed., *The Democratic Dilemma: Reforming the Canadian Senate* (McGill-Queens: 2009), Senator Serge Joyal, Ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's, 2003); David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003); and Peter McCormick, Ernest Manning and Gordon Gibson, *Regional Representation* (Calgary: Canada West Foundation, 1981).

[32] Ian Greene, "The Tension among Three Ethics Regimes: Government, House of Commons and Senate," 4 (2011) *Journal of Parliamentary and Political Law*, 361-387.

[33] See Colin Campbell, *The Canadian Senate: A Lobby From Within* (Toronto: Macmillan of Canada, 1978), and J. Patrick Boyer, *Our Scandalous Senate* (Dundurn: 2014).

[34] In Ontario, when deficiencies in the oversight of expense claims of cabinet ministers, their staff and senior executives were exposed, the office of the Integrity Commissioner was given the task of reviewing the expenses claims of these persons to ensure compliance with the law. Although the Senate could consider adopting a similar procedure, other ways of imposing adequate oversight over the expense claims of Senators may be more efficient and effective.

that a sufficient number of our leaders will rise to the occasion to bring about meaningful – and ethical – change.